

A N
E P I T O M E
OF ALL THE
Common & Statute
L A W S
OF THIS
N A T I O N,
Now in force.

Wherein more then Fifteen hundred of the
hardest Words or Terms of the L A W are Explained;
And all the most useful and profitable Heads or Titles of
the L A W by way of *Common Place*,
Largely, Plainly, and Methodi-
cally handled.

With an Alphabetical T A B L E.

By W I L L I A M S H E P P A R D, Esq;

Published by His Highness's Special Command.

L O N D O N,

Printed for W. Lee, D. Pakeman, J. Wright, H. Twyford, G. Bedell,
Tho. Brewster, Ed. Dod, and J. Place. 1656.

3 M 4

A

14 9 3

11 10 0

14 11 1

14 11 1

14 11 1

14 11 1

14 11 1

14 11 1

14 11 1

14 11 1

14 11 1

14 11 1

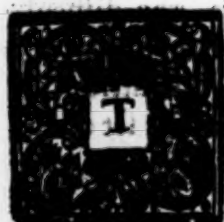
14 11 1

14 11 1

14 11 1

14 11 1

TO THE READER.



THE great desire which God hath bestowed upon me for the advancement of Publique good; the kind acceptance of my former Labors of this nature; and the clear conviction of my Judgment, that the effect will be answerable to my aim and intentions, have been the impulsive causes of my publishing this Methodical *Abridgment* of both the Laws, as well that called *Common*, as the *Statute-Law* (now in force.) Wherein I have at once perform'd two things, *viz.* My utmost ability in collecting the dispersed Cases and particular Conclusions of Law under the general Entitling words, whether they be of the first, or second *intention*. My *commanded duty* in faithfully rendering them into English, according to the prescription of the Act of Parliament in that case provided.

In pursuance whereof to say there are no faults, would be an arrogancie, and an unpardonable sin against that humility which I pretend to. Prolixity will be easily answered from the variety of the Subject which I have undertaken: And for the few mistakes which I my self, since the Impression, have discovered; I doubt not but the candor of an ingenious Reader will find me an excuse, from the perplexity which our Law (as it confusedly lay) did groan under. My labor herein is now grown old, having been the industrious search of thirty six years; though my intention for making them publique is of a much younger date; and not out of any peevish design of keeping the Law from the Vulgar, or irreligious hiding my talent in a napkin, but it had its reason from this, that I esteem'd my self the meanest of those of my Profession, and did modestly distrust my own sufficiencie for so great an undertaking, expecting still when some more
able

To the Reader.

able person would have befriended the World with so great a favor, as the orderly *Deduction* of our Laws from their *Chaos* into Methodical form. But weary with expectation, and not willing so great a good should be wholly neglected, I have attempted to manifest my good will to my Country by this following Tract; of which I dare say the Reader will find a requital of his pains; for that it will at once both facilitate and direct his Intention, whether it be to *know*, or to *act* what the *Law* requires. Besides, the difficulties of the Phrase and Terms are here explained, as they occasionally fall in under any Head; and Definitions of such things as are the Subject of the Laws, are here set down, and with as much certainty as the *Nil lege difficilium*, &c. will admit.

For all which I desire nothing of the Generality but good acceptance; and that those whom *God*, *Nature* and *Industry* have furnished with exemplary abilities in our Profession, would not wholly neglect the publike for their own private good; but either from my attempts contrive *de novo* something of their own, in order to that end whereto I have exposed mine, or that they would bring to perfection what I now offer; till when, I am sure, their carping at me will not be rational: And if perchance they shall either new-mould or amend, yet whether what I have here endeavoured be not in the mean time useful, I shall leave to the indifferent Readers to determine.

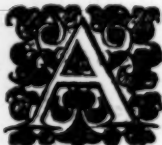
Farewell.

A N



AN
ALPHABETICAL TABLE
OF THE
PRINCIPAL TITLES,

The most useful whereof are largely
treated in this Book.

	Batement, pag. { in Lands, 452 { of Writs, 11, 12 & 18 Abbies and Monasteries 898	For words of { Slander, 21 { Promise, 47 Scandalum Magnatum, 25 { Nuisance, 62 { Trouver & Conversion, 64
Abbot and Prior, 747 Abeyance, 685 Abettors, 379 Ability, 186 Ab initio. See <i>Trespass</i> . Abjuration, 1018 Abjuration, 385 Abridgment of a Plea or Plaint; 18 Accedas ad Curiam, 464 Accedas ad Vicecomitem. See		For deeds of { Conspiracie, 65 { Deceit, 67 { Other not-doings, or mis- doings, 69 Chap. 5. <i>Acts</i> , 82 Accusation, 84 Addition, 747 Adjournment, 18 Allocato, 8 Admeasurement { of Pasture, 266 { of Dower, 526 Administrator, 549 Admiralty, } Admiral, } 361 Admission. See <i>Advowson</i> . Admittance, 318 Ad quod damnum, 619 Ad terminum qui prateriit: See Estate.
Action: Chap. 1. <i>Acceptance</i> , 1 Accessory, 379 Chap. 4. <i>Account</i> , 78 Auditors, 81 Allowance, ibid. Ex parte talis, 78 Monstravit, 79 Accomptant to the Lord Protector. See <i>Prerogative</i> . Accord, 105 Acquittance. See <i>Deed</i> . Acquitall, 385 Acre, 823		Advent, 1118 Adultery. Chap. 6. <i>Advowson or Patronage</i> , 84 Estate probanda. See <i>Office</i> . Assessors, 570 Assurance, 720 Affirmance, 1 Affray. See <i>Imprisonment & Trespass</i> . Chap. 7. <i>Age, and Age-Prier</i> , 87 Counterplea of Age, 89 Ch. 5.
Chap. 2. <i>Actions in general</i> , 5 Sect. 2. <i>Process or Writs</i> , 8 Action popular, 6 Chap. 3. <i>Actions upon the Case</i> , 20		

The Table.

Ch.5. Agent and Patient,	82	Arches, See Courts.	
Agist and Agistment,	1118	Archbishop, } See Clergy, & 747, 904	
Ch.8. Agreement and Disagreement,	89	Archdeacon, }	
Ch.9. Aid,	93	Arrivage,	1109
Counterplea of Aid,	93	Arms and Armory, See Name.	
Summons ad auxiliandum,	93	Armory,	1099
Ale and Alehouses,	468	Array, See Enquest:	
Ch.10. Allegiance or Ligeance,	194	Arraign,	1118
Alias dictus,	747	Arraignment,	384
Ch.11. Alien,	95	Arrearages, See Rent.	
Alien } Friend, }	ibid.	Arrest,	648, 649
Alien } Enemy, }		Arrest of Judgment, See Judgment.	
Ch.12. Alienation,	96	Arrow-heads, }	
Licence to aliens,	96	Artificers and Tradesmen, }	117
Fine for Alienation,	97	Archer le main,	383, 385
Alimony,	97	Assaier, See Officer.	
Allocations,	1118	Assaults,	1041
Allocato, See Exigent.		Assembly, See Riot:	
Allodarii,	1118	Assent and Consent,	89, 126
Allowances, See Accompt.		Assert or Assart,	613
Alms,	798	Ch.17. Assets,	118
Alnageor or Aulnageor,	465	Ch.18. Assignee or Assigns,	120
Alnetum,	1118	Assignment of Error, See Error.	
Ambodexter,	98	Assise,	9, 110
Amendment,	493	Assise of Bread, Beer, and other things,	120
Amends; See Tresspass.		Association, See Judges.	
Amercement,	570	Assumpfit,	20
Amoveas manum, See Ouster-le-main.		Attach and Attachment,	121
Angel,	1118	Attachment of Priviledge, }	
An, Pour, & Waste,	382	Forrein attachment,	ibid.
Annates, See First-fruits.		Re-attachment,	
Annua pensione, See Pension.		Attainder, See Crown,	
Annuity, See Rent.		Attaint,	121, & 1049
Apostate,	644	Attendant, See Services.	
Apothecary,	796	Ch.19. Atturmy or Attourney,	123
Apparance, See Action,	17	Warrant of Atturmy,	ibid.
Ch.12. Apparel,	98	Ch.20. Attournment,	126
Appeal of death,	384	Per quæ servitia,	
Ch.13. Appeal and Provocation,	98	Quem redditum reddit, }	127
To a Spiritual Court, }		Quid juris clamat, }	
To Rome,	99	Audience, See Courts.	
Appellor and Approver,	385	Auditors,	81
Appendant and Appurtenant, See		And see Officers.	
Incident.		Ch.21. Audita Querela,	136
Ch.14. Apportionment or Division,	99	Average,	1118
Equality,	104	Averia,	ibid.
Contributions facienda,	164	Averpenny,	ibid.
De oneranda pro rata portionis,	ibid.	Ch.22. Averment,	144
Apprentice, See Master.		Augmentation, See Courts.	
Appropriation,	85	for Attinisters,	898
Approvement,	268	Aumone,	1118
Ch.15. Arbitrators; and Arbitrement,	105	Ch.23. Auncestor,	142
The difference between it and an	ibid.	Action auncestril,	ibid.
Accord,	ibid.	Ch.24. Antient Demesne,	143
Archery,	621	Avoidance, See Adwonsen.	
		Avoir-du-pois,	1118
		Ch.25.	

The Table.

Ch.24. <i>Avowry</i> ,	143
Ch.26. <i>Authority or Power</i> ,	144
<i>Auxilium ad faciendum</i> , See <i>Aid</i>	
<i>Award</i> ,	105
<i>Ayle</i> ,	142, & 337

B.

Ch.27. B <i>Adgers and Drovers</i>	160
<i>Bail</i>	61
Ch.28. <i>Bailment or Delivery</i>	161
<i>Bailiff</i>	78
<i>And see Officer.</i>	
<i>Bailiff-errant</i>	118
Ch.29. <i>Bakers, Brewers, &c.</i>	165
<i>Balkers or Conders</i>	1119
<i>Bank le Roy</i>	361
Ch.30. <i>Bankrupts</i>	166
Ch.31. <i>Bargain and Sale</i> ,	168
<i>Barges and Barge-men</i>	184
<i>Bark</i>	1111
<i>Barkary</i>	1119
<i>Baron and Feme</i> , see <i>Marriage</i> .	
<i>Baron, Baronet, Barony</i> ,	748
<i>Bar</i> , see <i>Action</i> .	
Ch.32. <i>Barretor</i>	179
<i>Barwick</i>	1019
<i>Base</i> } <i>Court</i> } See <i>Court and Copi-</i>	
<i>Fee</i> } <i>hold.</i>	
Ch.33. <i>Bastard and Bastardy</i>	179
<i>Baston</i> , see <i>Imprisonment</i> .	
<i>Batchelor Knight</i>	748
<i>Battail</i>	1047
<i>Battery</i>	1029
<i>Beavers</i>	711
<i>Bedding</i> , see <i>Upholsters</i> .	
<i>Beadle</i> , see <i>Officers</i> .	
<i>Beggars</i>	798
<i>Behavior</i>	795
<i>Bell-mettal</i>	184
<i>Benefice</i> , see <i>Advowson</i>	84
<i>Benevolence</i> ,	1119
<i>Benerth or Berneth</i>	ibid.
<i>Berewica</i>	ib.
<i>Berquarium</i>	ib.
<i>Besail</i>	142 & 337
<i>Bew-pleading</i>	18
<i>Biens or Goods</i> , see <i>Chattels</i> :	
<i>Bigamy</i>	739
<i>And see Crown.</i>	
<i>Bill</i> , see <i>Obligation</i> .	
<i>By-laws</i> , see <i>Customs</i> .	
<i>Bilanciis deferendis</i>	10
<i>Bilingualis</i> , see <i>Medietate linguar.</i>	
<i>Band-boot or Burg-boot</i>	1119

<i>Bishop</i>	747 & 898
<i>Black-book</i>	1119
<i>Black-Rod</i> , see <i>Officer</i> .	
<i>Blasphemy</i>	896
<i>Blodewit</i>	1119
<i>Blood</i>	277
<i>Bloody-hand</i>	612
Ch.35. <i>Boats and Boat-men</i>	184
<i>Bois</i> , see <i>Wood</i> .	
<i>Bone-bearing</i> , see <i>Peace</i> .	
Ch.34. <i>Books, Images and Printers</i> ,	182
<i>Boat</i>	1119
<i>Bord-lands</i>	ibid.
<i>Borduarii or Bordanni</i>	ibid.
<i>Borrowhead or Burrow-holder</i>	ibid.
<i>Boscus</i>	ibid.
<i>Bosens</i>	ibid.
<i>Bove de tetræ or Bovata tetræ</i>	1119
<i>Bowes</i>	621
<i>Bowge of Diet</i>	1119
Ch.36. <i>Brass, Latten, Copper and Bell-mettal, &c.</i>	184
<i>Brief or Writ</i> , see <i>Action</i> :	
<i>Brewers</i>	165
<i>Bribery</i>	781
<i>Bridges</i> , see <i>Ways</i> .	
<i>Bridewell</i> , see <i>Poor and Rogues</i> .	
<i>Briga</i> }	
<i>Brigbote</i> }	119
<i>Brura</i>	421
<i>Brokers</i> , see <i>Usury</i> .	
<i>Buggery</i>	379
<i>Bullion</i>	1119
<i>Bulls</i> , see <i>Pope</i> .	
<i>Burgage</i>	701
<i>Burgbote</i>	1119
<i>Burglary</i>	375
<i>Burning</i>	185
<i>Burrow</i>	464
<i>Burrow-Englisb</i>	143
<i>Burrow-head</i> , see <i>Headborow</i> .	
Ch.37. <i>Butchers</i>	185
Ch.38. <i>Buster and Cheese</i>	186
<i>Butts</i> , see <i>Archery</i> .	
<i>Buying of Titles</i> , see <i>Maintenance</i> .	

C.

C <i>Able-Ropes and Halters</i>	186
<i>Cablisth</i>	613
<i>Calves</i>	189
<i>Cambridg</i>	1019
<i>Cantred</i>	1119

Ch.39.

The Table.

Ch.39. Capacity and Incapacity,	186	Chimin, See Way.	
Utlagatum,	1079	Chiminage and Pontage.	
ad Computandum,	79	Chirographer,	784
Capias { in Withernam,	143	Choral,	1120
ad faciendum,	547	Chose in Action, See Chattels.	
pro Fine,	570	Church and Church-yard,	897
ad Valentiam. See Warranty.		Churchwarden, See Officers.	
Capite,	701	Churchesmen,	1120
Ch.40. Captives,	189	Cinque-Ports,	617
Cark,	1119	Circuity of Action, See Action:	
Carriers, See Felony and Action.		Circumspecte agatis, See Estates.	
Carno,	1120	Circumstantibus, See Trial.	
Carve of Land,	ibid.	Circumstance.	
Carriage,	1119	Citation,	366
Castle,	189	City,	464
Castlain or Castelain,	ibid.	Clack, Force, and Bard,	1120
Castleguard,	701	Clap-board, See Transportation and	
Casu { confumili, }	8	Coopers.	
proviso, }		Ch.46. Claim,	246
Castel,	189	{ Continual claim,	ibid.
Kine and Calves, }	ibid.	{ Non-claim,	251
Sheep, }		{ Disclaim,	252
Causa Matrimonii prolocuti, See		{ Droit de Disclaimer,	ibid.
Marriage.		Clerks, See Officers.	
Ch.41. Causes and Effects,	190	Clergy, See Service of God.	
Cautione admittenda, See Usury.		Clerk constable or assaint, See Crown.	
Cell,	1120	Cloath,	628
Certainty and Uncertainty,	191	Cloth and Clothiers,	465
Certificate, See Trial.		Clove,	823
Certificate of Assise, See Assise.		Coadjutors to a Disseisin, See Dis-	
Certiorari, See Remover.		seisin.	
Cessavit, See Services.		Coaches,	253
Cession,	87	Cockes,	1120
Challenge,	1051	Cock-matches,	621
Chamber-dekins,	1120	Codicil,	931
Champerty, See Maintenance.		Cofferer, See Officers.	
Chance-medly,	372	Cognisance,	1120
Ch.42. Chancery,	193	Cognitionibus admittendis, See Fine.	
Chaplain,	900	Coin, See Money and Prerogative.	
Chappel,	897	Coleberri,	1120
Ch.43. Charge and Discharge,	227	Collation,	85
Charitable Uses, See Uses.		Collateral,	1120
Ch.44. Charters of Land,	233	Collectors, See Officers.	
Charter of the Lord Protector,	795	Colligendum bona Defuncti, See	
Charter-party,	718	Executor.	
Chace, See Forrest.		Colledg,	747
Ch.45. Chattels,	334	Colour, See Action.	
Chancellors, See Officers.		Ch.47. Collusion, Covin, and Fraud,	354
Chancellors Court, See Court.		Combat, See Trial.	
Chantry, See Service of God.		Commandment, See Authority,	144
Cheuage,	1120	Commandry,	1120
Chief-pledg, See Frank-pledg and		Commendam,	86
Burrow-head.		Comminality,	247
Chevisance,	1120	Commissary, See Officers.	
Chester, See Franchises, Courts, &c.		Commission and Commissioners,	148
Chien, See Dogs,	466	Committee,	1120
Childwit,	1120	Ch.48.	

The Table.

Ch. 48. Common	263	Corrector of the Staple, see Officer.	
Common Recovery	826	Cornage	701
Ch. 49. Common Law	270	Ch. 53. Corn	836
Common Weal	ibid.	Coroner	364, 791
Commotes or Commoythes	1121	Corodie	337
Communi Custodia, see Gard.		Corone	367
Composition, see Agreement	89	Corporation	747
Computo reddendo, see Account	78	Corps Politick	ibid.
Concealment and Concealers	270	Corpus cum causa	862
Conclusion	538	Correction	798, 890
Concord	574	Cors and present	746
Concubinage	513	Corruption of Blood	383
Conders	1120	Cousinage	142
Condition	281	Ch. 54. Costs and damages	337
Confederacy	277	Cote	1121
Confess and avoid, see Action		Ch. 55. Cottage and Cottager	339
Confession	539	Cotterelli	1121
Confirmation	270	Covenable	1121
Confiscation	593	Ch. 56. Covenant	342
Conge de Eslier	1121	Coverture	722
Conjurat	1110	Covin and Fraud	254
Cones, see Forrest		Counselor, see Officers and Main- enance.	
Ch. 50. Consanguinity	277	Count or Declaration	17
Conscience, see Chancery.		Counterfeiting of Seals or Letters	367
Conservators, see Officers.		Ch. 57. Countermand or Revocation	
Consideration	277		357
Consimili causa	8	Counter Plea	20
Consolidation	86	County	463
Conspiracy or Confederacy	277	County Court	36
Constable, see Officers.		County Palatine	363
Constat	825	Ch. 58. Courts	359
Constat & inspeximus	795	Cowcher	
Consultation	812	Cranage	
Ch. 51. Contempt	312	Creanor	1121
Contentment	1121	Creek of the Sea	
Contingency, see Remainder		Croft	ibid.
Continuance	17	Cross-Bows	644
Continual Claim	246	Ch. 59. Crown, and Matters called Pleas of the Crown	367
Continuando	18	Cucking-stool	893
Contra For-	} See Action	Cui ante divortium, see Marriage.	
mam		Cui in vita, see Marriage.	
Contrast	168, 720, 733	Coyage	1121
Contribution	104	County	ibid.
Controllers, see Officers.		Curate	ibid.
Conviction, see Crown	383	Curia claudenda	10
Conuſor, Conuſes	574	Curriers	905
Convocation	365	Curſor, see Officer	
Coopers	312	Court will advise	681
Coparceners	677	Courtesie of England	326
Copia libelli deliberanda	366	Curtilage	1121
Chap. 52. Copihold and Copiholder	313	Custody of Law	685
Copy of Court	327	Ch. Custode admittendo, see Action	
Customary Tenant	313	60. Customs, Customer, and Con- troller	386
Coraage. (not Cornage)	1121	Ch. 61. Custom and Prescription	387
Coram non Iudice	ibid.		2
Cordiner	ibid.		Customs

The Table.

<i>Customs and Services</i>	337	<i>Dereyne</i>	1123
<i>Brevium</i>		<i>Defontort Demeln, see Trespass</i>	
<i>Custos</i> { <i>Rotulorum</i> <i>Placitorum</i> <i>of the Spiritualties</i> }	<i>See Officers.</i>	<i>Ch. 64. Debt</i>	437
<i>Cut-purse</i>	375	<i>Descent, see Inheritance</i>	
<i>Cutter of Tallies</i>	786	<i>Detinue</i>	13
		<i>Devastavit</i>	992
		<i>Devenetunt, see Office</i>	
		<i>Devise</i>	964
		<i>Devoire</i>	1122
		<i>Diem clausit extremum</i>	625
		<i>Dies datus, see Action</i>	
		<i>Dignity, see Name</i>	747
		<i>Disapidation</i>	900
		<i>Diminution, see Error</i>	
		<i>Diocesi</i>	1122
		<i>Directory</i>	897
		<i>Ch. 65. Disability</i>	446
		<i>Disagreement</i>	89
		<i>Disceit</i>	354
		<i>Discharge</i>	227
		<i>Disclaimer</i>	252
		<i>Ch. 66. Discontinuance of Lands</i>	448
		<i>Discontinuance of Proces, see Action, and</i>	585
		<i>Disparagement, see Gard</i>	
		<i>Dispensation</i>	145
		<i>Ch. 67. Disseisin, Abatement, Intrusion, &c.</i>	452
		<i>Disseisor</i>	ibid.
		<i>Ch. 68. Distress</i>	453
		<i>Districus or District</i>	1122
		<i>Distingas</i>	1050
		<i>Disuser, see Franchises</i>	
		<i>Dividend</i>	1122
		<i>Divine Service, see Service of God</i>	
		<i>Ch. 69. Division of places</i>	463
		<i>Division of things, see Apportionment</i>	
		<i>Divorce</i>	738
		<i>Docket or Dogget</i>	1122
		<i>Dogs</i>	456
		<i>Dog-draw, see Forrest</i>	
		<i>Dogger</i>	1122
		<i>Dogger-fish</i>	ibid.
		<i>Domo reparanda</i>	8
		<i>Dole-fish</i>	1122
		<i>Donative</i>	85
		<i>Done</i>	625
		<i>Dorture</i> }	
		<i>Dotkins</i> }	1122
		<i>Doves, see Property</i>	
		<i>Double Plea, see Action</i>	
		<i>Double value, see Gard</i>	
		<i>Double quarrel</i> }	
		<i>Doubles</i> }	1122
		<i>Dower</i>	522, 523
		<i>Ch. 70. Drapery, Cloth, Clothing</i>	465
		<i>Draw Latchet</i>	1122
			Dry

D.

D *Amage Clear* 1121

Damage Fesant 455

Damages and Costs 337

Writ to enquire of Damages 339

Damage Fesant 456

Dane-geld or Dane-gilt 1122

Darrene Presentment 86

Darrene Continuance, see Action

Date, see Deed

Datum est nobis intelligi 625

Dean and Chapter 747

Deceit 254

Ch. 62. Debet & solet, &c. 396

Debet & detinet ibid.

Detainer ibid.

Declaration 17

Decies tantum 1049

Deceivers or Deziners 1122

Deonerando pro rata portionis 104

Dedimus potestatem 827

And see Commission and Fine.

Ch. 63. Deed 397

Defamation, see Action of the Case

Default 17

Defiance 775

Defender of the Faith 1122

Deforcement and Deforcer 452

Degrees, see Marriage and Name

Delay or Dilatory Plea, see Action

Delegates 36

Delivery 161

And see Deed.

Demandant, see Action

Demands 873

Demeln or Demain, see Lord and Ser-

vant

Demise of the King, see Prerogative

Demisance or half Blood 482

Demurrer 20

Denizen 96

Denial, see Rent

Deodand 373

Departure out of the Realm 396

Depositions, see Oath 754

Deprivation 87

Deputy, see Office

Deatraignment 491

The Table.

Dry Exchange, see Usury	
Drift of Cattle, see Forfeiture	
Ch. 71. Droit & Tort	468
Droit of custody of Lands, see Gard	
Droit de Advowson	84
Drunkennes	468
Duces tecum, see Chancery	
Duke and Dutches, see Name	
Dum fuit infra etatem	479
Dum non fuit compos mentis	648
Duplicat, see Patent	
Durelle and Manasse	659
Durham	1019
Dutchy of Lanchester, see Court Of-	
ficers, Franchises	
Ch. 72. Dying and Dyers	468

E.

Eafe, Writ of Eafe	1049
Easement	1122
Ecclesiastical Persons	907
Ecclesiastical Courts, see Courts	
Effect	190
Egyptians	890
Ejection del Gard, see Gard	
Ejectione firmæ	531
Eyre and Justices in Eyre, see Offi-	
cers and Courts	
Ch. 73. Election and choice	469
Electione clerici, see Writ	
Elegit	547, 912, 550
Elopement or Eloignement	521
Embaisement, of Coyn	744
And see Prerogative	
Emblems	240
Embraceor and Embracery, see Main-	
tenance	711
Empowerment	1122
Enchantment	1110
Encroachment, see Services	
Enditment, see Crown	
Endowment, see Dower in Estates	
Ch. 74. Engagement	473
Enemy	95
Enfant	473
Englisbery	1122
Chap. 75. Inheritance or Inheritance	481
Escheat	482
Enquest	1048
Enseins priement; see Bastard	
Heir	
Entendment	1122

Entail, see Estate	
Entire tenancy in Lands	490, 491
Chap. 76. Entry into Lands or Religion	
In casu proviso	8
In casu confirmili	8
Ad communem legem	8
Sine assentione capitoli	8
Equality, see Apportionment	
Equity	193
Earl, see Name	
Errant	1123
Ch. 77. Error	492
Escape, see Felony, Imprisonment	
Ch. 78. Eschange or exchange	494
Eschequer, see Court	
Escheat	489
Escheator, see Officers	
Esconow, see Dred	
Esconage	701
Esglise or Church	1897
Esplees	799
Essendi quistant de Tollonio, see	
Toll	
Essyn	17
Establishment of Dower	1123
Estandard	1824
Ch. 79. Estate or interest	507
Ch. 80. Estoppel or conclusion	538,
539, 399	
Ch. 81. Estovers	545
Estray	1083, 461
Estrange or Estranger	811
Estreets or Estraitts	592
Estrappment	1108
Evedroppers	546
Evidence, see Tryal	
Evidences of Lands, see Charters	
Ex assensu partium	8
Examiner	783
Examination, see Tryal	
Exchangers of Gold and Silver	546
Exception	409
Excise	545
Excommunication, see Court and Us-	
Exchequer, see Court	
Ch. 82. Execution	546
Executor, see Testament	
Executione Judicii	553
Exemplification	825
Exemption, see Discharge	
Ex gravi querela	8
Exigent	7
Exigent, see Officer	
Ex mero motu, see Patent	
Exoneracione Sectæ	8

The Table.

Ex parte talis	78	Fifteens	920
Expectant, and at common law	1123	Fine to the Lord	329
Expediata	ibid.	Ch. 85. Fine of Lands	574
Expensis militum Levandis, &c.	10	Fine to the Lord Protector	570
Exposition of Statutes, see Statutes		Fine force	1123
Exposition of Deeds, see Deeds		Fireboat	645
Exposition of Words	1118	First-fruits	901
Ex post capias	8	Fish and fishing	1109
Ex post facto	1123	Fleet, see Imprisonment.	
Extendi facias	546	Flax and Hemp	644
Ch. 83. Extinguishment	553	Fledwit	1123
Extirpation	10	Flemeswit	ibid.
Extortion	781, 782	Florences	ibid.
F.		Floresam	362
Faculties	359, 157	Folknote	1123
Failer of Record, see Record		Fools, see Idiots.	646
Faint Action	1123, 18	Footgeld, see Foreff and Expedi-	
Fair pleading, see Action		Foot of the Fine, see Fine	
Ch. 84. Fair and Markets	562	Forbar	1123
Faitor	1123	Force	580
Fait, see Deed.		Chap. 86. Forcible Entry and Defence	ibid.
Farding	ibid.	Forefalling	614
Fardingdeal or Farrundel, see Quantity.		Foregoers	1123
Farm and Farmer	563	Ch. 87. Forfeiture	573
Fasting days	ibid.	Forfeiture of Marriage	623
False imprisonment	648	Ch. 88. Forger of Deeds	610
False judgment	492	Forejudger	707
And see Error.		Forma pauperis	1124
False Latin	683	Form edon	9
Reauxifier de Recovery, see Recovery.		Fornication	665
False Recital, see Deed.		Forein Attachment	
Fenalty, see Services	701	Forein Opposer	586
Fee-farm	562	Forein Plea	
Fees	782	Foreff	611
And see Officers:		Ch. 89. Fowl and Fowling	613
Fee-Simple	503	Foucher	17
Fee-Tail	504	Frank-tenement	
Felony and Felo de se	372	Ch. 90. Frank-pledge	613
Felt and Hats	98	Frank-law	
Feme-covert and Sole, see Marriage and Infant.		Ch. 91. Franchises and Liberties	616
Fence month	613	Frank-almoigu	702
Feodary, see Officer.		Frank-bank	1124
Feoffment	563, &c.	Frank-chafe	612
Ferdroit	1123	Frank-fee	1124
Ferz natura	813	Frank-farm	
Fesants and Partridges	1645	Frank marriage	505
Fend	1123	Fraud and Fraudulent Deeds	254
Fighting and quarrelling	795	Free-chappel	613
And see Peace.		Freehold	ibid.
Fieri facias	547	Free-suitors, see Officers:	
		Free-borough	1124
		Free-suit	613
		Free-disseisin, see Disseisin.	
		Fresh fine	1124
		Fresh force	ibid.
		Friers	

The Table.

Friars	616
Friperers	1124
Fuel, see Wood	1110
Fuer	1124
Fugitive, see Waifs and Felon.	
Furlong, see Quantity	812
Fustians	616

G.

G Able	1124
Gage deliverance	143
Gager de Ley, or Wager of Law, see Oath.	
Gage, see Pledg.	
Gainage	1124
Gaol-delivery	362
Gaol, see Imprisonment	
Galedg or Gallocks	1124
Ch. 92. Games and Plays	611
Garb	1124
Garble	ibid.
Ch. 93. Guard or Ward	612
Gardein in { Chivalry } { Nature } { Soccage } { Nurture }	ibid.
Gare	1124
Garnishment	164
Guaranty, see Warranty	
Gavelet	143
Gawgeor, see Officers:	
Gentleman	747
Gift and Grant	622
Ch. 94. Gig-Mills	£44, 1124
Gild	ibid.
Glebe	87
Gold, Silver, and Goldsmiths	644
Good behavior	795
Governors, see Officers.	
Graffer	1114
Grand Cape	9
Grand Distress, see Process	8
Grand Seal, see Seal.	
Grand Serjeanty	701
Grange	1124
Grant	625
Gree	1124
Green-cloth, see Court,	
Grooms, see Officer,	
Green-wax	1124
Greave or Greave	ibid.
Grith-breach	ibid.
Guidage	ibid.
Guild	ibid.
Guns and Cross-bows	644
Gunpowder, see Guns	644

Guiltwit	1124
H.	
H Abas corpora	1850
Habeas corpus	861
Habendum	408
Habere facias { Seisinam } { Possessionem }	
See Execution.	
Haberjects	
Habler	
Haga	
Half-Seal	
Hallage	1125
Hallimose	
Hamlet	
Hankwit	
Hague	
Hares	645
Harlot	703
Hats and Caps	98
Haverdepois, see Averdepois.	
Hault-Treason, or High-Treason, see Crown.	
Hawkers	1125
Hawking, Hawks and Hounds	645
Hayward, see Officers.	
Headborow	1125
Hérons	613
Heir, see Inheritance	481
Hemp and Flax	644
Herbage, see Grant, &	1125
Hereditaments	ibid.
Hazrede abducto, see Gard	621
Herefe	379, 644, 896
Hide of Land	1125
Hidage	ibid.
High-Commission, see Courts.	
High-ways	1112
Hogshcad	823
Hogehive	1125
Holidays	895
Homagers, see Officers	
Homage	703
Homicide	369
Homesecken	1125
Homine replegiando	8
Honor and Honor-Court	644
Honor	748
Hops	644
Horns and Horners	ibid.
Horn-geld	1125
Hors de son Fee	
Horses and Mares	644
Hospital, see Poor	798
Hospitallers	125
Hostler	1055

The Table.

Horch-patch	681
Ch. 95. Houseboot, Hayboot, Fireboot, Hedgeboot and Plowboot,	645
House-robbing, see Crown.	
Housage	1125
Hundred and Wapentake	464
Hundredors	1050
Hundred Court, see Court.	
Ch. 96. Husband and Wife	815
Hubandry	1002
Hustings, see Court.	
Hue and Cry, see Crown.	

I.

Jarrook	1126
Jdemptitate Nominis	748
Ch. 97. Ideor and Lunatick	646
Ideota inquirenda	ibid.
Idolatry and Superstition	648
Ifeofaile	19
Ifeufiter and Priests	797
Ietsam	362
Ignoramus, see Crown.	
Images	797
Imber-days	563
Imbefilling of a Record	825
Imbraceor, see Maintenance.	
Imparlance	18
Impeachment of Waste	1106
Implead	1126
Implication	648
Importation	1019
Imposition, see Custom	1386
Impost	ibid.
Ch. 98. Imprisonment	1048
Imprapriation	85
In casu proviso	8
Incertainty, see Certainty.	
Incest	665
Ch. 99. Incident	662
Inclosure, see Common.	
Incontinencie	665
Incorporation, or Corporation	747
Incroachment, see Common, and Lord and Tenant.	
Incumbent	85
Indenture, see Deed.	
Indicavit, see Prohibition	812
Indistment, see Crown.	
Indivifum, see Jointenants	667
Indorsment	1126
Induction	85
Infangtheif	1126
Ch. 74. Infant	473
Informor and Information, see Officer.	

Ingrossing	614
Inheritance	481
Inhibition, see Prohibition	812
Inholders	1055
Injunction, see Chancery.	
Inmates and Undertenants	340
Inquest, see Trial.	
Inquisition, see Office	778
Inrollment, see Bargain and Sale, and Deeds.	
Inspection, see Trial:	
Inspeimus	795
Institution	85
Intakers	1126
Intent	665

Interdiction, see Court:	
Interlining, see Deed.	
Interpleader, see Action.	
Intestate	549
Intrufion, see Disseifin.	
Inventory, see Testament.	
Inveft	1126

Ch. 100. Jointenants, and Tenants in Common	666
Jointure	523
Journchoppers	1126
Journies account, see Action.	
Journyman, see Master.	
Ipo facto	1126
Ireland	683
Iron	907

Iron-Mills, see Mills.	
Issues of Jurors, see Trial.	
Isle of Wight	681
Issue, see Trial.	

Ch. 101. Judgment or Condemnation	682
Judges	ibid.
Jure Coronæ	1126
Jure Patronatus	86
Jurisdiction, see Authority	144
Jurors, see Trial.	
Jura regalia, see Prerogative.	
Justices, see Court and Officers:	
Justices	10
Justification	1041

K.

K Ing and Queens goods	683
Kine and Calves, see Cattel.	
Kings Silver	574
Knights, see Officer and Name.	
Knights Service	701
Knights Fee	705

Laborers

The Table.

L.		<i>Lothewis</i>	1126
		<i>Lunatick, see Idiot</i>	646
		<i>Lusborow</i>	1126
		M	
L aborers	743	M acegriefs	1126
<i>Laborarius</i>	ibid.	<i>Mad-men, see Idiots</i>	646
<i>Laches, see Time</i>	930	<i>Maime, see Trespass.</i>	
<i>Lagan</i>	362	<i>Maid</i>	1117
<i>Laghsite</i>	1126	Ch.107. <i>Maintenance</i>	711
<i>Lancaster</i>	1019	<i>Maintainers or Bearers</i>	ibid.
<i>Lastage</i>	1126	<i>Mainprise, see Imprisonment.</i>	
<i>Last, see Quantity</i>	822	<i>Mayor and Commonalty</i>	747
<i>Lattat</i>	8	<i>May-Poles</i>	621
<i>Latten, see Brass.</i>		<i>May-bois</i>	1126
Ch.102. <i>Latine and Law</i>	683	<i>Male-tenant</i>	ibid.
<i>Law-day Court</i>	364	<i>Mandamus, see Office.</i>	
<i>League</i>	700	<i>Mandat</i>	153
Ch.103. <i>Lease</i>	685	<i>Mandatum</i>	1126
<i>Leather</i>	905	<i>Manor</i>	701,707
<i>Leet</i>	364	<i>Manslaughter</i>	371
<i>Lent</i>	700	<i>Manicaptio, see Writ</i>	8
<i>Legacie, see Testament.</i>		<i>Mannel</i>	1127
<i>Leprolo amovendo</i>	9	<i>Manumission</i>	1056
<i>Letter of Attourney</i>	123	Ch.108. <i>Merchants and Merchandises</i>	718
<i>Patents</i>	795	<i>Marches</i>	1127
<i>Letters</i> { <i>Exchange</i>	1126	<i>Mark</i>	ibid.
<i>Marque</i>	739	<i>Market-overt</i>	562
<i>Levant and Comchant</i>	456	And see <i>Franchises.</i>	
<i>Levari facias, see Execution.</i>		Ch.109. <i>Marriage and Matrimony</i>	720
<i>Levy</i>	1126	<i>Mariners</i>	746
<i>Levy by Distress, see Distress.</i>		Ch.110. <i>Marque and Reprisal</i>	739
Ch.104. <i>Libelli</i>	698	<i>Marshals, see Officers, &c</i>	656
<i>Libera Piscaria</i>	1109	<i>Marshalsey</i>	ibid.
<i>Libera Chafea habenda, see Forrest.</i>		<i>Marshes and Fens</i>	739
<i>Liberate</i>	910	<i>Mas</i>	797
<i>Libertate probanda</i>	9	<i>Masons</i>	739
<i>Liberties</i>	616	<i>Masters of the Rolls</i>	783
<i>Librata terra, see Quantity.</i>		Ch.111. <i>Master and Servant</i>	740
<i>Licentia</i> { <i>Surgendi</i>	9	& 14	
<i>Transfretandi</i>		<i>Matter in Deed</i>	1127
<i>Licence, see Authority.</i>		Ch.112. <i>Malt and Malsters</i>	739
<i>Licence of Alienation</i>	96	<i>Manger and Boyer, or Meat and Drink</i>	See <i>Infant, Juror, and Prisoner.</i>
<i>Lisence ad eligendum, see Congedellier.</i>		<i>Maxims, see Law</i>	683
<i>Lieutenant, see Officer.</i>		<i>Meal</i>	744
Ch.105. <i>Lien or Place</i>	700	<i>Meason or Dwelling-house</i>	740
<i>Ligeance, see Allegiance.</i>		<i>Measures</i>	822
<i>Limitation</i>	930	<i>Medelese</i>	1127
<i>Linnen Cloth</i>	700	<i>Medietate lingule</i>	1049
<i>Livery of Seisin</i>	867	<i>Medio acquietando</i>	707
<i>Livery out of the Kings hands, see Gard.</i>		<i>Melius inquirendum, see Office</i>	778
<i>Livery and Retainer</i>	740	<i>Menace</i>	1050, 170
<i>Local, see Action, and</i>	1126	<i>Mesne</i>	701
<i>Lollards</i>	1126		<i>Mesne</i>
<i>Loriners</i>			
Ch.106. <i>Lord and Tenant</i>	701		
<i>Lords day</i>	698		

The Table.

<i>Mefne, Rates or Profits</i>	624,778	<i>Nihil dicit</i>	18
<i>Mefnage</i>	1127	<i>Nient lettered, or, Not able to read,</i>	684
<i>Mildernews and Powldevy</i>	ibid.	<i>Night-walkers</i>	746
<i>Metropolitan</i>	904	<i>Nil debet, see Action:</i>	
<i>Militia</i>	1099	<i>Nifi prius</i>	1050
Ch.112. <i>Mills and Millard</i>	744	<i>Nobility</i>	747
<i>Mineral</i>	1127	<i>Nomination</i>	85
<i>Mines</i>	744,803	<i>Nomine poenæ</i>	873
<i>Minifters</i>	898	<i>Non obftante</i>	795
<i>Mint, fee Prerogative.</i>		<i>Non-ability, fee Disability.</i>	
<i>Mife</i>	1127	<i>Nonage</i>	473
<i>Mifcontinuance, fee Action.</i>		<i>Non-claim</i>	251
<i>Mifericordia</i>	592	<i>Non compos mentis</i>	648
<i>Mifseafance, fee Action on the Cafe.</i>		<i>Not guilty, fee Action</i>	
<i>Mifnomer</i>	943	<i>Non-feafance, fee Action on the Cafe.</i>	
<i>Mifprifon</i>	383	<i>Non diftringendo</i>	
<i>Mittimus</i>	862	<i>Non implacitando aliquem</i>	
<i>Moderata mifericordia</i>	592	<i>Non intromittendo</i>	
<i>Modo & forma</i>	19	<i>Non mercandizando victualia</i>	6, 7
<i>Monafteries</i>	898	<i>Non procedendo ad Affifam</i>	
<i>Monopoly</i>	744	<i>Non refidentia</i>	
<i>Money</i>	744	<i>Non moleftando</i>	
		<i>Non ponendo in Affifis & Juratis, fee Trial.</i>	
<i>Monfrans de</i>	<i>Droit</i> 779	<i>Non-refidence, fee Service of God,</i>	
	<i>Fait, fee Action.</i>		895
	<i>Fines or Records, fee Records.</i>	<i>Non fanx memoria,</i>	646, 631
<i>Monfraverunt</i>	143	<i>Non-fuit, fee Action.</i>	
Ch.113. <i>Mortgage and Pledg</i>	744	<i>Non-tenure</i>	702
<i>Mortdauncefter</i>	142	<i>Non-ufer, fee Franchifes</i>	616
<i>Mortling</i>	1127	Ch.115. <i>Nofme or Name</i>	747
<i>Mortmain</i>	745	<i>Notæ of a Fine, fee Fina.</i>	
<i>Mortuary</i>	746	Ch.116. <i>Notice and Ignorance</i>	749
<i>Mulier</i>	179	<i>Novel-Assignment, fee Treifpafs.</i>	
<i>Multiplication of Gold, fee Crown.</i>		<i>Nudum pactum</i>	176, 53
<i>Multure</i>	1127	<i>Nul tiel Record</i>	825
<i>Murage</i>	1127	<i>Nuncupative</i>	931
<i>Murder</i>	370	<i>Nuper obiit</i>	142
<i>Mufters</i>	1099	<i>Nurture, fee Gard.</i>	
<i>Mufe</i>	1047	Ch.117. <i>Nufance</i>	752
N.			
<i>N</i>		O.	
<i>Nam</i>	1127	Ch.118. <i>O Ath</i>	754
<i>Name</i>	747	<i>Oatmeal</i>	ibid.
<i>Nativo habendo</i>	1056	<i>Oblations</i>	1127
<i>Natural affection, the kinds of it</i>	277	<i>Obligation and Dofeafance</i>	755
<i>Naturalization</i>	96	<i>Obventions</i>	1127
Ch.114. <i>Navy and Navigation</i>	746	<i>Occupancie and Occupant</i>	527
<i>Ne admittas</i>	86	<i>Occupavit</i>	7
<i>Negativa pregnans</i>	19	<i>Odio & Atia</i>	661
<i>Ne injuftè vexes</i>	707	Ch.119. <i>Office before Efcheator</i>	778
<i>New Assignment, fee Action.</i>		<i>Officials, fee Officers</i>	793
<i>News</i>	746		
<i>Newcastle</i>			
<i>Next of blood</i>	277		

The Table.

Ch. 120. <i>Office and Officers</i>	780
Oyer de Record	825
Oyer and Terminer	1127
Oyl	755
Ordeal {	1127
Ordelf {	
Ordinances	755
Ordinary	ibid.
Orgeis	1127
Overseers of the poor	798, 792
Ouster le main	624
Outlary, see <i>Utlary</i> .	
Out-Riders	1127
Outfang Thief	ibid.
Oxegange	822
Owelty of <i>Services</i> :	1127

P.

P ayment	877
Paine fort & dure	384
Painters	795
Pannage	63
Pannel	1050
Pape	797
Paramount {	1128
Paravail {	
Paraphernalia	730
Parcofracto	459
Parcel Makers	785
Parcenors {	677
Parcenery {	
Pardon	794
Ch. 121: <i>Barish, Pares or Peers</i>	1128
Park	612
Parliament	260
Pernour of profits	1116
Paraphernalia	728
Parson and Parsonage	84
Particeps criminis, see <i>Accessory</i>	379
Parties	811
Partition	678
Partridges	645
Patent of the Lord Protector	795
Patron	84
Paving London streets	795
Pawnage	613
Pawntakers, see <i>Friperers</i>	
Peace	795
Pearch or Rod	823
Podage	1128
Peer	748
Penalty	873
Penance	366
Pension	337

Perambulatione facienda	9
Perdonatio Utlagarie	7
Peremptory	20
Perjury	754
Perinde Valera	145
Permutatione Archidiaconatus.	
Pernor of profits	1128
Perpetuity	796
Per quæ servitia.	127
Perquisites	710, 1128
Personable	186
Personal and Personality	1128
Personal Action, see <i>Action and Trespass</i> .	
Persons ne Prebendaries:	7
Petit cape	9
Petition	779
Petit Treason	368
Petit Larcenary	376
Petit Serjeanty	701
Ch. 122. <i>Pewter, Brass, and Pewterers</i>	796
Physicians, Apothecaries, and Surgeons	796, 36
Pickage	1018
Pickle or Pistle	1128
Pillory and Tumbrel	797
Pipowder	363
Pipe	823, 1128
Piracy	377
Piscary	1109
Placards (not Placat)	1128
Plague	796
Plaint and Plaintiff, see <i>Action</i> .	
Plays	621
Pleading and Plea	18
Ch. 123. <i>Pledge and Gage</i>	797
Pledge, see <i>Chief Pledge and Mortgage</i>	
Plegus acquietandis	ibid.
Plenary	85
Plonkets	1128
Ploughboot	645
Plough-Land	1128
Pluralitie	900
Pluries capias	7
Pocket of Wool	823
Poll-moneys	920
Poll or Deed Poll	397
Polls	1050
Polein	1128
Policy of assurance	718
Ponendis in Assis	7
Pone	864
Pone pervadium	10
Pontage	1116
Pope and Papists	797

The Table.

Ch. 124. Poor or Beggars	798	Privy Seal	894
Port greve	}	Ch. 128. Privities and Privies	811
Portmote		Prize, see Marque.	
Portsale		Parties	ibid.
Portion of Tithes, see Tithes.		Probate of Testament	931
Ports, or Cinque-Ports	617	Procedendo	862
Posse Comitatus	1128	Proces	6
Possession	799	Prochein Amy	608
Possessio Fratrís	483	Prochein de Sank, or next of Blood	277
Possibility and impossibility	799	Prochein avoidance	84
Post Diem	1128	Proclamation	819
Post Disseisin, see Disseisin.		Procurator	1128
Post Fine, see Fine	574	Profer	ibid.
Posteriority	}	Prohibition	812
Post Term		Pro indiviso, see Joyntenants	666
Postea		Prolocutor, see Convocation	365
Pourpresture, see Purpresture	753	Promise	47, 168
Powrparty	1128	Promoters, see Officers.	
Pownd	462	Proof	1051
Poundage	618, 1128	Ch. 129. Property	813
Power, see Authority.		Ch. 130. Prophecies	819
Prayer, Preaching, and Preachers	897	Proprietarie	813
Preamble	917	Pro rata	826
Preceptarium, see Action		Protection	819
Precept, see Commandment	153	Protector	800
Preceptory	1128	Protest	819
Præcipe	8	Protestation, see Action.	
Priority	702	Proviso, see Condition	281
Promothary or Preignotary	784	Province	}
Premises	408	Provision	
Premunire	800	Provocation, see Appeal	1128
Prender	1129	Pur seiser le terres, le feme	7
Propositus	1128	Ch. 131. Purchasor and purchase	820
Ch. 126. Prerogative of the Lord Pra-		Purgation	585
estor	800	Purview	612
Prerogative Court	365	Purpresture	753
Prescription	387	Pur suivant, see Officers	780
Ch. 125. Presence and absence	800	Ch. 132. Purveyors	821
Presentment to a Church	85	Piracy, see Piracy	377
Presentment in Court, see Court.			
President	786		
Prest money	1128		
Presumption, see Tryal			
Pretensed Droit or Rights, see Droits.			
Prices	800		
Priests	797		
Primer Seisin	624		
Principal and Accessary	379		
Principal and Challenge	1050		
Printers	182		
Priority	}		
Prisage			
Prison and prisoners	648		
Ch. 127. Privileges	810		
Priviment Enseint, or privily with			
Child, see Infans	473		

Q.

Quale jus	746
Ch. 133. Quantity	822
Quare impedit	}
Quare incumbravit	
Quare non admittit	84
Quare ejecit infra terminum	531
Quare intrusit Matrimonio, see Gard.	
Quare obstructit	7
Quare non permittit	ibid.
Quarentine	523
Quarter Sessions	362
Quæ	

The Table.

Quæ plura, see <i>Offices</i>		<i>Redubbers</i>	119
Quæ Estate	19	<i>Reentry, see Condition</i>	281
Quæ est Mesme		<i>Reeve, see Bailiff</i>	
Quem redditam reddit	127	<i>Reextent, see Extent</i>	
Quid juris clamat		<i>Regarder</i>	611
Questus est nobis	753	<i>Regrators</i>	614
Quia improvide, see <i>Superfedeas</i>		<i>Rejoynder</i>	19
Quid pro quo	168	Ch. 136. <i>Relationi</i>	835
Quinzisme	920	Ch. 137. <i>Release</i>	838
Quite claim, see <i>Release</i>	854	<i>Relief</i>	704, 705
Quod ei deforceat		<i>Religion</i>	895
Quod clerici, &c.		<i>Remainder</i>	884
Quod personæ nec <i>Prebendarii</i> , &c.	7	<i>Remembrancer</i>	784
Quod clerici <i>beneficiati</i> , &c.		Ch. 138. <i>Remitter</i>	858
Quod permittat	753	Ch. 139. <i>Remover or Remand</i>	863
Quo jure	7	<i>Remover of Records</i>	
Quo minus	808	<i>Render and Prender</i>	881, 1118
Quorum	1139	Ch. 140. <i>Rent, and the kinds of it</i>	865
Quo Warranto	610	<i>Repeal</i>	1118
		<i>Replication</i>	19
		<i>Repleader, see Action</i>	
		<i>Replevin</i>	143
		<i>Reports, see Chancery</i>	
		<i>Reprisal</i>	739
		<i>Reprises</i>	1139
		<i>Repry or Reprive</i>	
		<i>Request, see Demand</i>	
		<i>Receipt</i>	818
		<i>Rescience</i>	1125
		Ch. 141. <i>Rescous</i>	883, 461
		<i>Refisor</i>	883
		<i>Reservation</i>	881
		<i>Resignation</i>	87
		<i>Residence, see Religion</i>	895
		<i>Resummons</i>	7
		<i>Respectu Compoti</i>	ibid.
		<i>Respite of Homage</i>	703
		<i>Restitution</i>	883
		<i>Retainer</i>	740
		<i>Retourn</i>	883
		<i>Retourno habendo</i>	143
		<i>Retourn de Avers</i>	
		<i>Retourn of Car-</i>	
		<i>tle, see Avers</i>	
		<i>Retourn Irreplevisible</i>	144
		<i>Retraxit, see Action</i>	
		Ch. 141. <i>Reversion and Remainder</i>	884
		<i>Reviver, see Extinguishment</i>	
		<i>Revocation</i>	317
		<i>Riens luy doit, or he oweth nothing, see</i>	
		<i>Action</i>	
		<i>Riens inter maiora, or hath nothing in</i>	
		<i>his hands, see Testament</i>	
		<i>Right</i>	456
		Ch. 143. <i>Riot, Brawl, and unlawful As-</i>	
		<i>semblies</i>	891
		<i>Robbery</i>	379
		<i>Rogues</i>	890
			890
			890

R:

Ransom 1139
Rape 378, 666

Razure, see Deod

Rates 331

Rationabili parte 142

Rationabilibus divis 7

Rationabili parte bonorum ibid.

Ratification 1129

Ravishment of Gard 624

Rauuge and Rauuger 611

Reattachments 311

Rebutter 184

Recaption 144

Receipt, see Acceptance and Pay-

ment

Receivers 78

Recital 409

Recluse 1129

Recognizance

Recognitors ibid.

Recordari facias 864

Recorder, see Officers

Ch. 134. Records 825

Ch. 135. Recovery 816

Recouper or deduction 881

Rectus in curia 1129

Recto, see Right

Recto upon Disclaimer 7

Rectory

Rector Ecclesiz { see Advowson

Recusants 797

Reddendum 411

Redisseisin, see Disseisin

The Table.

911 Road of Land	823	Serjeant at Arms	893
106 Rome	797	Servant	740
Royal assent	See Prærogative.	Ch. 146. Service of God, or Religion	895
Royalties		Scriptures	ibid.
Rundlet, see Quantity.		Services	701
S.		Sewer, see Officers.	
		Sessima	362
238 Sabbath or Lords day	894	Session	900
100 Sacraments	897	Sewers	894
100 Sas	1129	Sheep	189
100 Sack of Wooll	823	Sheriff, see Officers.	
Ch. 144. Safe or Sauf-conduits	893	Shewing	1130
100 Sake	1129	Ships and Shipping	746
100 Salary, see Master and Servant.		Ship-money, see Subsidy	920
100 Sale	168	Ch. 147. Shoemakers, Tanners, and	
100 Salt Peter	744	Curriers	905
100 Sanitaries.	385	Shooting	644
100 Sank or Blood	277	Shop-book	1052
100 Surplar	813	Side-men or Quest-men	792
Saver defaults, see Action.		Signet	894
100 Scandalum Magnatum	36	Silvæ Cedux, see Tythes and Waste.	
100 Scandalous Ministers and School-		Ch. 148. Silk	907
masters	903	Symony	899
100 Scavages		Simple Contract	368
Schedule	1130	Sine assensu Capitali	7
Scire facias	547	Skippers	905
208 Scold and Cucking-stool	893	Slander, see Action.	21
100 Scot and Lot	1130	Socage	701
100 Sea	894	Sodomy	666
Ch. 145. Seal of the Lord Protector	894	Soke	1130
100 Seal of a common person	401	Soldiers	1099
100 Seavorn	894	Sum in gross, see Rents.	
100 Sealing of Cloth, see Cloth.	465	Sope-vessels	907
100 Search	807	Sorcery	1110
And see Travers.		Speaker of Parliament	782
100 Secondary	784	Special Verdict	1054
100 Second Deliverance	144	Spices	907
ad Curiam, to a Court or		Spiritualities	ibid.
100 Secta		Spiritual Courts	365
Suis	707	Spiritual persons	907
ad molendinum to a mill		Spoilation	86
100 Secus per illum	919	Sponsality	720
Secunda super operatione	369	Stable-stand	612
100 Securitate preta	793	Stage-plays	611
Se defendendo	372	Stallage	1018
100 Seignior, see Baron	754	Stanes	1019
Seignior and Tenement	701	Stanneries	1134
100 Seizure, see Livery.		Standards	814
100 Seizure of goods for offences	894	Staple	907
Selson of Land, Selio terræ	822	Star-chamber	360
100 Seignior, see Steward.		Ch. 149. Statute	908
Sequester sub suo periculo, see War-		Statute-Sessima, see Sessions.	
100 Sequestration	893	Statutes	917
Sequestratio habends	ibid.	Steel and Iron	907
100 Searchers of Cloth	466	Sterling	1130
100 Serjeanty	107	Steward, see Officers and Courts.	
100 Serjeant at Law, see Officers.		Stray or Bstra	1082
		Stoppage	

The Table.

Stoppage, see Retainer.	
Submission	106
Subornation	754
Subpoena, see Chancery.	
Ch. 152. Subsidy	980
Substance	919
Suffragan	984
Ch. 153. Suit	989
Suitors	865
Sumage	1130
Summons { ad amicum	93
ad Warrantizandum, see	
Warranty,	
Superfideas	920
Supervisors of the High-way, see	
Officers.	
Superstition, uses	1068
Supplicavit, see Peace.	
Supremacie	94
Surety of the Peace	795
Surety, see Bail.	
Sibi cui in vita	7
Surgeons	796
Surname	747
Surrogate, see Officers.	
Surrender	951
Survivor	668
Suspension	554
Swara	613
Swainemote	611
Swearing and Cursing	754

T.

Tale	1304
Tale or Tally of the Exchequer	1130
Tales	1050
Tame Beasts	930
Tanners	905
Tant amount	1130
Tax and Tollage	930
Taxations and Rates	231
Ch. 154. Tarm	930
Tellers	785
Temporalities of Bishops	907
Temps or Time	930
Tenans	701
{ by Contract	526
{ in Common	675
{ in Fee	
{ in Tail	
Tenant { for Life	See Estates.
{ for Years	
{ at Will	
{ by Sufferance	
{ by Copy	
Tenements	1130

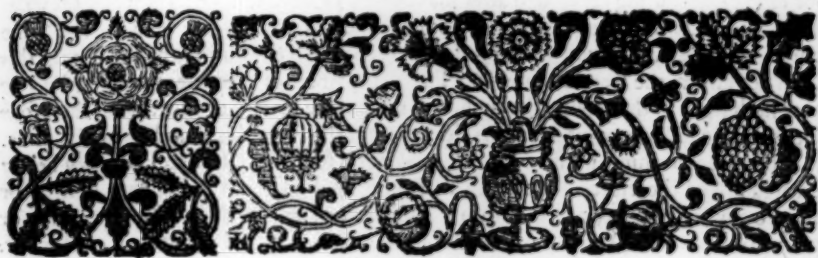
Tender or Paiment	877
Tenth	901
Tenure	701
Terms of the Law, see Words.	
Termor	685, 1130
Terms of Art, see Words.	
Terre-tenant	1130
Ch. 155. Testament	931
Teste	1130
Theft	375
Theftboot	1130
Theme	ibid.
Thing in Action, see Chose.	
Thirdborow	1130
Thrive of Corn	ibid.
Threatning, see Trusts.	
Thruus	465
Ch. 156. Tillage and Husbandry	1002
Tiles	ibid.
Ch. 157. Tythes and Parsonage	1003
Tything and Tythingman	791, 464
Title of Entry	1018
Title in Law	1130
Tod of Wooll	823
Toft	1130
Ch. 158. Toll	1018
Tonnage or Ponnage	618
Towns	1019
Totted	1130
Town, or Town of the Sheriff	364
Tout temps Prist, at all times ready.	
See Action.	
Trade and Traffique	718
Transcript	825
Transitory, see Action.	
Ch. 159. Transportation and Imprisonment	
Travers or Sans ceo	1019
Treason	39, 61
Treasure-trove	1083
Treasurer	786
Treat	1051
Ch. 160. Trepass	1020
Tress	1010
Tritis	612
Ch. 161. Trial and Triers	1047
Trover and Conversion	64
Trust and Confidence	1056
Tun	813
Tumbrel	797
Turbary	1131
Turvey	
Turno Vicecomitum	7
Turn of the Sheriff	364
Tutor, see Infant and Guardian.	

The Table.

V.	W.
V acation, <i>see</i> Record, Deed, Judgment.	W ager of Law 684
Vacat, <i>see</i> Record, Deed, Judgment.	Wages, <i>see</i> Master and Servant.
Vaccaria 1131	Wage 1131
Vagabonds, <i>see</i> Rogues 890	Ch. 166. Waife eſtray, Waiver 1081
Value 826	Ch. 167. Wales 1099
Valore maritaggi 622	Wapentage 1131
Variance, <i>see</i> Action.	Wardens, <i>see</i> Officers.
Vciors 1035	Wards and Liveries 361
Verge or Vierge 1131	Warvain or Warren 612
Venditioni exponas 7	Warrantis 1083, 412
And <i>see</i> Execution.	Warre 1099
Vencw or Viſne 1049	Warrant of Attorney 123
Venire facias 1050	Ward and Wardſhip 622
Ventre inſpiciendo 10	Warſcos } 1131
Verdery 611	Wardwis or Warrwis }
Verdiſt 1054	Waſte 1099
Vers 613	Ch. 168. Watch and Ward 1109
Veſſels 312	Waters ibid.
Veſtura tetræ 1131	Wax and Honey ibid.
Vicar and Vicaridge 84	Ch. 169. Wayes and Bridges 1112
Viceſhamberrlain 785	Wears 1109
Ch. 162. Viſtnallers, Inholders and Hoſtlers 1035	Weavers 466
Vicountiel 1131	Weights and Measures 822
Vicount 748	Wharf and Wharſage } 1131
Vi & armis, <i>see</i> Treſpaſs.	Were }
View 1035	White aſhes, <i>see</i> Transportation 1019
View of Frankpledg 364	Weald of Kent. 1131
Villain Judgment 1131	Widow 1117
Villo or Village, <i>see</i> Corporation 747	Wiſe, <i>see</i> Marriage
Vi laica removenda 86	Will, <i>see</i> Teſtament
Villenage and Vilain 1036	Wild-fowl 1110
Virgata tetræ 1131	Wines ibid.
Viſne 1049	Wiſchcraft, enchantment, ſorcery, and conjuration ibid.
Umpier 106	Wiſhernam 143
Uncore priſt, ſtill ready 19	Wiſneſſes 1047
Under-treaſurer 786	Wood and Treſs 1110
Union of Churches 902	Wood geld 612
Universities 1035	Wool 465
Volunt. <i>see</i> Teſtament.	Women, Widows, Wives, and Maids, 1117
Voucher 1084	Words, & the expoſition of words 1118
Voidance 84	Worſthead 465
Upholſters and Bedding 1035	Writings for Land, <i>see</i> Charters 233
Upper Bench 361	Wreck, or Wrack 362
Uſage 1387	Writ of Right 9
Ch. 163. Uſes 1036	Wyrits 6, 7
Uſher 785	
Uſurpation 86	
Ch. 164. Uſury 1076	
Ch. 165. Uſlagary, or Uſlary 1079	

Y

Yard Land 823
Yarn 465



CHAP. I.

Of Acceptance.



ACCEPTANCE is the taking in good part *Acceptance.*
or agreement unto some Act done, or
something given; which if he had not ac-
cepted of and received, he might have had
and required some other thing, whereof he
is now barred by Acceptance, or he might
have avoided something done, which he
hath now affirmed by this: And this is of *The Kinds.*
a Rent or other thing; and it is either ex-
press or implied: And it is sometimes of a
Rent by an issue in tail after his ancestors
death, or by the successor of a spiritual
person after the death or departure of his
predecessor, or by a wife after her husbands
death, or by him in remainder, or by an

Infant at his full age, or by an heir after his ancestors death, or it may be by the party
himself that made the estate. And sometimes it is of a sum of money or other thing
either of the same nature, or of another nature; and by the taking of the Rent in
such cases, the party that accepteth it is barred for his time to take any advantage
of the estate, or him of whom he took the rent that was before voidable, and might
by him have been avoided before the acceptance of the rent, but is now by this means
affirmed: And in other cases by such acceptance he is estopped to do or have some-
thing that before he might have done or had; as appeareth in the examples follow-
ing. *Terms Ley. Dyer 46.9.*

Wheresoever the acceptance of a rent by any shall bar him that doth accept and
affirm the estate of him from whom it is accepted, there must be these conditions and
qualities in the case. 1. There must be a privity either in Deed or in Law between the
party giving and the party taking: And therefore if a disseisin of any issue, &c. ac-
cept a rent, this shall not prejudice an issue. 2. There must continue in the taker a
power of acceptance to, and at the time he must have the next estate: And therefore
if the issue in tail before his acceptance have suffered a recovery of his Reversion, and
after accept the rent, this will not affirm the Lease against the Recoverer. 3. The
Lease on which the Rent accepted is reserved, must be a good Lease, and not void or
determined by Re-entry; and therefore if a Lease be on condition for years that such
an act be not done, the estate shall cease and become void, no acceptance of the Rent
reserved upon that Lease after will affirm the Lease: 4. The Lease must begin in the
life-time of him that made it. 5. If there be any precedent Lease, the acceptance
must

Affirmance

See 1.

1. Where and
in what case
the acceptance
of a rent is a
bar.

must be after the end of that Lease: And therefore if one seised in Fee make a Lease for ten years rendring rent, and after make him an Estate tail, or to him and his wife, and then make another Lease, or himself and his wife of her land to the same party, and the issue or wife after his death accept the Rent during the ten years, this doth not affirm the second Lease. 6. The acceptance of the Rent must be by one that hath right to the land at the time, and not before his right come: And therefore if the issue in tail before his ancestors death accept the Rent, this is no bar to him after. 7. The accepted thing must be a Rent, and not a sum in gros, or an Annuity newly created: And therefore if one make an Estate, and therein the Feoffee, Lessee, or Donee covenant to pay to the Feoffor, Donor, or Lessor a sum of money yearly, or grant to him a new Annuity or Rent out of the Land, and the issue successor &c. accept this, this is no bar nor affirmance of the Lease. 8. The Lease on which the Rent is reserved must be by Indenture. *Broo.* 166. *Dyer* 46 9. 11 *H.* 4. 15. 14 *H.* 8. 11. *Dyer* 27. *Broo.* 399. 879. *Co.* 3. 64. 26 *H.* 1. 2. *Broo.* Acceptance 2. *Dyer* 91. 13.

1. By issue in tail, or his Feoffee.

If a Tenant in tail make a Lease for years rendring Rent, and die, and his issue accept the Rent; this doth bar that issue that he cannot avoid the Lease, and doth affirm the Lease for his time: And if such a Lessee for years make a Lease of part of the land for all the term, and the issue accept the Rent of the Lessee or Assignee, this is an affirmance of the Lease for so much of the land as the Lessee or Assignee hath, and for the rest also. 21 *H.* 7. 38. *Dyer* 30. & 95. *Broo.* 166. *Co.* 3. on *Walker's* Case, 23.

If there be Tenant for life, the remainder in tail, and he in remainder make a Lease for years rendring rent, after the Tenant for life dyeth, and then the Tenant in tail dyeth, and after his death the issue in tail accept the Rent the next Rent-day; this doth not bar the issue and affirm the Lease. *Dyer* 279.

If Tenant in tail make a Lease for forty years to begin ten years after rendring rent, and dye, and after the issue in tail enter, and make a Feoffment before the ten years expire, and at the ten years end the Feoffee wave the possession, and the Lessee enter and pay the Rent at one of the days of payment, and the Feoffee accept it, this hath affirmed his Lease. *Plow* 437. *Co.* *super Lis.* 46. 6.

2. By the successor of a spiritual person.

If a Bishop, Abbot, Dean or Prebend by their common Seal had made a Lease for years rendring Rent, and die, and the successor accepted the Rent, this would affirm the Lease for his time. *Dyer* 46. 309. *Co.* 3. 65. 2 *H.* 7. 38. 37 *H.* 6. 3. 4. *Broo.* 380. 322.

3. By a wife after husband's death.

If a husband and wife make a Feoffment in fee, Gift in tail, or Lease for years or life of the land of his wife rendring Rent, and die, and after his death the wife take the Rent, this express acceptance doth affirm the estate, and bar the wife and her heirs of entry and action both for ever; and if she distrain and avow for the Rent, or bring an Action of Waste against such a Lessee; this is an implied acceptance, and will bar her and hers also. So if the husband and wife make a Lease by Indenture rendring Rent, and the husband before the Rent-day die, and the wife before day take another husband, who at the day doth accept the Rent, and then dies; this acceptance by her husband is her acceptance, and will bar her for ever. 26 *H.* 8. 2. 15 *Ed.* 4. 18. *Dyer* 46. *FNB.* 192. 3 *H.* 6. 53. *Broo.* lease 3. 11. *Dyer* 159.

4. Of a Lord of a Manor, or he in remainder or reversion.

If a Lord of a Manor grant a Copyhold estate for three lives, and after make a Lease for three lives rendring a Rent, and give Livery of Seisin, and so disseise the Copyholder, and after the Lord granteth the Fee to the Copyholder, and he accept the Rent of the Tenant for life, this doth affirm the Lease. *Dyer* 30. 107.

If a Disseisor make a Lease for life rendring Rent, and after grant by Fine the Reversion to the Disseisee, and he accept the Rent of the Lessee, it seems this is a bar. *Dyer* 30. 107.

If one make a Lease for years, (if the close of the Condition be not, That then the Estate for years shall cease or be void) rendring Rent, with clause of Re-entry for non-payment, and after non-payment and a legal demand made, the Lessor doth accept the Rent at another day of payment; this doth bar the Re-entry and affirm the Lease: And if it be an Estate for life, or any Freehold that is granted rendring Rent, let

let the close of the Condition be how it will, until an actual entry, acceptance of the Rent will bar the Lessor, and affirm the Lease or Feoffment. *Coo. 3. 64. Coo. super Eir. 211.*

If a Tenant make a Feoffment by Collusion, and the Lord die, and his heir accept the services of the Tenant, by this he is barred to take advantage of the Collusion. *FNB. 142. a.*

If a man seised of land in the right of his wife make a Lease for years not warranted by the Statute of 32 H. 8. rendring Rent, and after their death the heir accept the Rent; now it seems by this he hath affirmed the Lease. *Dyer 229.*

If an Infant make a Lease for years rendring Rent, and at his full age accept the Rent, by this he hath affirmed the Lease and barred himself: And if it be a Lease for years, the remainder for years to a stranger, rendring Rent, and he accept the Rent of the first Lessee, this doth affirm it for the remainder also. So it seems if he accept the performance of other Covenants, this may affirm the Lease. And so it is of Copyhold land: If an Infant-Copyholder make a Lease for years rendring Rent, and at his full age accept the Rent, this shall bind him. *Trin. 2 Car. B. R. Ashfield's Case. Plow. 545. 18 Ed. 4. 14 H. 8.*

If lands be given to the husband and wife and the heirs of the body of the husband, and he lease for years rendring Rent and die, and the issue in tail accept the Rent during the life of the woman, this is no bar, nor affirmance of the Lease. *Coo. 3. 64. Broo. Accept.*

If the Tenant in tail make a Lease for twenty years rendring Rent, and the Lessee make a Lease of the land for ten years, and the Tenant in tail die, and his issue accept the Rent of the second Lessee; this is no bar to the issue, nor affirmance of the first or second Lease: but if the first Lessee pay it, it is good; so also if the second Lessee pay it as Bailiff to the first Lessee. *Broo. 166.*

If the Tenant in tail make a Lease for years not warranted by 32 H. 8. as if he make a Lease to begin after his death rendring Rent, and the issue accept the Rent, yet this doth not bar him. *Dyer 279.*

If a Parson, Vicar or Prebend make a Lease for years rendring Rent, and the successor accept the Rent, this is no bar to him, nor affirmance of the Lease: So if that a Bishop had made a Lease for Tythes or the like, or any other void Lease, and his successor accept the Rent, yet this would not bind. *Coo. 3. 65. Dyer 46. 37 H. 6. 34. Broo. 38. 321.*

If a Bishop had made a voidable Lease to one, and after made a good Lease confirmed by the Dean and Chapter to another, and the successor had accepted the Rent upon the first Lease, this would not affirm this first Lease. *Dyer 46. 9.*

If a Bishop had made a voidable Lease and die, and his successor had accepted the Rent only due to the King in the time of the vacation of the Bishoprick, it seems this is no affirmation of the Lease. *Sed quare of this Case. Hil. 18 Jac. B. R.*

If the husband alone make a Feoffment in fee, Gift in tail, or Lease for life or years rendring Rent, and die, and the wife accept the Rent, this doth not bar the wife nor her heirs, nor affirm the Lease: So if the husband alone make a Lease for life rendring Rent, with a Letter of Attorney to his wife to give Livery, and she doth so (as it seems she may) and after his decease she accept the Rent, this is no bar. *26 H. 8. 2. 15 Ed. 4. 18. Perk. sect. 199.*

If husband and wife had at the Common-Law before the Statute of 32 H. 8. made a Lease for years by parol, rendring Rent to them, and the husband had dyed, and the wife had accepted the Rent, yet she might have avoided the Lease, unless it were by Indenture. *Dyer 91. b.*

If husband and wife by Indenture enfeoffs A. of the land of the wife, and A. in the same Indenture covenants and grants to pay to them yearly during their lives forty shillings, the husband dyeth, the wife accepts the Rent; this shall not bar the wife. *36 H. 8. 2. a.*

If the husband and wife make a Lease by parol, rendring Rent, and she accept the Rent after his death, this will not bar her. *Plow. 431. per Bromley.*

5. By an Heir.

6. By an Infant at full age.

Self. 2. 11. Where and in what case it barreth not.

1. By issue in tail, or his Feoffee.

2. By the successor of a spiritual person.

3. By a woman after her husband's death.

4. By a Lord of a Manor, or by him in remainder or reversion.

If one have title to have a Writ of Escheat, and he after accept the Rent of the Tenant, he is not barred of this advantage: For if the Lord accept the Rent by the hands of the Heir or Feoffee of the Disseisor, that is in upon a Title of descent or feoffment after the Escheat accrued, this is no bar: but if he avow for the Rent in a Court of Record, or accept homage or fealty of the Tenant that is in by disseisin; by this he is barred. *Coo. super Lit.* 268.

If a Lease be made upon a Collateral Condition, or Condition to do some Collateral thing, as not to alien, or the like; and after the Condition broken, he in Reversion not having notice thereof doth accept the Rent; this is no bar nor affirmance of the Lease. *Coo.* 3. 64.

If a Tenant in tail be the Remainder in tail, and the first Tenant in tail make a Lease for years rendring Rent and die without issue, and he in Remainder accept the Rent; this is no bar. *Cessante statu primitivo, cessat derivativum*; (the primitive estate ceasing, the derivative alto ceaseth.) *Broo.* 370.

If a Copiholder makes waste, by which a forfeiture accrues to the Lord, and afterwards the Lord accepts the Rent, this shall not conclude him of his entry by book, because by the forfeiture the Estate was meerly void, *H.* 28. 9. And yet see the Case, if a Copiholder enfeoff a stranger to his own use by Livery in fee, and after pay the Rent to the Lord as before, this is a continuance of the Estate. *Arden and Banmure's Case, in Crompton Jur.* f. 214. b.

5. By an heir.

If one make a Lease at will and die, and after his death the heir accept the Rent, this doth not bar him nor affirm the estate: for Acceptance cannot make good a Lease determined by the Lessors death, no more then a Lease determined by Entry. *14 H.* 8. 11.

If Lessee for life or Tenant in dower make a Lease for years rendring Rent, and die, and the heir accept the Rent, this is no bar to the heir. *2 H.* 4. 3. *11 H.* 4. 15.

See 3. III. Where and in what case the acceptance of another thing is a bar, and where not.

If the husband and wife make a partition of his wives land, and it be not equal, and he die, and after his death she doth enter into and agree to that unequal part; this will affirm the Partition, and bind her for ever. *2 Ed.* 3. *qui in vita* 172. *Coo. super Lit.* 170.

If the husband be seised of three Manors of equal value, and chargeth one of them with a Rent and dyeth, and she accept this Manor charged for her dower; in this case she is barred, and must hold the Manor charged with the Rent; but if she had taken the provision the Law made by Writ of Dower, there she shall have a third part of all discharged. *Coo. super Lit.* 173. *18 H.* 6. 27. *26 Ed.* 3. *Dower* 133.

1. To a woman after her husbands death.

If a woman accept of a Rent or other land, or part of the same land whereof she is to be endowed, or a Jointure made to her after marriage, by these means she may be barred of her Dower; for which see more in *Dower*. *Dyn* 366. 317. *Coo.* 4. 35. *26.* 7. 40.

2. To a Feoffor, Lessor, &c.

If one make a Feoffment or Lease on condition that the Feoffee or Lessee shall do some act, as make a Lease for life or the like to the Feoffor or Lessor, and he do some other thing, as make a Lease for years or the like, and the other accept it; now by this he is barred to take any advantage for the breach of the Condition; but if the Act to be done were to a stranger, and he accept another thing for it *contra*, it is otherwise. *Coo.* 3. 64.

3. To an Infant.

If an Infant that is a Parcedor make a division, and it be unequal, and at her full age she accept of it, and enter upon the part allotted her; by this she hath affirmed the partition and barred herself. *Coo. super Lit.* & *Lit.* 4. 171.

4. To the Lord of a Manor.

If there be Lord, and the Tenant enfeoff his heir within age, or a stranger, and the Lord receive homage of the heir, or accept the services of the Feoffee, and after the father die: Now in this case he is barred of the Wardship by his acceptance, and cannot aver the Collusion. *FNR.* 142. *Fi Gard* 33. *Broo.* 321.

5. To an Obligee.

If one be bound in an Obligation, with Condition that the Obliger or a stranger shall pay to the Obligee a sum of money at a day and place certain, and the Obliger or stranger pay, and the Obligee accept a less sum before the day at any place or at the time in any other place then the place appointed, or the Obliger or stranger give, and

and Obligee accept any other thing, as a horse or the like in recompence, in satisfaction, be it before or at the day; by this he is barred to take any advantage upon the obligation; and this is held to be a good performance of the Condition: But the giving and taking of a less sum for a greater at the time and place of payment, nor the giving of a horse or the like, if it be by a stranger to the Condition; and the Acceptance by the Obligee in this case is no bar to the Obligee, nor performance of the Condition. So if a Condition be to make an Estate of Twenty pounds *per annum*, or to deliver twenty Quarters of Corn, and he make an Estate of Ten pounds *per annum*, or deliver ten Quarters of Corn, and the Obligee accept this at the time and place of delivery, it seems this is no bar; (but if the Obligee make a Deed of Receipt of less, this by way of Release may be a bar.) And if a Condition of an Obligation be to do any Collateral thing, as to account, make a Feoffment or Lease, or grant a Rent, or the like, the giving and taking of money or any other thing in recompence and satisfaction will not bar. And if the Condition of the Obligation be to pay money to a stranger, and the Obliger give, and the stranger accept a horse or other thing in recompence, yet this is no bar to the Obligee, nor good performance of the Condition: And if it be to pay money to the party himself, and he give, and the Obligee accept a horse or the like in satisfaction of part of the debt, and say not for what part, this is void for uncertainty. *Park. Feff. 751. 753. Co. 3. 117. Dyer 1. Bro. Accept. Det. 43. Co. super Lit. 212, 213. Dyer 50. Perk 749, 752. Co. 9, 78. Co. 4, 3.* The gift and acceptance of a horse or other thing in satisfaction of a Judgment, is no bar in a *Scire facias* upon the said Judgment. *Trin. 9. Jac.* See more in *Obligation, numb. 8. Agreement, Accord.*

Condition of an Obligation.

Upon a Judgment.

Acceptance by a Witness of a less sum for his charge then is reasonable, will bind him. *Mareh. 18. pl. 43:*

By a witness.

CHAP. II.

Of Actions in general.

AN Action is nothing else but the right of prosecuting in Judgment of that which is due to one; or it is the lawfull demand of ones right; or (as others define it) the Form of a Suit given by Law to recover a thing. But this is sometimes taken also for the power or ability a man hath to sue, as at other times it is taken for the execution of this power, the Suit it self; and this is the proper sense of the word. *Co. super Lit. fol. 284. 285.*

1. Action, what.

Of Actions, some do concern the Pleas that were called the Pleas of the Crown, *Placita Corona* or *Criminalia*, (i. e.) Pleas of the Crown or Criminal, (of which we shall not speak at all here;) and others do concern Common Pleas, called *Placita Communia seu Civilia*: These are either Real, Personal, or Mixt.

The kinds of Actions.

The Real Action is such a one wherein Frank-tenement or Inheritance is to be recovered; or such an Action whereby the Demandant claimeth title to any Lands or Tenements, Rents or Common in Fee-simple, Fee-tail, or for term of life.

And this again is either Possessorie, (i. e.) of a mans own possession; or Ancestrel, (i. e.) of the seisin and possession of his ancestor. And this last is either Possessory; when nothing doth descend from the ancestor but a naked right; or Possessorie; i. e. when the ancestor doth die in possession, and the land it self doth descend.

The Personal Action is such an Action, as is in the personality only, whereby a man claimeth debt, or goods, or chattels, or damages for wrong done to his person; or when some personal thing, as a debt or sum of money or damages is to be recovered. And this is again so personal, that it cannot be brought by or against an Executor or Administrator: So are all the Actions that are founded on some wrong done by

Executor.

or

Action personal.

or to the person of another, and for which a man shall recover damages only; as Actions of Trespass, Trespass upon the Case for misdoing, Debt upon an Escape, Waste, and Covenant grounded on a personal Covenant for a thing to be done by the person of the Covenantor, and the like: In all which Cases, upon the death of the party by or to whom it is done and made, the Action doth die and is gone, and neither Executors or Administrators can sue or be sued in it. Or it is such a personal action as doth continue to and against Executors and Administrators, as all other actions do. *March Rep. 9. pl. 23. 13 pl. 33.*

Popular.

And this personal action is also either Popular, (*i. e.*) given to any man that will sue, as upon a Statute; or it is Particular, (*i. e.*) such an action as is given to one, or some men in certain.

The Mixt action is such an action, as wherein not only the thing it self being a real thing in demand is to be recovered, but also damages for the wrong; as in Assise, Waste, *Quare impedit*, and the like.

Demandant and Tenant.
Plaintiff and Defendant.

He that sueth in an action Real for title of land, is called a Demandant; and he that is sued, is called a Tenant: but he that sueth an action Personal, is called Plaintiff; and he that is sued, is called Defendant.

Process, what.

In every action and the proceedings thereupon three things are to be done. 1. The Cause or matter of fact must be shewed, and this the parties must do. 2. The Law must be shewed, and Judgment given according to the Law upon the matter of fact appearing in the Case; and this the Judges must do. 3. The Execution of the Judgment given by the Judges; and this the Officers of the Court must do. *Plow. 36.*

The whole proceeding of a Suit from the original to the end, is called the Process: it is sometimes taken for the proceedings from the original to the Judgment: but most properly it signifieth nothing but the Writs and Precepts that issue out in all actions Criminal and Civil.

Set. 1.
2. A Writ, what.

A Writ is a Precept in the name of the Lord Protector, &c. written in parchment and sealed with the Great Seal. Wherein there is, 1. The Salutation. 2. The matter or cause of the Complaint briefly set down, called *Breve*, *quia rem breviter enarras*, for that it doth tell the matter in short. 3. The Conclusion, wherein are, 1. The Test, which in the Chancery is the Lord Protector himself, in other Courts the Chief Justice of the Court as a witness. 2. The place. 3. The time or the date. These Writs admit of many divisions and distinctions; some be Criminal, and some Civil or Common. Of Criminal, some be against the person to have Judgment of death, as Writs of *Appeal of Death, Robbery, Rape, &c.* And some to have Judgment of Damage to the party, Fine to the King, and Imprisonment, as Writs of *Appeal of Maims, &c.* These Civil or Common actions also admit many divisions and distinctions; for these are also Real, Personal, and Mixt. But sometimes they come open, and sometimes inclosed in the Seal, and hence perhaps they are said to be open or patent, and close. But some of them are said to be *Brevia amabilia*, some *Brevia adversaria*. *Amabilia* are Writs of Entry for the passing of a Common Recovery; and a Writ of Covenant for the passing of a Fine. *Adversaria*, are all other Writs, which are either Original, (*i. e.*) the foundation of the Action, as *Distress, &c.* Mean, (*i. e.*) between the Original and the Judgment, as *Capias, Exigent, &c.* Judicial, (*i. e.*) tending to the execution of the Judgment given, as *Eligit, Fieri facias, Levare facias, Habere facias seisinam*, or *possessionem, &c.* Original Writs have some of them a certain form and rule; others are to be framed according to the Case. Original Writs are some of them Real, some Personal, some Mixt. Some of them also are Writs of Prevention, or *Anticipation*, as *Warrantia Charta, Audita Querela, &c.* which may be had before Impleading, or Execution sued. Some for Restraint, as *Waste, Trespass, &c.* Some of them are to stay Suits in other Courts; some to remove Causes out of, or send them back to, or reform disorders in other Courts, as *Accedat ad Curiam, &c.* Some, to enable other Courts in an Action. Some, to be eased of a Burthen coming or come upon a man. Some Process or Writs are after appearance, when the parties be at issue, to make the Inquest to appear, as *Veniis facias, Habeas corpus*, and the like. But most Writs are to recover some debt or duty, or amends or recompence in lieu thereof. Some of these are of little or no use at this day; as

Native

Nativo habendo, Libertate probanda, Libertatibus allocandis, Manu caption, Extirpation, Passagio, Hæretico comburendo, Quale jus, Sine assensu capitali, Occupavit, Contra formam Collationis, Excommunicatione secta, Diem clausit extremum, Mandamus, Quæ plura, Devenere, Melius inquirendum, Valore maritagii, Ætate probanda, Præcipe in capite, Droit de Guard, Intrusion de Guard, Ejection de Guard, or Ejectione custodia, Ravissement de Guard, Datum est nobis intelligi Excommunicato capiendo, and in any other such like. Others there are, whereof there neither is, nor is like to be much use; as, Inhibition, Indicavit, Sequestro habendo, Ne admittas, Attornato faciend, Homine replegiando, Domo reparand, Premunire, Summons ad auxilian-dum, Plegius acquietandis, Monstraverunt, Protection, Essendi quietum de tollonio, Estrepment, and the like.

Others there are which are Writs appointed to be used in Real actions, as Writs of Right, and of Entry, Assise, Ayle, Besaile, Mordauncester, Nuper obiit, Casu consimili, Cui in vita, Cofinage, Formedon, Quod ei desorceat, Escheate, Rationabili parte, and such like, very seldom used in these days. Others there are of more common use, as Accedas ad Curiam, Recordari, Certiorari, Pone, Attachment, Audita Querela, Capias ad computandum, Corpus cum causa, Disceit, Warrantia charta, Dedimus potestatem, Dower, Distringas, Distress, Error, Dum non suis compos mentis, Dum fuit infra aetatem Capias pro fine, Ex parte talis, Extendi facias, Faux judgment, Habeas corpus, Habeas corpora, Injunction, Jusciens, Mesue, Moderata misericordia, Ne omittas propter aliquam libertatem, Nisi prius, Partitione faciend, Per qua servitia, Prohibition, Procedendo, Proprietate probanda, Quare ejecit infra terminum, Quid juris clamat, Quem redditum reddit, Quod permittat, Quo minus, Quo jure, Quo warranto, Recaption, Rescou, Recordare, Replevin, Retorno habendo, Scire facias, Second deliverance, Sequatur sub suo periculo, Summons, Summons ad warrantizandum, Superfedas, Venire facias, Venditioni exponas, Withornam, Latitas, and such like: Others there are of most common use; as, Account, Action of the case, Debt, Annuity, Trespass, Waste, Covenant, Detinue, Ejectione firme, Capias ad respondendum, Capias, Capias ad satisfaciendum, Fieri facias, Elegit, Exigent, Habere facias, Seisinam, Possessionem, Replevin, and such like: Of some of these you shall have the definition here; the rest you shall find in other places annexed to the things about which they serve.

Summons; is a Writ to the Sheriff to cite or warn one to appear at a certain day, and it must be by certain summoners in the Tenants land, not by his goods, Rent or Common; and if it be against an heir, it must be in the land that did descend; and if it be to recover the Freehold, it must be in the same land: Else making default, he may at the Grand Cape wage his law of Non-summons; but if he appear, it matters not where he was summoned. *Co. 6. 54. 37 H. 6. 26.*

3. Summons, what.

It is when a Suit is put without a day by the demise of the King; then this Writ shall go out, or a Reattachment as the case is; and as the first action was, to revive the suit: And this is either general, when it is one man for all suits; or special, when it is for one man for one suit only. *5 H. 7. 40. Co. 7. 29. Finchestey 441.*

Re-summons, what.
Reattachment, what.

A *Capias* is a Writ to take the body of a man; and of these there be divers species: as before Judgment, a *Capias ad respondendum*; after Judgment, a *Capias ad satisfaciendum*, *Capias pro fine*, *Cap.* and others. That before Judgment is called *Cap. ad resp.* And if the Sheriff return upon that, *Non est inventus*, &c. then the Process is *Alias capias*, *Pluries*, and *Exigent*: which *Exigent* must be five times proclaimed, and the party not appearing is outlawed.

Capias, what.
The kinds.

Exigent; It is a Writ, and lieth where a man doth sue an Action personal, and the Defendant cannot be found, nor hath any thing within the County whereby he may be attached or distrained; then this Writ shall go forth to the Sheriff to make Proclamations at five Counties every one after another, that he appear, or else that he shall be outlawed; and if he be, then all his goods and chattels be forfeit. And this goeth forth in some cases before Judgment, and in some after Judgment: Before Judgment in a personal action it cannot be had till there have been three *Capias*'s ad respondendum one after another, with a *Non est inventus* returned. But one upon a *Capias* upon an Indictment of Felony, and then the *Exigent* doth issue after the first *Capias*: After Judgment, on a *Capias ad computandum*, or *Capias ad satisfaciendum*; and

Alias capias.
Pluries capias.
Exigent, what.

and then it doth issue out after the first *Capias*. See at large, *stat.* 18. *Ed.* 3. *chap.* 5. *Fitz. process* 192. 5 & 6. *Ed.* 6. 26. 6 *H.* 6. 1. 8 *H.* 6. 10. 31 *Eliz* 3. 12. 25 *Ed.* 3. 14. *Coo.* 3. 12.

If the *Exigent* be returned not fully served, without any folly in the Plaintiff, as where the Defendant after demand at two Counties rendreth himself in Court, and upon Mainprise found hath a *Superfedeas*, and yet appeareth not at the day: but otherwise it is upon a *Superfedeas* by another person bearing the same name, or in case where no more Counties but four can be holden, between the delivery of the Writ to the Sheriff and the Return, the Plaintiff bringing a new *Exigent* before any other County holden, but else not, shall have the benefit of the former Counties: and therefore it is called an *Exigent allocato Comitatu*, or *allocato Hustingo*, if it be in *London*. 22 *Ed.* 3. 11. 38 *Ed.* 3. 1. 14 *Ed.* 3. 1. 17 *Ed.* 3. 43. *Fitz. Exigent* 14.

Allocato, what.

Capias ad respondendum, what.

Capias ad respondendum, is a Writ to take the body of a man, after an Original or Summons is returned. *Nihil. Fitz. Wast.* 47. See *Utlarie*.

Latitat, what.

A *Latitat* is a Writ, whereby all men in Personal actions are called into the Upper-Bench.

Writs, or Process in Real Actions.

Self. 2.
Writ of Right, what.

THE *Writ of Right* lieth properly where a man is seised of land in Fee, and another recover it against him by default in a *Precipe quod reddat*. Now he that so loseth by default, may sue this Writ; or where one dyeth seised of land in Fee, and a stranger abateth and entreth into the land, and deforceth the heir, here the heir may have this Writ, or an *Affise of Mortdauencester*. *FNB.* 1.

Writ of Right quando Dominus reuiscit, &c.

Writ of Right on a Disclaimer, what.

Is a Writ which lieth in case, where lands or tenement that be in the Seignury of any Lord, are in demand by a Writ of Right. *Regist. Orig.* 4.

Is a Writ that lieth where the Lord in the Kings Court, *scil.* in the Common-Pleas, doth avow upon his Tenant, and the Tenant disclaimeth to hold of him, upon the Disclaimer he shall have this Writ. And if the Lord aver and prove that the land is holden of him, he shall recover the land for ever. *Old N.B.* fol. 150.

Writ of Right de Rationabili parte, what.

Is a Writ that lieth always between Privies blood, as Brothers in Gavelkinde, or Sisters, or other Coparceners, as Nephews or Nieces, and for land in Fee-simple, when the one doth enter upon all. *Regist. Orig.* 3.

Writ of Entry, what.
The kinds of it.

A Writ of Entry *sur disseison*, lieth where a man is disseised of his Freehold, then he or his heirs shall have this Writ against the Disseisor or any other that is Tenant of the land. And if the Disseisor alien or die seised, then the Disseisee shall have this Writ against the Alienee or the heir in the *per*. And then the Writ shall say, *In quod A. non habet ingressum nisi per B. qui illud ei demisit qui inde injustè disseisivit*. And if the heir or Alienee die seised or alien to another, then the Writ shall be in the *per & cui*, and shall say, *In quod idem A. non habet ingressum nisi per B. cui C. illum demisit, qui inde &c.* *Coo. super Lit.* 238, 239.

Precipe, what.

Precipe is the beginning of many Writs of great diversity: There is a *Precipe in capite*, a *Precipe quod reddat*, as Writs of Right, Debt, and others; some be *quod permittat*, as Writs *de quod permittat*; some be *quod faciat*, as *de consuetudinibus & servitiis, de domo reparanda, &c.* And some of these contain several Preecepts, and some joint, and some are sole. See *Coo.* 2 *par. Instit.* 40.

Ad communem legem, what.

It is a Writ lying where a Tenant for life in Dower, or by the Curtesie, doth alien his land and die; then he in Reversion may have this Writ against him that hath the land. *Terms ley.*

Consimili casu, what.

The Writ of Entry *Consimili casu*, is a Writ of Entry granted where Tenant by the Courtesie or for the life of himself or another, alieneth in fee or in tail, or for any other life then what he hath, and this is given to him in Reversion against the party that it is so aliened to, and in the life of the Tenant. *FNB.* 206.

In casu proviso, what.

It is a Writ lying where a Tenant in Dower doth alien the land in fee, in tail, or for life she hath in Dower, in this case he in Reversion, Fee-simple, tail, or for life, may either enter, or have this Writ, (which he will) against the Alienee or him that is Tenant of the Freehold of the land, and that during the life of the Tenant in dower.

It

It is a Writ lying where a Bishop, Abbot, [or other that had a Common-Seal, *Sine assensu capituli, what.*] alien the lands they have in the right of their Churches without the consent of the Covent or Chapter, and die, then the successor might have this Writ or a Writ of Right. *Terms ley 80. Bro. 380.*

It is a Writ lying for a man, where he is in time of peace put out of his lands or tenements, or any profit aprender, as Rent-Common to be taken in a place certain, and so disseised of his Freehold, then he may have this Writ to recover the same again. *Co. super Lit. fol. 135.* *Affise, what.*

Formedon, It is a Writ lying where a Tenant in tail doth discontinue, or is disseised and dyeth, then the issue in tail may have this Writ for his remedy; and in this case he must have a *Formedon in Descender*: And if it be to remain over for want of issue, then he in Remainder must have a *Formedon in Remainder*: And if there be no Issue nor Remainder, then the Donor or his heir may have a *Formedon in Reverter*. *Co. super Lit. 326.* *Formedon, what.*

Is a Writ that lieth for the Tenant in tail, Tenant in dower, or Tenant for term of life, having lost by the default, against him that recovered, or against his heir. *Regist. fol. 171.* *Quod ei deforcest, what.*

Grand Cape, is a Writ in an Action real, lying where the Tenant doth not appear after the first Summons, but maketh default; then this Writ shall go forth to summon the party to answer the default, and also to the Demandant: and for this default he shall forfeit his land to the use of the Lord Protector, unless he can come into Court and wage his law that he was not summoned according to law, or let by water, or by imprisonment; for then he may plead with the Demandant. *Old N. B. 177. 50 Ed. 3. 16.* *Grand Cape, what.*

Petit Cape, is a Writ lying where any Real action is brought, and the Tenant appeareth, and afterwards maketh default; then this Writ shall go forth to seise the lands into the Lord Protectors hands. *Dyer 24.* *Petit Cape, what.*

Ex gravi querela, is a Writ that lieth for him unto whom any lands or tenements in fee within a City, Town or Borough, being devisable, are devised by will, and the Heir of the Devisor entreth into them and detaineth them from him. *Regist. fol. 244.* *Se. 3. Ex gravi querela, what.*

This *Perambulatione facienda* is a Writ lying between two Lords of Manors, when there is question between them about the bounds of their Manors to ascertain them, and this is by agreement of both Lords. If one disagree, the other may have a *Rationabilis divisio*.

3. Perambulatione facienda, what. Rationabilis divisio, what. Rationabili parte bonorum, what.

This *Rationabili parte bonorum*, is a Writ lying within the Province of York and Diocese of London, upon the custom there for the wife and children of the deceased to recover a third part of his goods, after funeral-expences and debts defrayed. *FNB. 122.*

This *Libertatibus exigendis*, &c. is a Writ whereby Justices in Eyre were commanded to admit an Attorney for another man. *Regist. Orig. 19.*

Libertatibus exigendis in itinere, what. Libertatibus allocandis, what.

Libertatibus allocandis, is a Writ for a Citizen or Burgess that hath a freedom, and is impleaded before Judges that will not allow it, to compel them to allow it. *FNB. 239.*

Libertate probanda, what.

It was a Writ used for them that were questioned for slaves, and did offer to prove themselves free. *FNB. 77.*

Licentia surgendi, is a Writ whereby the Tenant effoined *de malo lecti*, obtaineth liberty to arise. *Regist. 8.*

Licentia surgendi, what.

Licentia transfretandi, is a Writ directed to the Keepers of the Port at Dover, to command him to let one pass there, that hath the Kings licence. The Writ called *Passagio*, is of this nature, directed to the Keepers of the Ports.

Licentia transfretandi, what. Passagio, what.

Leproso amovendo, is a Writ that lieth for a Parish to remove a Leper or Lazar that doth thrust himself into the company of his neighbors, either in Church or other public meeting, to their annoyance. *FNB. 234.*

Leproso amovendo, what.

This is a Writ for the respiting of the Sheriffs account. *Reg. Orig. 139.*

Respectu compati Vicecomitis habendo, what. Quare obstructio, what.

It is a Writ that lieth for him that hath a way through his neighbors ground, and he hath stopped it that he cannot pass.

Pontibus reparandis, what.
Ventre inspiciendo, what.

Extirpation, what.

Expensis militum levandis ab hominibus de antiquo domino, &c. what.

Expensis militum levandis, what.

Non ponendo in Assis & Jura, what.

Turno vicecomitum, what.

Domo reparanda.

Justicies, what.

Sec. 4.

Curia claudenda what.

Pone per vadium, what.

Homine replegiando, what.

Ponendo in balium, what.

Bilanciis deferendis, what.
Manucaption, what.

4. Who may bring Actions, and against whom they may be brought or not, and how.

Infant.
Lunatick.
Prochein-Amy.
Guardian.
Disability.
Executor.
Husband and wife.

Pontibus reparandis, a Writ to the Sheriff to require some to repair a Bridge that are bound to it. *Regist. Orig.* 153.

This is a Writ for the search of a woman that saith she is with child, and thereby keepeth the land from him that is next heir at Law. *Regist. Orig.* 227.

Extirpation, is a Writ lying against him, who after a Verdict found against him for land, &c. doth maliciously overthrow any house upon it, &c.

This is a Writ given to Tenants in antient Demesne, to forbid the Sheriff to levy any thing of them towards the expences of the Knights in Parliament. *Regist. Orig.* 191.

Expensis militum levandis, is a Writ to the Sheriff to levy the allowance for the Knights of the Parliament. *Regist. Orig.* 191.

This is a Writ granted in divers Cases to Free-men of serving in Juries. *Westm. 2. ch. 38. Articuli super chartas* 9. *FNB.* 165.

Turno vicecomitum, is a Writ given to relieve those that are called out of their own Hundred to do suit at the Sheriffs Turn. *Regist. Orig.* 174.

This is a Writ lying for one against his neighbor, by the fall of whose house he feareth hurt to his own house, to force him to repair. *Regist. Orig.* 153.

Justicies, is a Writ in the nature of a Commission, directed to a Sheriff for the dispatch of Justice in some especial cause, wherewith of his own authority he cannot deal in his County-Court. *N.B.* 35, 41, 73.

Curia claudenda, is a Writ lying against another man that ought to inclose his ground to sever it from another man his neighbors, and doth not, to compel him to do it. And he that brings it. 1. Must have a Freehold in his Close. 2. It must be for a Close next adjoining. 3. He must be able to charge the other with the Repair time of mind. *FNB.* 127. *Dyer* 295. 38. 52. *Finches* 1796.

This is a Writ commanding the Sheriff to take surety of one for his appearance at a day assigned. *Regist.*

Homine replegiando, is a Writ lying where a man is imprisoned, and not by any special commandment of the Lord Protector or his Justices, nor for the death of man, nor for the Kings forreft, nor for any such thing for which a man is not repleviable, and in such a case where he isailable by Law; or where one is detained as a Villain or Ward, and is none, in this case he may have this Writ to relieve him. *FNB.* 66.

Ponendo in Balium, is a Writ to command Bail to be taken of a prisoner. *Regist. Orig.* 133.

Bilanciis deferendis, is a Writ to a Corporation to command it to carry the Weights there to such a place to carry wooll. *Regist. Orig.* 270.

Manucaption, is a Writ lying for a man that is taken for suspicion of Felony, and offereth Bail for his appearance, and cannot be admitted thereunto by the Sheriff or other that hath power to bail. *FNB.* 249. See more of Process. *Stat. Articuli super Chart.* 15. 5 *Ed.* 3. 11. 6 *H.* 6. 1. 8 *H.* 6. 10. 10 *H.* 6. 10. 19 *H.* 7. 9. 23 *H.* 8. 14. 8 *Eliz.* 2.

For Process against those that are indicted and appealed, See Statutes 5 *Ed.* 3. 11. 6 *H.* 6. 2. 1 *H.* 5. 5. 1 *H.* 6. 10. 6 *H.* 8. 4. 31 *Eliz.* 3.

For answer to this Question, it is to be known, 1. That Ideots, Mad-men, and such as be deaf and dumb, or any other man, woman or child, (except persons disabled by Law) being wronged, may bring the proper Action appointed for remedy in that case; and all, or any of these wronging others, may be sued: And if an Ideot sue or be sued, he must do it in person; an Infant must sue by Prochein-amy, and being sued must defend by Guardian. But some men there are that are disabled to sue; and this disability is either for a time only, or perpetually: And it is also either absolute, or *secundum quid*, and *quoad* only; as a man outlawed cannot sue in his own right, but he may sue in another's right as Executor; a Feme-covert cannot sue but with her husband. There are six manner of men (saith Littleton) who if they sue, Judgment may be demanded whether they shall be answered, &c. Or there are six kinds of disabilities of the person disabling him to sue, so long as the disability doth continue.

Lit. sect. 196. *Cook upon it.* 1. The Villain might not have sued his Lord in his own right,

right, but as Executor he might have sued him. (2.) A man outlawed in any Action, or upon any Indictment, cannot sue any man in his own right whilst he doth so continue; and yet a person outlawed may sue in anothers right, as Executor or Administrator to another: So in his own right the person outlawed may bring a Writ of Error to reverse that Outlawry, or an Attaint. *Lit. sect. 197. & Co. upon it.*

(3.) An Alienee that was born out of the liegeance of the Lord Protector, in a strange Country, under a strange Prince, could not sue; if he be subject to a King that is an enemy, he cannot sue in any action; or if he be subject to a friend, he may not have a Real or Mixt action: but this impediment may be by Act of Parliament, or the Lord Protector's Letters-patents removed, and the party hereby be put in a capacity to sue. *Lit. sect. 198. & Cook upon it.*

(4.) He that hath a Judgment given against him upon a Writ of *Pramunire facias*, so long as the Judgment is in force, may not sue another. *Lit. sect. 199. & Cook upon it.*

(5.) Where a man is entred and professed in any Order of Religion, as Monk, Frier, or the like, so long as he continues so, and is not dearraigned, he is disabled to sue. *Lit. sect. 200. & Cook upon it.*

(6.) A man Excommunicate, till he is absolved, cannot sue in any action. And these disabilities hold for Suits in Courts of Equity also. But it seems that any of these disabled persons may sue in *Anter droit*, (i.e.) in anothers right, as being Executor or Administrator to another, they may sue so far as is needful to the performance of that trust. *Dyer 275. 371. 117. 227. F.N.B. 36. 26 H.8.1. Cook 8.68. 3 H.6. 39. 23. 44 Ed.3. 27. 16 Ed.4. 4. 21 H.6. 30. Dyer 77. Cook upon Lit. fol. 124, 125, &c.*

Excommunicate.

So he that is attainted of Treason or Felony, or a convict Recusant, or abjured the Realm, is disabled to sue for the time he continues in that estate. But in all those cases the disability being removed, the *Pramunire* or Attainder being pardoned, or Outlawry reversed, Excommunicate person absolved, &c. the party may sue again as before. *29 Aff. 47. 7 H.4. 39. Cook upon Lit. 128, 129.*

Felon.

And in all these cases, the Defendant when he doth first appear, ere he make any delay, Effoin, or otherwise answer, must take exception to the Plaintiffs ability, and shew his disability, and demand Judgment of the Court, and pray that the Writ may abate; for if he make any Answer, the Exception comes too late.

Abatement.

3. If husband and wife deliver goods, he alone must bring a Detinue for them, *8 Ed.4. 15.* So upon an *Assumpsit* made to her to pay him money, *27 H.8. 24.* So if he have execution of a Statute made to his wife, or upon the execution of it by his wife before the marriage, and after marriage he is outed, he alone must sue for relief, *37 Aff. pl. 15.* But the wife can in no case sue alone after marriage, nor can the husband sue alone for any kind of trespass done to her before or after marriage, but they must joyn. So for Recovery of her inheritance, and upon an *Ejectione firme*, they must join, *Co. 5. 16. 97. Dyer 805. 9 Ed.4. 53.* And therefore if the wife were beat before or after marriage, they must join; but if the husband die, she may sue alone; and if the beating during marriage be such as thereby he lose her service or company, the husband alone may sue, *20 H.7. 5. Adjudg. Pasch. 16 Jac. B.R.* But if a Bond or Bill be made to them two during Coverture, he may, or may not join with her, *3 H.6. 37.* So if an Account be to be made to her, by one who was her Receiver whilst she was sole, and yet in debt for the arrearages of account, they must join, *16 Ed.4. 8. Plow. 418.* And yet it hath been said, that in all Actions wherein nothing but damages are to be recovered, and the husband alone may release it, he may sue alone, or join his wife with him, as where she is beat or slandered; but it is safe to sue in both their names. See *March 212. pl. 249.* So where a Reversion is granted to them, and the Lessee break a Covenant. *Sir John Bret's Case, Pasch. 14 Jac. B.R.*

Self. 5.
How husband and wife may sue and be sued.

2 H.47. 38 H.6. 3. 37 Aff. 11. Co. 5. 18. So if he have a Lease for life in her right, and he make a Lease for years, and the Lessee do waste, he may bring the Action of the Case with, or without his wife. *Germey vers. Longer. Pasch. 38. Eliz. B.R.* So if the husband make a Lease of her land, and the Lessee doth waste, it is said he may sue with, or without his wife, *3 H.6. 57.* But *Quare* of this: For if so it be such an Action, as wherein the place wasted is to be recovered, he may recover her inheritance from her. And if the wife have a Rent-charge arrear before her marriage, he may with or without his wife sue for it. *Fennet's Case, M. 37. & 38 Eliz.* The wife that

Election.

hath

hath

hath

hath

hath

hath a husband, cannot be sued in any case without him for any thing she hath done : but he may in some cases be sued without her, for things done by her ; as if goods were delivered to her being sole, now they must both be sued for it, 39 *Ed.* 3. 17. Trover and Conversion will lie against them both ; but take heed how you declare: *Draper's Case*, *M. 7. Jac. B. R.* So if he do waste in the land he hath in her right, they must both be sued. So if one had sued her for Recusancie on the Statutes, her husband must have been joined. So if one sue a man for land he hath in right of his wife, they must be joined, *Co. 5. 75. 52. 11. 62. Co. upon Lit. 13.* If she being sole, make a Bond or *Assumpsit* now after marriage, they must both of them be sued upon it, *Dyer* 355. But if they both during the Coverture make an Obligation, the husband alone may be sued, 43 *Ed.* 3. 10. And if one be possessed of the Wardship of certain land, either in his wives right, or jointly with her, the Writ of Dower shall be brought against the husband alone, *Co. 1. p. 39.* And in all cases where they are both sued, albeit the husband may answer alone, yet the wife shall never be forced to answer without the husband, 34 *H. 6.* 19. 40 *Ed.* 3. 34. 2 *R.* 3. 15. 41 *Ed.* 3. 22. See in *Waste*.

Covenant.

3. In cases where the Covenantees have, or are to have several interests or estates, there when the Covenant is made to and with the Covenantees, & cum quolibet eorum, aut altero eorum, (i.e.) with either of them, and to either of them, in this case these words make the Covenant several. As if one by Indenture demise Black-acre to A. and White-acre to B. and Green-acre to C. and Covenant with them and either of them, or Covenant with them and every of them, that he is lawful Owner of all these acres ; in this case the Covenant is several : but if he demise to them the three acres together, and covenant in this manner, the Covenant is joint, and not several. And if A. and B. do covenant jointly and severally, in this case the Covenant may be joint or several, and the Covenanters may be sued either the one way or the other at the election of the Covenantee, *Co. 5. 19. Dyer* 338. *Bro. Conventum.* 49. Six Merchants covenant with the Owners of a ship *separatim* ; this word makes the Covenant several. *Co. 5. 23.*

Sec. 6.
Obligation.

4. If two, three, or more bind themselves in an Obligation thus, *Obligamus nos, i.* We bind us, and say no more; the Obligation is, and shall be taken to be joint only, and not several. But if it be thus: *Obligamus nos & utrumque nostrum*; or, *obligamus nos & unumquemque nostrum*; or, *obligamus nos & quolibet nostrum*; or, *obligamus nos & alterum nostrum*; We bind us & either [or every] of us: In all these cases the obligation is both joint & several ; so as in these cases the obligee may sue all the obligers together, or all of them apart at his pleasure ; but it seems he may not sue some of them, and spare the rest, but he must sue them all together, or all apart by several *Precipes* ; and in this case he may have several Judgments & several Executions against the Obligers, and take all their bodies in execution, but he shall have satisfaction but once, or from one of them only : for after he hath been satisfied by one, the rest shall be discharged. But in the first case, where the Obligation is joint and not several, the Obligee must sue all the Obligers together ; for he cannot sue one alone with effect, without the rest, unless it be in some special cases ; as where one of the Obligers alone doth seal the Deed, or where all of them do seal, but one of them is an Infant, a woman Covert, a Monk, or the like, or where one of them is dead ; for in these cases, one or some of them may be charged without the rest : But otherwise the Plaintiff cannot proceed in his suit against one, or some of them, without the rest, except the Defendant give him advantage. For howsoever the suit be well begun, (for when one or some of them alone is, or are sued, it shall not be intended that the rest are living, until it be shewed by the other party ;) yet the Defendant is not bound to answer, unless the rest be sued also. And therefore in this case, he or they that is or are sued alone, are thus to take advantage of it, viz. To shew the matter to the Court, and to plead in abatement of the Writ : For if he appear and shew it not, but plead *Non est factum*, or the like to the Obligation, the Jury must find against him, and he will be charged with the whole debt : And so also if one appear, and the other make default and is outlawed, it seems he that doth appear must answer all. *Hil. 19. Eliz. B. R. Adjudg.*

Abatement.

5. If a Bond or Promise be made by two or more, not one or any of them may be sued without the rest whilst they live, *M. 7. Jac. B. R. Co. 9. 53.* And if a promise be made

made to two or more, no one of them can sue whilst the rest live, but they must sue all together:

6. If an erroneous Judgment be against many regularly, they must all join in a Writ of Error or Attaint, *Co. 5. 25. 11. 43.* And if there be many Executors, and some accept, and some refuse, if they bring any action, they must all be named in the Writ: and yet if one Executor have goods in his possession, and he alone sell them, perhaps for this Contract he may bring an action for the money in his own name; so also if the goods be taken out of his possession alone, it is said he alone may sue for them: But the safest way in these Cases, is to sue in the names of all the Executors; for, the possession of one of them, is said to be the possession of all of them. If many do commit a Trespass to me, I may sue all, some or any one of them at my choice; and the Recovery against one, will discharge and bar me against all the rest.

Executors

7. Where the wrong and action given for relief is said to be personal, there no action lieth for or against an Executor or Administrator; for the Rule in this is, *An Action personal dieth with the person.* And therefore if *A.* beat *B.* or suffer an escape, (which is a wrong to *B.*) he being a Sheriff, or do waste in the lands of *B.* or enter into the lands of *B.* and *A.* or *B.* die, here the action is gone for ever; and so in all cases where the wrong is *ex maleficio.* But where it is *ex contractu*, that it arise by way of Contract, there the Executor or Administrator shall have action: As if one deliver goods to another man, and he die, his Executor shall be charged: And albeit a man hath received profit, if the action be personal, yet in most cases he shall not be chargeable in Equity. *Plow. 181, 183. Dyer 14, 169, 322. Co. 9, 84. 11, 80.* See

Personal actions

Executors. Brownl. 2 part. 9.
8. A Creditor may sue the Executors or the Heir, which he will; or he may sue both, if he will; but he can have but one Execution with satisfaction, *Brown. 2 part. 97.* See *Enfant, Husband and wife, Ability.*

9. If two retain an Attorney, and both die, the Executor of the Survivor only shall be charged for the Fees; for a Personal contract doth survive of both parties, otherwise of Real contracts, as Warrantie. *Brown. 2 part. 99.*

10. If one Covenant with *A. B.* and *C.* to pay *A.* 10^{l.} and he die; in this case, *B.* and *C.* not the Executor of *A.* must sue, *Brownl. 2 part. 207.*

For answer to this question, these things are to be known.

1. If the Sheriff have one in execution for my debt, and suffer him to escape, I may (for my relief herein) have an action of Debt, or an action upon the Case. So if I sell my goods to one upon an Executory contract for money, I may have either of these actions for the money. *Co. 4. 92.*

5. Where the Plaintiff may bring one Action or other at his choice. Debt. Action upon the Case.

2. If an Officer take Toll of me, who ought to go quit of Toll, I may have a general action of Trespass, or an action of the Case against him at my choice: So if one distrain my goods that are not distrainable by Law, I may have either of these actions against him, *Co. 4. 94.*

3. If one distrain me or my Tenants to come to his Leet, who have a Leet my self the place, I may bring an action of Trespass, or Trespass on the Case against him, *Co. 4. 94.* And albeit it be in such case wherein I may have an Assise for my relief in the disturbance, yet I may have an action of the Case also at my choice, *Co. 9. 51.*

Trespass

4. If I be Executor of a Lessee for years, and be ousted by the Lessee himself, I may have for my relief herein an action of the Case, *Ejectione firme*, or action of Trespass at my choice, *Co. 4. 95.*

5. If one contract with me for good consideration, to deliver to me twenty bushels of Corn a year, every year during my life, and he fail to perform with me one year, for this I may have an action of the Case; but no action of Debt will lie upon this Contract till all the days be past, that is, till my death; after which my Executor or Administrator may have an action of Debt, *Co. 4. 94.* So likewise if a sum of money be given in marriage to be paid at several days, no action of Debt will lie until all the days be past; but an action of the Case will lie upon every failer, *Co. 4. 94.*

6. If one find my goods, or I deliver them to him, and he having them in his custody convert them, I may at my choice have an action of Detinue, or an action of the Case upon the Trover and Conversion, *Dyer 121, 32.* If I deliver to one money open

Detinue

Account.

open (not in a bag or box sealed) to keep to my use; in this case for my relief, I may have an action of Debt or Account, but not an action of Detinue, *Dyer 22*. If I be a Brewer, and buy Corn of a man to serve my turn, to be delivered me at such a time and place, and he fail me, whereby I am forced to buy elsewhere; in this case I may have an action of Debt, or an action of the Case, at my choice, but not an action of Detinue, *Dyer 22*.

Master and
Servant.

7. If a servant buy goods for his master, and give a Note of the Receipt of them to his masters use, and undertake by his Note to pay the money at a day, but this Note is not sealed; in this case an action of Debt doth not, but an action of the Case doth lie against the servant, *Dyer 230*.

Self. 7.

8. If I (being a Solicitor) retained for *7. s.* do retain an Attorney for him to sue, and I do assume to pay him his Fees; in this case he may have an action of Debt, or an action of the Case against me (at his choice) for his Fees. *Adj. H. 16 Jac. Bradfords case. 33 H. 6. 8. 17 Ed. 4. 5.* But if I retain the Attorney for *7. s.* and say no more, in this case (it seems) he can have neither of these actions against me. And yet if I say to him, *Be Attorney for 7. s. and if he pay you not, I will*; in this case he hath an action of the Case only. And if I say, *Be his Attorney, and I will pay you*; in this case I may be charged in both these actions at his pleasure. *43 Eliz. Simpson's Case.*

9. If one grant me a Rent out of his land, with clause of Distress, I may distrain, or bring an Annuity at my choice: But if the Grant be not for him and his heirs, I may not have an Annuity against his heir, *Dyer 344*.

If one have a Judgment for Debt in any Court of Record, whilst this is in force, the Plaintiff cannot have a new action upon the first Cause; but he must sue Execution upon the Judgment. For which he may have a *Fieri facias*, *Cap. ad sat.* or *Elegit*, at his choice: Or he may outlaw him after Judgment, if he please: Or the Plaintiff may bring a new action of Debt upon the Judgment, *Co. 6. 45. 1. 88.* And albeit the Record be removed out of one Court into another, yet within the year the Plaintiff may take out his Execution at his pleasure. If one have a Judgment to recover an Annuity, he hath no remedy for the recovery of this, but by suing out a *Scire facias* on this Judgment, *Co. 6. 45.* See *Election*.

6. Within
what time. Ac-
tions must be
brought, or
not.

All actions of Trespas *Quare clausum fregit*, actions of Trespas, action *sur Trover*, Detinue and Replevin for taking away Goods and Cattel, all actions of Account, other then Accounts which concern the Trade of Merchandise between Merchant and Merchant, their Factors and Servants; all actions of Debt grounded upon any Lending or Contract without Especialty, and for arrearages of Rent; all actions of the Case, other then for Slander, which shall be sued, must be commenced and sued within six years after the cause of such action or suit accrued, if the Plaintiff be then of full age, discreet, *compos mentis*, at liberty out of prison, and in *England*; otherwise within that time after he become so; and not after.

All actions of Trespas for Assault, Menace, Battery, Wounding, and Imprisonment, within four years after the Cause, and not after.

All actions of the Case for words, within two years next after the words spoken, and not after.

But if in a former action, a Judgment being given or arrested, or the Defendant outlawed, and the Outlawry reversed, a new action may be brought within a year of the reversal or arrest of Judgment or Outlawry, *21 Jac. 16.*

For the opening whereof take these things. 1. Where one is indebted to another for Wares, and the Debt is gone in time, and after they account together, and he is found so much in debt; in this he may bring an action upon this account, notwithstanding this Statute, *March. 106. pl. 182.* 2. A Trust is not within this Statute, and therefore no lapse of time herein shall take away remedy in Equity: But in other ordinary cases, where he is barred in Law by the time, he is barred in Equity also, *Mar. 129. pl. 207.* 3. The time must be accounted from the time that the Plaintiff hath compleat cause of action, and not from the time of the promise; as if one promise to pay upon request; or when one is married, or returned from *Rome*, or the like, *Hughes, Rep. 437.*

All

All Actions, Bills, Informations which shall be brought for any forfeiture upon a penal Law, then made or to be made, whereby the forfeiture was given to the Lord Protector only, was to be brought within two years after the offence done, and not afterwards.

And all others, except the Statutes of Tillage, which gave the benefit to the King and Prosecutor, was to be brought by the Prosecutor within a year after the offence done; and in his default, and for the King, within two years, and not after; and where by any Statute it is appointed to be brought in shorter time, there it must be brought in shorter time: *Stat. 31 Eliz. 5.* See more in *Limitation*.

All real and mixt actions, as *Waste, Ejectione firma, &c.* must be brought in the County where the land lieth, and cannot be laid in any other place, for they are local. So all actions of Trespafs; for Trespasses which are local (as *Quare clausum fregit*) must be brought in the County where the land lieth, and the same place must be set down in the Declaration wherein the wrong was done: But (by the Common-Law) all personal actions (that are not Local in their own nature, as *Quare clausum fregit* is) and briefly, all transitory actions may be brought in any County where the Plaintiff pleaseth; and the Plaintiff by his Declaration may suppose it to be done in any place or County. And so was it held by Justice *Dodridge*, *Hil. 16 Jac. B. R.* But by the Statute of 6 R. 2. chap. 2. the title whereof is this, [*Writs of Debt, Account, &c. shall be commenced in the Counties where the Contracts were made;*] and the Act it self is thus, [*To the intent that Writs of Debt and Account, and all other such Actions, be from henceforth taken in their Counties, and directed to the Sheriffs of the Counties where the Contracts of the same Actions did rise: It is ordained, That if from henceforth in Pleas upon the same Writs it be declared, That the Contract thereof was made in another County then is contained in the Original Writ, that then instantly the same Writ shall be utterly abated.*]

7. Where, and in what place Actions must be brought.

The Defendant in Debt upon a Bond, pleads this Statute of 6 R. 2. and that the Bond was not made in L. as in the Writ is alleged, and prays that the Plaintiff being present in Court, may be examined upon it; who thereupon was examined in Court upon his oath, who confessed upon his oath that it was made at H. in the County of C. whereupon it was adjudged, that the Plaintiff should take nothing by his Writ, &c. 9 H. 5. R. 109. *Old book of Entries*, 183. *Crompt. Jur. Courts*, 101. *B. F. N. B.* 116. Yet nevertheless the Law is held to be, and the practice is at this day, That one may lay a Transitory Action, as Debt, Detinue, Annuity, or Account, &c. in what place he pleaseth; and so the Plaintiff useth to do. And accordingly it was held by Justice *Dodridge*, *Hil. 16. B. R.* for (said he) the Statute was never put in ure. And so it is held in *Coo. upon Lit.* 282. *Perk. Grants* 80: *Broo. ch.* 457: *Kitch.* 180. 136. That in an Action brought for Transitory things, as beating a man, or the like; the wrong being done in one Town, the Plaintiff may allege it to be not only in another Town, but also in another County; and the Jury upon *Not guilty* pleaded are bound to find for the Plaintiff. And in these cases, if the Plaintiff lay the thing to be done in another place, the Defendant may not traverse it, and say it was done in another place, and not the place set down in the Declaration, unless there be special cause of Justification, which doth extend to the place: As if a Constable of a Town in another County arrest a man for the breaking of the Peace, and the Action being laid in another County, there he may traverse the County, but withall he must add, *And all other places saving the Town whereof he is Constable.* So for taking of goods, damage feasant in another County, *Coo. upon Lit.* 283, 282. A Lease for years was made of land in London, and the Lessor brought debt for the Rent against the Assignee in *Middlesex*; this is not well brought, by the opinion of the whole Court. Debt for Rent upon privity of Contract, may be brought in any County: but if it be upon privity of Estate, as by the Grantee of the Reversion, or against the Assignee of the Lessee, it must be brought in the County where the land is. *Hughes Rep.* 335. But if an Action be brought against an Officer, as Justice of Peace, Constable, Churchwarden, Surveyor of High-ways, or the like, for any thing done about his Office, it must be laid in the County where the fact was committed, or upon Trial it will go against the Plaintiff, 21 Jac. 12. *Ord.* 3. *March*, 1654.

Self. 8.

The

The like is the Law upon an Action brought against a man for doing any thing under any Ordinance of Parliament. *Ord. 2 Decemb. 1646. Co. 2 par. Inst. 231.* For the place where Criminal Actions may be laid and tryed, See *Stat. 17 H. 8. 4. 28 H. 8. 15. 33 H. 8. 11. 23. 2 & 3 Ed. 6. 24. 2 H. 5. 5. 11 H. 7. 9. 9 H. 5. 7.* and the new Law, 20 Septemb. 1649.

For answer hereunto, take these things:

8. Where the Plaintiff may join several causes of wrong in one Action; and where Plaintiffs or Defendants may be joined in Action, or not.

1. In Personal actions one may comprehend several causes or wrongs in one Action or Writ, so as they be of one nature, and against one person: as Debt and Detinue may be joined together; and one may bring one Action of Trespass for divers several Trespasses done in divers places, and at divers times. So for divers Trespasses one after another in the same place, the Plaintiff may have relief by one Writ with a *Continuando*, (that is) that divers times continuing from such a time to such a time he did Trespass him. *Co. upon Lit. 257. FNB. 91:* And yet it hath been said that this cannot be, except the Plaintiff make a regress after his first entry, *Baron Henden at Gloucester Assizes, 17 Car.*

2. So one Action of the Case may be brought for divers *Assumpsits*; and so may one Action of Waste be brought for divers Wastes, done upon divers lands, granted by divers Leases. But if the causes and wrongs be of divers natures, as Debt and Trespass, and the like, albeit they be against one person, yet they cannot be joined together in one action, *Co. 8. 87. 3 H. 4. 13. 14 H. 6. 18.*

3. So likewise in Real actions which are founded upon a wrong or forcement, and doth not comprehend any Title in them, there the Demandant may demand in one Writ or Action divers lands and tenements which came to him by divers titles; as where divers Manors descend to me from divers ancestors, and I am disseised or deforced of them, I may have one Writ of Right or Entry into the nature of an Assise, or an Assise, and comprehend all these Rights in the same Writ. But if I bring a Writ of Entry *sur disseisin*, made to my Mother and my Aunt, Copartners in Fee-simple, the Writ shall abate, because the Title is by several Ancestors, *Co. 8. 87.*

4. The Plaintiff brought an Action of Debt for 3*l.* 18*s.* against the Defendant and his wife, and declared for 39*s.* upon a Contract of the wives, *dum sola fuit*; and 39*s.* upon an *In simul computaverunt*, with the husband only, and after issue: *Nil debet* found for the Plaintiff, Judgment was said for Error, *Hobard 258.*

5. So if the Defendant be by one Writ sued for one thing as Executor, by reason of the buying of the Testator, and for other things of his own buying; and declare, That upon an account the Executor being found in debt to him these sums, promised him payment, this is not good in one Action, for the Defendant is to be charged in two manners, *Hob. fol. 120. pl. 115.* And yet in *Hobards Reports, fol. 8.* an Action of the Case was brought for slander about Murther, and a Conspiracie to take away his life for it, in one Writ; and in a Writ of Error brought, wherein divers other Exceptions were moved, no Exception was taken to this; it seems therefore to be good.

6. Two or more Plaintiffs may not sue in one Action for several Causes, though of the same kind: And therefore two cannot join in one Writ to sue upon two Bonds for Debt due to them, or to sue one man for Trespasses. But if two or more have cause to have one Action, as if one Bond or *Assumpsit* be made to two or more, in this case they may and must sue all together. And if two men have more lands or goods together in joint-tenancie, and thereby wronged in it, regularly they must sue jointly in one Action for it; and if they be Tenants in Common of lands, in a Personal action, as for a Trespass or the like wrong, they must sue jointly; but in a Real action they must sue apart, *Cook upon Lit. 195, 196, 198.*

7. Nor can one man sue several Defendants in one Writ, in Actions of the same nature, as for several Trespasses; but if one Trespass be done by divers, the Plaintiff may make it joint or several, as he pleaseth. *Co. upon Lit. 331, 332.* And yet two that join in a Trespass, do so make one Trespasser, that one of them is answerable for his fellow; and if they be sued in one Action, they may sever in Pleas and Issues, yet one Jury must assess damages for all, and there shall be but one satisfaction, and a Release

Release to one will discharge them all; and as to the damages, he that is no party to the issues shall have an Attaint as well as his fellows: And if they be sued in several actions, though the Plaintiff may make choice of the best damages, yet if he take one satisfaction, he can take no more; and if he go about to take satisfaction twice, an *Audita Querela* lieth. *Hob. Rep.* 91. See before 3. See more in *Brownlow's Rep.* fol. 20.

For this take these things.

1. When one is barred in any personal action by Judgment upon Demurrer, or upon Confession, or upon Verdict; this is a bar to him for the same thing in any other action for ever. *Expedit reipublica ut sit finis litium.* 2. And in actions real where a man is so barred in any action, by this he shall be barred in the like action, or any action, or any action of the same nature. But in this case the party against whom the Recovery is, may notwithstanding have an action real of a higher nature, *Co. 6:7.* And therefore it is a good plea in Trespass to say, that the Plaintiff in another action hath recovered against him for the same cause. So a Recovery against another, if it be for the same thing, and execution made, which gives satisfaction. *Trin. 3. Jac. B.R. Brown and Worton.* 3. But a Recovery or Bar in an action popular by Covin, shall be no Bar to an action sued with good faith, *Stat. 4. H. 7. ch. 20.* 4. A Bar in one Ejectione firme is a Bar in another brought for the same Ejectment, but not for a new Ejectment, *March 59. pl. 91.*

Sec. 9.
9. Where an Action may be barred by a former Action had for the same thing, or not.

1. If one do maliciously vex another, and cause him to be arrested or attached at the suit of one, where there is none such, or without his consent, he shall be imprisoned six moneths without Bail, and not enlarged till he have satisfied the party grieved his treble damages, and 10^{l.} forfeiture, *Stat. 8. Eliz. 2.* See *Accusation.* 2. If one be twice arrested for the same cause, this is a misdemeanor punishable in the Plaintiff, *Goldsb. 30. pl. 5.*

10: Remedy for him who is causelessly vexed.

The Proceedings of Law in Actions, and the Terms concerning Pleading, are these which follow.

Circuit of Action, is a Term of Law signifying a longer course of proceeding to recover the thing sued for, then is needful. See for this more in the *Terms of the Law.*

Circuit of Action, what it is.

Appearance, is where a Tenant or Defendant in any Action doth appear and shew himself in person or by Attorney in the Court where the Action is sued, to answer the Action and defend the Suit. And the not appearing by the Tenant or Defendant at the day he ought to appear, is called a Default.

Appearance, what it is.

Default, what.

Saving of a Default is, where something is or may be said or done to save the default of another that ought to appear in any Action; or when a man cometh after his default, and sheweth good cause why he did it.

Saver of Default, what.

Essoin is, where an Action is brought, and the Plaintiff or Defendant cannot well appear at the time he is to appear in Court, for some special cause, sickness or the like, allowed to him by Law for a good excuse; and this doth save his default for this time.

Essoin, what.

Fourcher doth signifie a shifting, delay, or put-off by a Plaintiff or Demandant in a Suit.

Fourcher, what.

Departure in despite of the Court, is when the Tenant or Defendant doth appear to the Action brought against him, and hath a day over in the same Term, or is called after, though he had no day given him, so that it be in the same Term, and he do not then appear, but make default.

Departure in despite of the Court, what.

The *Declaration* or *Count* is the shewing in writing of the grief and complaint of the Plaintiff or Demandant against the Tenant or Defendant, wherein he supposeth to have received wrong.

Count or Declaration, what.

Continuance of a Suit, is the putting of it off from time to time by the Plaintiff or Demandant, to give it a being: And the last day given for this prorogation is called *Darrein Continuance*; when the further day is given by the Court, it is called *Dies datus*; and when it is by the agreement of the parties, it is called *Ex assensu partium*.

Continuance, what.
Darrein Continuance, what.
Dies datus.
Ex assensu partium.

- Continuando.** *Continuando*, is a Term used in an action of Trespass, whereby the Plaintiff doth suppose the Trespass to be continued from such a time to such a time.
- Adjournment, what it is.** *Adjournment*, is when any Court is dissolved, and assigned to be kept at another day or place.
- Imparance, what it is.** *Imparance* is the desire of the Defendant in the Suit after the Declaration put into the Court, and the Courts Order thereupon, that the Defendant shall have a longer day to answer the matter. And this is also by the consent of the parties.
- Journies Account.** And this also is by sometimes *Journies account*, which is a kind of continuance of a Suit begun and interrupted.
- Discontinuance, what it is.** *Discontinuance* of a Suit, is the interruption or breaking of a Suit; which being done, the Plaintiff is without a day, and must begin his Suit again.
- Miscontinuance, what it is.** *Miscontinuance* of a Suit, is where a Suit is continued, but not well continued: By this also the Suit is determined, and the Plaintiff is put to begin anew.
- Retrahit, what it is.** *Retrahit*, is where the Plaintiff in a Suit comes in person into the Court alone, or with the Defendant, and saith he will proceed no further: This now is peremptory, and a perpetual bar to him.
- Non suit, what it is.** *Non suit*, is where the Jury is ready to appear, or to give up their verdict, or when the parties have demurred in Judgment, and have a day given them further; and at that time the Plaintiff being called, doth wilfully make default and renounce his suit. This is always after appearance.
- Sett. 10.** *Abridgment* of a Plaintiff or Demand, or Plea. *Abridgment* of a Plaintiff, Plea or Demand, is a form in pleading, whereby the Defendant-Plaintiff is put to, and doth abridge or ascertain his demand. But of this and of all the rest of the particulars before named, see the First Part of the *Marrow of the Law*, Chap 58.
- Pleading, what.** *Pleading*, taken largely, doth signifie all the sayings of the parties to a Suit, after the Declaration put in; that is, all that is contained in the Bar, Replication, Rejoinder, Surrejoinder, &c. But more properly and strictly, it is taken for the Answer or Defence of the Defendant to the Declaration of the Plaintiff. And some kind of Pleas are called Exceptions: And when the Plea is such an Answer, as it doth destroy the Action of the Plaintiff for ever, then it is called a Bar.
- Plea or Defence.** *Abatement* of a Writ or Plea, is, where a Writ, Plea, or Avowry is brought, wherein there are any of the Causes of Abatement; then the Defendant finding fault with it, and taking Exception against it in time, may by Pleading or Motion destroy it, and put the Plaintiff to begin his Suit again.
- Exception.** *Nihil dicit*, is a failing to put in Answer to the Declaration of the Plaintiff by the Bar, what it is. *Nihil dicit*, is a failing to put in Answer to the Declaration of the Plaintiff by the day assigned: which if a man do, Judgment will be given against him for saying nothing to the contrary.
- Abatement of a Writ or Plea, what.** *Non sum informatus*, is a formal Answer put in of course by an Attorney in defence of his Clients suit, by which he leaveth the same undefended, and so Judgment passeth against him.
- Nihil dicit, what.** *Nihil debet*, is a general Answer used to an action of Debt without a Specialty, whereby the Defendant doth say, that he doth owe nothing to the Plaintiff.
- Non sum informatus, what.** *Not guilty*, is a kind of Plea used to actions of Trespass and such like actions, whereby the Defendant doth absolutely deny the thing wherewith he is charged.
- Nihil debet, what.** *Riens arere*, is a kind of Plea used to an action of Debt upon arrearages of Account, whereby the Defendant doth allege that there is nothing behind.
- Not guilty, what.** *Faint action* or pleading, what. *Faint action* is, when the Writ is true, and yet the Plaintiff by Law can recover nothing by it. And a *Faint Plea* is a covenous kind of Plea to deceive a third person.
- Riens arere, what.** *Bewpleader*, what it is. *Bewpleader* is a Writ in the nature of a Prohibition, to forbid the Sheriff to do something he had been used to do. But it is now out of use.
- Faint action or pleading, what.** *Dilatory plea*, what. *Dilatory Plea* is a Plea that makes a delay and put-off in the matter, and is not to the matter.
- Bewpleader, what it is.** *Colour*, what. *Colour* is a fained matter, which the Defendant in an action of Trespass or Affise useth in his Plea, by which he giveth the Plaintiff a shew of good matter, though in truth he have none; and the end of it is to bring the matter to be tried by the Judges, and not by the Jury.

A *Forrein plea*, it seems, is such a plea as is not triable in the County where it is made. *Forrein plea, what it is.*

A *Double plea*, is where the Defendant in an action pleadeth a plea wherein there are two matters, either of which is a sufficient bar to the action of it self. *Double plea, what it is.*

Modo & forma, are words of art in pleading, when the Defendant in his Answer denieth the thing laid to his charge to be done in manner and form as is declared. *Modo & forma, what it is.*

Negativa pregnans, is where the Defendant to an action pleadeth such a negative plea, which includeth in it an affirmative plea also. *Negativa pregnans, what.*

Protestation is a form used in pleading, when one will not directly affirm or deny any thing which is alleaged by another or by himself; or a defence and safeguard to the party which maketh it, from being concluded by the act he is about to do, that issue cannot be joyned upon it. *Protestation, what.*

Que est mesme, or which is the self-same thing; It is a word of art used in an Action for a direct Justification of the very act complained of by the Plaintiff as a wrong. *Que est mesme, what.*

Monstrance is a form of pleading, when one makes use of a Deed in a Court as Plaintiff or Defendant, that he saith he is ready to shew the Deed, for it must be shewed forth in Court. *Monstrance de fait.*

Que estate, it signifieth a plea whereby a man intitling another man to lands, &c. he saith, that the same estate that the other hath, he himself hath from him. *Que estate, what.*

Action of the Writ, is a kind of pleading whereby one sheweth some matter whereby he sheweth the Plaintiff hath no cause to have that Writ which he hath brought, and yet it may be he may have another Writ or action for the same matter. *Action of the Writ, what.*

Uncore prift, or yet ready; it is a form of pleading used by a Defendant in an action being sued for a debt due at a day past, to save the forfeiture of a Bond; saying, That he tendred the money at the time and place, and there was none to receive it; and that he is now also ready to pay the same. *Uncore prift, what.*

Traverse signifieth sometimes to deny, and so it is used in pleading; and then it is made by the words [*without that*:] and sometimes it signifieth to overthrow or undo: So a Traverse of an Indictment, is to deny the point of an Indictment. *Traverse, or Sans ceo, what.*

Confess and avoid, is a form of pleading, when the Defendant doth by his answer confess the effect of the Plaintiffs charge, but by some new matter he doth avoid it and put it from himself. *Se&. 11. Confess and Avoid, what.*

Conclusion of a Plea, is the latter part of the pleading in the Declaration, Bar, or Replication, which is and must be apt according to the precedent matter: As if the Suit be upon a Deed, and he hath pleaded in avoidance of it, then he demand the Judgment of the Court if it be his Deed; and if it he hath pleaded in discharge of the Debt, then he demands Judgment if he may have that action; and if one plead in abatement of a Writ or bar of an Action, he doth conclude, *And this he is ready to aver*. This is called an Averment. *Conclusion of a Plea, what. Judgment si fait. Judgment si action. Averment, what.*

Replication is, where the Defendant in the Action maketh an Answer, and the Plaintiff thereupon maketh an Answer to his Answer. *Replication, what.*

Departure from a plea or matter, is where a man pleadeth a plea in bar, and the Plaintiff doth reply to it, and he after in his Rejoinder pleadeth or sheweth another matter contrary or not pursuing to his first matter. *Departure from his plea, what.*

Variance is, where one part of the pleading doth not agree with another part thereof. *Variance, what.*

De son tort demesne, or, *Of his own wrong*; are words of art used by way of Reply to a plea of the Defendant, whereby he doth charge the other party to do the thing otherwise then as he hath set forth. *De son tort demesne, what.*

Rejoinder is, where after the Plaintiff in the Action hath replied to the Answer of the Defendant, the Defendant doth again make Answer to the Plaintiff. And if now after this the Plaintiff shall answer again to the Defendant, this is called a *Sur-rejoinder*. *Rejoinder, what. Surrejoinder, what.*

Jeofaile is, where the parties to any Suit in pleading have proceeded so far that they have joined issue, which shall be tried, or is tried by a Jury: And now it doth appear that there is some fault in it, and they cannot go on safely; this being shewed to the Court, it shall be stayed: *Jeofaile, what.*

Sett. 12.
Peremptorie,
what.

Repleader,
what.

Novel Assign-
ment, what.
Interpleader,
what.

Counterplea,
what.
Receipt, what.

Demurrer, what

A *Peremptorie* is an art in pleading that is final, without hope of renewing. *FNB. 35.*

Repleader is, where the pleading in any part of it is bad, and by order of the Court or consent of the parties he is to plead again.

Novel assignment, is a form of pleading in an action of Trespass, whereby a man doth assign more certainty in the place then he did before.

Interpleader is the discussing of a point incidently falling out in the pleading, before the principal cause can have an end.

Counterplea is a kind of Replication against a praying in Aid, desired by or offered to a particular Tenant in defence of a Suit.

A *Receipt* is, where an Action is brought against a Tenant for life or years, and he in the Reversion comes into the Court and prays to be admitted to join in defence of the Title.

Demurrer is a kind of pause upon a point of difficulty in Law arising in the pleading, wherein they can go no further till the Judges have determined it. But of this, and all the rest before, See more in the *First Part of the Marrow of the Law*, Chap. 58.

For the several kinds of Actions, see them in their proper places. And for the rest of the Proceedings in Actions, see *Error*, *Trial*, *Judgment*, and other Titles.

CHAP. III.

Of an Action of the Case in general.

Action of the
Case, what it is.



AN Action of the Case is a Writ brought against one for an offence done without force; as, for not keeping promise, for breaking trust, for slanderous words, deceit, or the like misdemeanor: And is called an *Action of the Case*, because the whole Case (so much as is in the Declaration, (save only the time and place) is set down in the Writ; and there is no other Action given in the Case, save only in some few Cases where the Plaintiff hath his choice to bring this, or some other Action.

How many
kinds of it
there be.

This Action is sometimes about *Words*, (that is) if another speak that to, or of me, by which I am any way damnified. And sometimes it is about *Deeds*, and then it is either for not doing what a man ought to do, either by his own undertaking, or the requiring of Law; or it is for doing something he should not do; or it is for doing something otherwise then he should do. That for *Defamation*, is either of Great men, called *Scandalum Magnatum*; or it is of ordinary men. That for *Deeds*, is either upon an *Assumpsit* or Promise, upon a *Nuisance*, upon a *Trover* and *Conversion*, upon a *Deceit*, upon a *Conspiracie*; or it is upon some other *Non-feasance*, or *Mis-feasance*. Amongst Slanders and Defamations also, some tend to the disgrace of the person of another, some to the disgrace of the Title of his Land. Those against the person also do some of them tend to the peril of his life, some to his prejudice in his livelihood and estate, and some to his reproach in his name only. *Cook 4. 92, &c. Dyer 8. 72.*

Sett. 1.

We shall begin with Actions for *Words*; and we will say a little to the Scandal of great men. But first of all we will give you certain general Rules that concern all sorts of *Defamation*, or the Slander of all sorts of men.

A *Defamation* also may be by *Deeds*, as by bringing an Action, or the like.

Of an Action of the Case for Slanderous words.

WE shall first give you in sundry Rules, the general Doctrine of Actions of the Case touching Slanders; and these like the Veins in the Body, run through the Body of all the Cases hereafter following, wherein the words are, or are not Actionable, as they fall within these Rules. And then we shall give you the Cases themselves, as examples answering to these Rules. The Rules are these.

General Rules
touching this
Action.

1. In these Actions for words, the Law doth much heed how the words do sound, and are esteemed amongst the men of the place where they are spoken, whether they be odious in the estimation of men or not. And for this purpose, it is held, that words may be actionable in one Countrey, that being spoken in another Countrey, are not actionable; and this I take to be the most sure and best touchstone of all actionable words.

2. The sense of the words in these Cases, is much looked upon by the Law; and for the finding out thereof, the occasion, subject matter, and coherence of the Discourse must be weighed; *Sensus verborum sumendus ex causa discendi*, *Coo. 4. 16.* Words that of themselves will bear an Action, yet sometimes being considered *causa discendi*, (i. e.) By the occasion of the speech, will not bear Action. *March Rep. f. 20.* And they are to be taken as they are spoken *Conjunctim & uno halitu*. *New Book of Entries, F. 22. 6.*

3. All scandalous words which touch or concern a man in his life, as to say, He is a Traytor, Thief, or the like; or which touch him in his Liberty, as heretofore to have said of one, *He was Villain to J. S.* or which concern a man in Member in any corporal punishment, as to say, *A man hath stoln sixpence*, (which is petit Larceny) or the like: Or which scandal a man in his office, or place of trust, as to say to a Judge or Justice of Peace, *He is a corrupt Judge or Justice of Peace*, or the like; or which slander a man in his calling, or trade, by which he gets his living, as to say to an Attorney, *You are a cheating knave*; of a Tradesman that lives by buying and selling, *He is a Bankrupt*, or the like; or which tend to the loss of a mans preferment, as to say to a man about to be preferred to a Benefice, *That he is an Heretick*: Or of a Woman like to have a Husband, *That she is a whore*, or the like, if by this means they lose their preferment; or which charge a man to have any dangerous disease, by reason of which he ought to separate himself, or be separate by the Law from the society of men, as to say a man hath the *French Pox*, or the *Plague*, or the like: Or which tend to the slandering of a mans title, as to say, *He hath no estate in his Mannor*, when he is about, and hath need to sell it, or the like: Or which tend to a mans disinheretance, as to say to an Heir to Land, *He is a Bastard*, or the like: Or which tend any way to a mans particular damage. All such words are Actionable, *Coo. 4. 13. 14. &c. Coo. 10. 130. Dyer 26. 72.* This general Rule for the clearing of it doth admit of many Extensions, and many Exceptions and Limitations, which we shall lay down in the Rules that follow: And first of the Extensions.

4. Many words (though of themselves they be not Actionable) yet being equivalent to words that are Actionable, may bear an Action. *Pasche 15. Car. B R. a. greed*; for they may *prima facie*, sound from the mouth of the speaker, in the ears of the hearer, as bad as any Actionable words.

5. It matters not how the words (if they be Actionable) be published or divulged, whether by writing or speech; for the Action is maintainable in both Cases. A man might have been charged in this Action for a slander, by a Bill in the Star-Chamber, and so he may be now by a malicious Indictment, *Coo. 4. 14, 15:*

6. It is all one, as to the maintenance of the Action, if the words be spoken or written to the person slandered before his face, or of him behinde his back. *Old Book of Entries, Coo. 4. 14, 15. and Hobb. Pl. 292.*

7. Nor is it material, whether they be spoken in the second or third person; for the Action is alike maintainable in both Cases, *Coo. 4. 14, 15, 16.*

8. Nor is it material, in what Language they are written or spoken, if the hearers do, or may attain to understand it, *Hobb. Rep. Pl. 165, 236, 351, 236.*

9. Nor

9. Nor is it material, whether the words be uttered by way of affirmation, as *A. is a thief*; or hearsay, or report, as *J. S. saith, A. is a thief*, and *J. S.* did never say it; or by way of Interrogation, as, *Hast thou been at London to change the money thou didst steal from me?* Or by way of negation, when it doth imply an affirmation, as *you are no thief*, or the like; for in all these Cases they are Actionable. *Pasche 15 Car. Appletons Case, B. R. Hill. 4 Jac. B. R. Lady Morrisons Case. See March. Rep. f. 7. Pl. 18.* One said, *That he would prove that J. S. had stoln his Books*; or say, *I will prove he hath stoln my Books, and I will have him before a Justice*; it seems either of these Speeches are Actionable. *March. f. 19. Pl. 44.* It lieth for words spoken thus, *Hast thou been at London to change the money thou didst steal from me.* It is said it lieth for saying to one, *I dreamed this night that J. S. did steal a horse*, *March. Rep. f. 58. Pl. 9.* But I much doubt the last Case: It lieth for saying, *I do verily think J. S. to be a horse-stealer*, *Goldsb. 186.* So for words spoken thus, *A Woman told me, that she heard say that J. S. &c. Goldsb. 139. Pl. 43.*

10. Nor is it material, whether they be uttered by way of earnest, or seemingly onely in jest, but with a minde to slander; for the Action will lie in both Cases.

11. Nor is it material, whether the man that uttereth them, be sober, or drunk with Wine, or Passion; for the Action lieth alike in both Cases;

12. Nor is it material, whether the words be delivered in one or more sentences or speeches.

13. Nor is it material, how the words be uttered, either directly or indirectly, and obliquely, for the Action doth lie alike in both Cases.

14. The slander that doth concern a mans life, liberty, member, or any corporal punishment, his office, trust, calling, or that charge him with a foul Disease, to cause a separation; these Actions are maintainable, without averring in the Action any particular damage come to the Plaintiff by the slander.

Averment.

15. This Action may lie for words, though the words in a proper speech cannot be true; as if a Woman say to me, *Thou hast stoln my goods*; for she hath no goods, but what is her Husbands adjudge, *M. 9 Jac.*

16. If a man speak against another, words that are not in themselves Actionable as that he is a *Rogue, Knave, Cozener, Fornicator*, or the like; yet if the Party can make it appear by proof, he had any special loss hereby, he may perhaps have an Action for these words: But then he must make a special Averment in his Action of his loss. Thus much of the Rules of Extension: Now to the Rules of Limitation or Exception.

Averment.

Sec. 2.

17. When words in themselves Actionable, are spoken too generally, so that they are uncertain, they will not then bear an action; as to say, *A man deserves to be hanged*, *M. 4 Jac. B. R. He seeks my life*, or the like. *Coo: 4. 15. Hobb. Rep. Pl. 196. 332. 3.*

18. Words not positively affirmative, will not bear an action; as, *I fear you will be charged with Felony*, &c. *Hobb. Rep. Pl. 381.* Or, *Arrested for Felony.* *Hobb. Pl. 286* or the like. *Hobb. Rep. Pl. 381.*

19. Words of a double and indifferent meaning, when one of the senses is good, will not bear action; for, *Verba accipienda sunt in mitiori sensu*; as if one say of another, *He did burn my Barn*, *Coo. 4. 20.* For it may be a Barn without Corn; or, *He hath the Pox*; For it may be the ordinary, not the French Pox, *Coo. 4. 17.* For these actions are not to be maintained by a strained construction upon mens words, but where the words do clearly import a slander. But if the common ordinary and violent sense, and intent, be the worst, that sense shall be taken, as *A. had the use of her body*, this is to be taken in the worst sense, *Hill. 4 Jac. B. R. Hobb. Rep. Pl. 350. 236.*

20. Words of a doubtful meaning, that have no clear and certain Intendment, especially if they be insensible, will not bear an action; as to call one *filching fellow*, *Coo. 4. 15.* Or to say, *He smells of a murder*, *Hobb. Rep. Pl. 350.* or the like. And yet if they have a bad Intendment in the Countrey where they are spoken with an Averment thereof, they may be Actionable, *Hobb. Rep. Pl. 394. 323.*

21. Actionable words may be qualified, and made unactionable by subsequent words;

words; as, *Thou art a Thief*, [*for*] *thou hast stolen a Tree, my Apples, or Corn, or the like*. But if he say, *Thou hast stolen my Wood out of my Barton, Corn out of my Barn, or the like*; these words are actionable. *Hob. Rep. pl. 97. pl. 406. Co. 4. 19. Hob. Rep. pl. 381. 406.*

22. Words that do not import an act, but an intent or inclination to a thing, are not actionable, *Co. 4. 19*. To say, *He is a Thievish fellow; He had a mind to have killed me*, *Co. 4. 16*. And yet if that intent be an offence punishable, as an intent of Treason is, the words are actionable. And therefore adjective words, as to say, a man is a *Thievish*, or *Traiterous*, or *Seditious fellow*, are not actionable: and yet if they be such as import an act done, as *Perjured Knave*; or the like slander in a mans Office, as to a Judge, *Corrupt Judge, Bribing Knave*; or slander to a mans Trade, as to a Tradesman, *He is a Bankrupt fellow, or Bankruptly fellow*, or the like, these words are actionable.

23. Words that are impossible, are not actionable; as to say, *He is perjured, and that may be proved by stakes, &c.* *Co. 4. 19. My Mare doth piss as good drink as J. S. (being a Brewer) makes.* *Mich. 15 Car. B. R.* or the like.

24. When it doth appear in the action brought, that the words spoken are no damage to the Plaintiff, no action will lie upon them: as when he saith, *Thou hast killed my wife, or kinsman*; and the Record shews him or her to be alive, *Co. 4. 16. Hob. Rep. pl. 11*. But if it appear not upon Record, some say the Plaintiff must aver it, or his action is not well laid; others say the Defendant must set it forth, and this is the safe way, and for this there seems to be better reason, *Hob. Rep. pl. 11. March Rep. 110 pl. 189.*

25. Words that are uncertain in themselves, will not bear action, as to say, *Thou hast taken away the money of J. S.* for it may be done without Felony, *Hob. Rep. pl. 11. Thou hast taken away my money*, *Hob. pl. 136*. and these cannot be made certain by an *Innuendo*. But to say, *Thou didst kill a woman great with child, innuendo A. uxor cuiusdam R. defuncti*, was ruled good, *Mich. 2. J. A. B. R.* And *A. sued B. for saying, My Brother (innuendo the Plaintiff) is perjured*; and upon *Not guilty* pleaded, and Verdict for the Plaintiff, it was adjudged good, for these words are certain in themselves; not like to this, *One of my brothers is perjured. Wiseman's Case, Mich. 3. J. A. B. R.* See for the *Innuendo*, *Brownl. 1. par. 7. 13. 9. 10.*

26. When the person charged is uncertain, no action will lie; as if one without any other speech precedent, say, *One of the servants of J. S. is a Thief*, and he have divers servants, or the like, *Co. 4. 17. Hob. Rep. pl. 351*. and yet words somewhat uncertain at first, by an Averment and the Verdict of a Jury may be made certain, in case where they are spoken of one man in certain, as, *My brother is perjured*, and averred it was meant of him, and the Jury found it so, *M. 3. J. A. B. R. Wiseman's Case. Hob. Rep. pl. 300*. So likewise when the thing charged is uncertain, no action can lie for the words, *Hob. Rep. pl. 145. 119. Co. 4. 25*. To say, *This boy is a thief, of J. S.* then present, is certain enough, *Brownl. 1. par. 2*. If two men speak together of *J. Symes and W. Symes*, and one of them said, *These Symes make Half-Crown peeces*; this is certain and actionable: Otherwise it is if he say, *The Symes, &c.* for this is uncertain, *Hughes Rep. 391*. So if there be divers Defendants in a Suit, and he say, *These Defendants did, &c.*

27. When there be actionable words spoken amongst others, but upon the whole discourse it appeareth the party did not intend them in a slanderous sense, these words are not actionable. As if their dialogue be about killing of Hares, and one saith, *He killed six in one day*, and thereupon the other said, *He is a Murderer*; these words here will not bear an action. So if one say to another, *Thou art a Traitor, for I trusted thee to buy Land for me, and thou boughtest it for thy self*: Or, *Thou art a Thief, for thou robbedst my Orchard of my Apples*. And if in this case the party sue upon those single words, and name not the rest, the Defendant may in his plea shew all the words specially, or he may plead *Non culp. modo & forma*, and give the special matter in evidence; or he may traverse these words, and justify the speaking of the words as they were, or he may upon the evidence have the words found specially, as he shall see cause, *Co. 4. 13*. or he may plead *Not guilty* to a part, and justify the rest. *N. B. of Entries, f. 24. a. 25. a. 26. a. 27. a.*

28. The

28. The words spoken, though actionable, must be spoken in the hearing of some body, or else the action will not lie; the Writ doth say so, *In presentia quamplurimorum ligeor. &c. Hob. Rep. pl. 63.* And (as some say) they must be spoken in a language that the hearers do understand; and therefore if they be spoken in *Welsh*, that no action will lie, unless one of the hearers do understand *Welsh*: and some Judgments are on this side, and others hold the contrary and (in my opinion) upon better reason; for a man may call another *Thief* in Latine or *Welsh*, in the hearing of such as understand it not, but they may remember the word and ask the meaning, and so a man may be grievously slandered without remedy. And yet it is held, if a man send or give a slanderous Letter to the party slandered, or speak such words in one mans ear only in private, both these are actionable, *Hil. 38 Eliz. Cromp. Jur. 13. Hob. Rep. pl. 63. 276.*

29. The Charge must be false, for the Writ is *Falso & malitiose*, and so it must be, or it is not actionable; for if the thing that he is charged with by the words be true, the Defendant may justifie it; but he must see he do not plead Not guilty, but make a special Justification.

30. The words must be spoken purposely; and therefore it is considerable here, *quo animo* they are spoken: for the Writ is *malitiose*, and so it must be, or the words are not actionable. And therefore it is held, that if a Minister preaching, recite a History; or a Lawyer pleading, do innocently and pertinently speak words whereby a man is charged with a crime, and it prove false, this is not actionable: So if one advise his friend to forbear the company of *T. S.* for he hath the Pox, &c. this is not actionable, *40 & 41 Eliz. C. B.* And yet if such men shall make this but a cloak of their malice, *contra*: and circumstances will clear it with what mind he did it, *Mic. 31 Jac. Brook's Case. Hob. Rep. pl. 399.*

31. If the ground of the damage do not appear in the action, no action will lie; as to say a man did *Cozen by false weights*, and do not say he is a *Tradesman*, or getteth his living by buying and selling, *M. 17. Car. B. R.*

32. When it doth not appear that he that spake the words had notice of the ground or occasion of the offence, no action will lie: as, *A. hath Thieves in his house*; for he may not know it.

33. If this slander be in a course of Justice, and be not malicious and touch a mans life, it is not actionable, *Kelm. 26.* And therefore it lieth not against a man for suing a Writ of Forgery of False Deeds, or exhibiting Articles against a man for his good Behaviour, *Coo. 4.* Nor doth it lie against a man for putting in Articles against a Master of Chancery or Justice of Peace, to have the good Behaviour, though the things be false. But if he begin there, and give over there, and then begin elsewhere out of course; it is otherwise, *Brownl. 1 par. 3, 4. 2 par. 100.* It had lien against a man for slanderous matters (wherein the Court had not jurisdiction) put in a Bill in Star-chamber, *Brownl. 2 par. 100. Hyghs 444.* But herein let the party take heed he go not out of the Rode of Justice, nor say more herein then is necessary. For if a Robbery be done, and common report is that *J. S.* hath done it, he may arrest him; but if he say he hath done it, this is actionable: So if he tell abroad in Taverns the same thing, here he may be made liable to action by it, *March. 76. pl. 119. Hob. Rep. pl. 105, 238, 381, 71, 112.* So one may indict another for such a thing: But if I indict a man for Felony upon ground, this is justifiable; if I say he hath done the Felony, and it be not so, or I will speak of it in an Ale-house, I may be charged in this action for a slander; and I cannot justifie the speaking of slanderous words upon a fame, arrest, imprisonment, no nor upon Indictment; for if I justifie, I must prove he is guilty of it. And yet if there be malice, and a conspiracie in a course of Justice to take away my life, here I may have an action of the Case for the slander and vexation. As if two or more conspire to indict me for a Felony, and I be on a Trial *legitimo modo acquiescens*, I may have a Writ of Conspiracie against the Indictors. And if any man procure me falsely and maliciously to be indicted, arrested, and imprisoned, though I be not acquitted, I may have an action of the Case, *Pasch. 3 Jac. B. R. Roll. 372. Hob. R. pl. 111.* But if upon the Trial there do appear any probable cause for the Indictment and prosecution, this action will not lie, *Hob. Rep. pl. 350.*

34. Where any thing is the cause or ground of action, or tends necessarily to the maintenance of it, this thing must be averred to be, or not to be, as the case requires, or the action will not lie: As if one say, *My son stole his Hens*; in his suit he must aver he is my son, *Mich. 14 Car. B.R.* If I say, *He that dwels in the next house to I.S. one R.L. did rob me*; if he sue, he must aver he dwels in the next house to I.S. *Pasch. 7 Jac. Clark's Case.* So if I say, *Pritchard's man robbed me*; if he sue, he must aver he is *Pritchard's man.* See *Cook 4. 16. Hob. Rep. f. 8.*

Sett. 3.
Averment.

35. If the words in themselves be uncertain, and will not bear an action, as to say, *One of my Brothers is perjured*; they may not be made actionable by averment, or an *Innuendo*, as words of a double sense; by an *Innuendo* he meant the worst sense, as *Pox*, *Innuendo* the French *Pox*, *Coo. 4. 17. 20.* So to make uncertain words certain, *He took my money with a strong hand, innuendo Felonice, M. 15 Car. B.R.* *He forged a Writing, innuendo such a Deed, Hob. Rep. pl. 4. 48.* The office of this word is only to contain and design the same person which was named uncertain before, as thus: Two are speaking together of *B.* and one of them saith, *He is a Thief*; there *B.* in his Count may shew, that there was a speech of him betwixt those two, and that one of them said of him, *He (innuendo the Plaintiff) is a Thief*; or else to declare the matter or sense of the words themselves, which was certainly expressed before, as thus: *A. and B. speaking of C. A. said, that C. was a Traitor, to whom B. said, that he was so too*; in this case if *A.* bring an Action for these words, he may shew in his Count that there was a speech betwixt him and the Defendant of *C.* and that the Plaintiff said to the Defendant, that *C. was a Traitor*; and that the Defendant said then to the Plaintiff, that he (*Innuendo the Plaintiff*) was so too, [*Innuendo, a Traitor*] in both these cases the *Innuendo* is good, because it doth its office in designing of the person, as also in declaring of the matter or sense of the words which was certain before, *Mich. 20. Jac. B.R.* But an *Innuendo* cannot make a person certain, which was uncertain before, nor alter the matter or sense of the words themselves, *Coo. 4. 17.* See more, *Brownl. 1 par. 7, 9, 10, 13. 2 par. 34, 272, 273.* It lieth not for saying, *He hath stolen 40 staure of Lead* (meaning Laad in staure) from the Minister; for it shall be intended parcel of the Minister, *Brownl. 2 par. 84.*

Innuendo.

Out of all which it appears, that in all Cases where this Action will lie for words, the words must have these qualities in them.

1. They must be particular.
2. They must express or imply an affirmation.
3. Sufficient certainty both in the persons and thing charged.
4. They must be plain.
5. The thing must be directly, and in plain terms, and not by inference or argument applied to the person charged.
6. The things charged must be such as (if true) were against some Law, and the party may be punished for them, or he must have some special prejudice by the words which he must aver.
7. The charge must be out of a course of Justice.
8. The words must be sensible and plain.
9. They must be spoken in the hearing of some body.
10. And in a Tongue that some of the hearers do or may understand.
11. The thing charged by the words must be false.
12. The words must be spoken maliciously, and purposely to slander.
13. The thing charged to be done, must be possible.

Scandalum Magnatum, is a wrong done to some eminent person of the Land, as *Duke, Earl, Baron, Chancellor, Treasurer, Privy-Seal, Justice of the one Bench*, or of the other, by false news, or false messages, whereby debates and discords between them, or any scandal to their persons may arise, *Stat. 2 R. 2. chap. 5. Westm. 1. chap. 34.*

Scandalum Magnatum, what it is.

In this case the party defamed may have his Action in the name of the *Keepers of the Liberties*, and his own, upon the Stat. of 2 R. 2. And hereby he shall recover damages for the wrong, and the party shall also be otherwise punished. And if the Slander be divulged in the nature of a Libel, it is punishable by Indictment; and great Fines are imposed for this offence, for that the reproach of such persons is the reproach of the State it self, and of the Commonwealth. *Coo. 5. 125. Old book of Entr. 593. Cromp. Jur. 35. 19. 13.*

It matters not in what manner the words or reports be published, whether by speech or writing reported from another, or spoken by ones self; or by hanging

Where and
for what
words or
deeds a man
may have this
Action of
Scandalum
Magnatum, or
not.
For the man-
ner.
For the mat-
ter.

up a writing in any open place: for publication may be by writing as well as by speech, *Crompt. Jur.* 13.

But if by any of these ways such persons had been slandered by these, or such like words as follow, they might have been relieved by this means. And this action did lie for these words: *You maintain sedition against the Kings proceedings*; or, *You uphold and countenance them that do so*, *Coo. 4. 13.* Or, *You are a Traitor to your Prince, or Rebel against him*, *Sur. Monteagles Case, M. 9 Jac. B. R.* Or *You are a base Lord, and a pauntry Lord, and keep none but Rogues and Rascals like your self*, *E. of Lincoln's Case, Trin. 5. Jac. B. R.* Or, *It is your grief that you are a Subject*, *Countee of Salop's Case, M. 40 & 41 Eliz. B. R.* Or, *You charged them that transport, or import Merchandizes so, or from such a place, that they should not pay Custom for it, nor suffer the Customs to search them*, *Old Book of Entries, 393.* Or, *You have no more conscience then a Dog; so you have goods, you care not how you come by them*, *Duke of Buckingham's Case, M. 4. H. 8. Rot. 659.* Or to a Chief Justice, *You are a corrupt Judge*, *Crompt. Jur. 35.* Or, *You said you would winde my guts about your neck*, *Lord Abergavinie's Case, Crompt. Jur. 3.* So also it is thought of these words, *You are used to do things against Law, so impound the Subjects beasts, and keep them in a Castle that they cannot be relieved*; or, *You have sent Commissioners to spoil the Country*. And generally any words which being spoken to an ordinary man will give him an Action, being spoken to such an eminent person, will give him this Action. But if a man do bring a Suit in a Legal way, or do Legally proceed by Indictment or otherwise for any misdemeanor; as if a man sue a Writ of *Forger of False Deeds* against a Peer of the Realm, or cause him to be indicted for a Crime, it is doubted whether for these acts this Action be given. *Dyer 285. Kntw. 27. Crompt. Jur. 35.* Yet for a Conspiracie to indict these persons, they have remedy as other men have.

It hath been adjudged that these Statutes do extend to Extrajudicial, and not to Judicial sayings or doings. And therefore a man may not be punished for an Appeal of Murder, Robbery, &c. brought against a Peer, nor for affirming it to Council, and the like, though the thing be false: For it is a Maxim in Law, That a man shall not be punished for suing of Writs in the Kings Court, be it for right or wrong. And therefore to have charged a man with any thing falsely in the *Star-chamber*, proper to the Court, while it stood, was not actionable: But to have charged one with a Felony there falsely, was actionable, *Coo. 2 par. Inst. 228.*

It will lie for words spoken thus, *I will justifie that Barns is a Thief*, *Trin. 9 Jac. B. R. Barns Case. Adjudg.*

It will lie for speaking words thus, *What, I. S. that Thief?* *Nelson's Case, Pasch. 15 Jac. B. R.* and *Hardwick's Case, 40 Eliz. Co. B.* So, *Have you brought my horse you have stolln?* *Main's Case Adjudg. Trin. 18 Jac. B. R.* Or, *The twenty pounds you stole from me?* So for these words, *Thou wast in the Tower for High-treason*, *Cur. 9 Jac. B. R.* But this Case others doubt.

It is said it lieth for this, *I did dream this night that you stole a horse*. But this seems to be a strange Case, and not so much as to report such a thing as is false. So it lieth for saying, *I think in my conscience A. is a Thief*, *Adjudg. Hob. Rep. 152.* For saying, *Did not you kill I. S.* It will lie for saying, *That I. S. told me that A. was a thief, when I. S. never told him so*, *M. 9 Jac. B. R. Adjudg.* But it doth not lie for saying, *A. reported that B. did steal a horse*, if it be true he did report it; but then it must be so alleged in pleading, *per Just. Tanfield Hil. 4 Jac. B. R.*

And it is said it will not lie for this, *Will you not leave your stealing!* It lieth for saying thus, *Hast thou been at London to change the money thou didst steal from me?* *Mich. 15 Car. B. R.* It lieth for calling one Thief in Welsh, or any other unknown language; but then it is said it must be averred in the Action, that one at least of the hearers did understand it; And it is said it hath been adjudged in the Exchequer-Chamber, that otherwise it will not lie. But I wish it may be well weighed; for they that hear the words, may carry them, and get the meaning from another that can interpret them; and so a man may be grievously slandered without remedy: And it is all one in reason, not to know the men, as not to know the tongue: But if one slander a meer stranger, that one of the hearers do not, perhaps never shall know, is not

Where and
what words
will bear an
Action or not,
for others; and
how.
For the man-
ner of speak-
ing.

Self. 4.

Adverment.

not this actionable? It is doubted of words spoken thus, *I am persuaded thou wouldst, if thou couldst, kill the King.* If *I.S.* and my self be speaking together of one *Fox*, and I say thus, *Go tell him he is a Thief, and I will justify it,* though *I.S.* never tell him so, *M.9. Jac. B. R. Foxes Case.*

I did tell *Mr. Carm*, *That I am neither Traitor to my Prince, nor Rebel to my Country, as I.S. is,* and these words are spoken to *Corel*; the words are actionable, though never spoken to *Carm*, nor to any but to *Corel* himself. *Curia, Mich. 9. Jac.*

The Declaration was, That the Defendant *dixit de prefato* the Plaintiff, *Thou, innuendo &c. hast stoln, &c.* and it was adjudged good: For, *dixit de prefato*, is all one with *dixit ad prefatum*, and these words may be spoken in his absence, *Stoner's Case, Pasch. 5 Jac. B. R.* and *Dickenson's Case* adjudged *M. 20. Book. b. Eadem ratione*, to say to ones face, *He is a Thief.*

Words in the second person, the party not present, Actionable.

If one exhibite Articles in writing to a Justice of Peace, and write thus, *I.H.* (who was the Informer) *doth charge K:* (who is the Plaintiff) *that he did commit Burglary in breaking of my house, and stealing of my goods:* an Action will lie for this, though he change the person, *adjudg. Pasche 9 Jac. Pet's Case, B. R.*

If a Minister in a Certificate to his Ordinary, where he was of duty to certifie some other matter, had inserted a slander, an Action will lie for this, *Reads Case, M. 7. Jac. B. R.*

To write a Letter in private sealed to the party slandered, unless he deliver it to his own hands, is (as it seems) actionable; so to speak it but in one mans hearing, and bid him keep counsel, *M. 9. Jac. B. R. Hob. Rep. pl. 63.*

It lieth for saying, *You are no Thief, Pasch. 15 Car.* but it must be intended ironically. It will not lie for saying, *that I have Articles against you for Felony, Adjudg. B. R.* Nor for this, *I have matter enough against I.S. about the death of I.S.* Nor, as it seems, for this, *I.S. hath found Felony in I.S. and can prove it.* See *Hob. Rep. pl. 3. 395. Quare* the last Case.

It will lie for saying, *I will prove that you have stolen my books or my horse, Pasche 15 Car. B. R.* So, *I can prove you a thief, and ten men will justify it, Pasche 5 Jac. B. R.* So, *It will be proved by many vehement presumptions, that I.S. was a plotter of the death of I.R. Pasche 7 Jac. B. R.* It is said it lieth for this, *I.S. is a Felon:* To which a Rander by said, *Take heed what you say:* To which he said, *Is not he a Felon that doth conceal Felons, or steal trees?* *Hil. 17 Jac. Newland's Case, or takes my goods upon Execution?* à Fortiori, if the last words be first, they are actionable.

And as it is in these cases where the charge is of Felony, so it will be where the charge is of a lesser offence, as to the manner of the speech.

It will not lie for saying, *One of you three, or one of the company* (where be more then one) *or one of you two* (where two be together) *is a Thief, Adjudg. Harris Case.* Or one of the servants of *I.S.* if *I.S.* have more then one servant, or one of my brothers, where I have more then one, *Coo. 4 17.* Or one that is near to *I.S.* or about *I.S.* or mine adversary, *hath done a Felony, or other Act:* For any of these words, no Action will lie.

For this is altogether incertain in the party charged to commit the offence, and an Averment will not help here, *Hob. Rep. 375. pl. 351.* And the Defendant in these cases may do well in avoidance of the Action, to set forth that there were more in the company. Uncertainty.

It will not lie for these words, *One I.S. stole the horse that was lost. M. 7 Jac. B. R. Reads Case.* So, *Stiles stole my horse,* omitting the Christian name: But this last may by an *Innuendo* be made good. And yet some circumstances may make such words certain and actionable, as *Mich. 3 Jac. B. R.* as if the precedent conference were about one man incertain, or the like.

Wiseman sued his brother for saying, *My brother [innuendo the Plaintiff] is perjured:* Upon *Not guilty*, it was found for the Plaintiff, and Judgment given. And this difference taken where the words are incertain, as in the Cases before. But where they are certain in themselves, so that it may appear that the speaker intended a person certain, they may be made certain, as before.

It hath been adjudged also to lie for these words, *Thou didst kill a Woman great with childe*, *Innuendo* J. uxorem cujusdam R. S. defunct. Here the offence, and person committing it, are certain, *Mich. 2 Jac. B. R.*

Foxcroft sued *Lacy*, and declared, That a talk was between *Walter* and *Gwin* about a suit wherein the Plaintiff and others were Defendants, and therein the Defendant *Lacy* spoke these words, *These Defendants* (*Innuendo* the Plaintiff, and the others) *are those that did help to murder* I. S. [meaning J. S. deceased] who was murdered by one T. G. who was hanged for it: This was adjudged to be Actionable, for words may be certain by reference, *Id certum quod certum reddi potest*, *Hob. Rep. pl. 119.*

If one say to a Woman, *Your Husband is a thief*; or to a man, *Your Wife is a thief*, this is certain enough, and Actionable: But if he say your Brother, or your son, *Contra*, unless the Plaintiff aver he hath but one brother, or one son, which is himself, *Trin. 14. Jac. B. R. per Dodridge.*

Self. 5.

So likewise it will not lie, when there is an uncertainty in the thing charged; as in these cases for saying, *Thou art a false thief, rogue, or some such like thing*, *Brook Action of the Case, 112.* To declare for calling one Thief, or *Verba similia*, is not good; but to declare for calling one Thief, and to say further, *Ac eadem verba sapinus reperivit*, it seems good, *H. 41. Eliz. C. B. Goldsb. 55. pl. 11.*

Averment.

It is said it was adjudged not to lie for these words, *Thou wast whipt about Taurion, or burnt in the hand or shoulder, for stealing sheep*, *Hills Case, Mich. 8 Car. B. R.* So it will not lie for saying, *Thou art a healer of Felons, or didst strain my Mare*, without Averment that the words have such a meaning in the Country, *Cook 4. 25.*

It is said it lieth not for saying, *Thou hast cozened all my kindred*, *18 Eliz. B. R.* It lieth not for saying, *Who ever is the falsest thief in the County of Salop, what ever he hath stoln*, J. S. is falsest then he. But these words are Actionable with Averment, that there are Felons within that County, *Hasselwoods Case, Pasche 1 Jac. B. R. Rol. 107.*

It lieth for saying, *Thou stolest a piece from me*, *Appletons Case* adjudged.

No Action will lie for a slander by Indictment, though false, *27 Ass. pl. 12.* nor for a false Affidavit in the Chancery, by which one is imprisoned, *Trin. 41 Eliz. B. R. Heires Case*; nor against J. S. for taking a false Oath, by which bad Bail is taken instead of good Bail, *Trin. 41 Eliz. B. R.* Nor for preferring Articles in the Sessions, though false, *Cook 4. 15.* Nor for Articles exhibited before a Master of the Chancery, for to have the good behavior for prosecuting a legal course in the Country, though it be false and unjust, yet this Action will not lie. But the Party is to be punished in the same Court for the misdemeanor, *Trin. 9 Jac. B. R. Hunters Case.* But if things be inserted, those Judges have not the Consuance of *contra*, *Cook 4. 14.* And if one Indict another, or charge him legally for a Felony where none is, nor any reason to charge him, here an Action will lie, *Trin. 14 Jac. B. R. Dennis Case.* But all these Actions must be *malitiose indictavit*. For a slanderous complaint put into a Member of the Parliaments hands it seems is not Actionable, *Trin. 21 Jac.* It lieth against the Husband and Wife, for the Wives saying, *Thou hast stoln me two Cocks*, [*Innuendo, &c.*] These words are Actionable, and shall be taken for two Cocks, and the *Innuendo*, and *me*, void, *M. 9 Jac. B. R.*

For the matter of the words which hazard a mans life.

This Action lieth for calling a man *Traitor, Buggerer, Sodomite, Robber, Murderer, Felon, Thief, Sacriledger, House Robber*, *30 Ass. 19. 27. H. 7. 14. 21. Cook 10. 130. 4. 15. 16. &c. 27 H. 8. 14. 22. Dyer 26. 19. 236. Newlands Case. Ghurch-Robber. Trin. 7 Jac. B. R. Beringtons Case.* And so for saying, *A man hath committed Treason, Buggery, Sodomy, Burglary, Robbery, Murder, Sacriledge, or Felony. Pets Case.*

It lieth not in our Law (as it seems) for calling a man *Heretick*, unless he have some special loss by it. *27 H. 8. 14. Sed Quere. Hob. Rep. in pl. 276. f. 397.*

It did lie for saying, *There is no King in England*, *Trin. 37 Eliz. Mayes Case* adjudged. *B. R.*

It lieth for saying, *Thou hast spoken words that are high Treason. Atwards Case.*
Or,

Or, *Thou wouldst kill the King and all his Subjects, if thou couldst.* This was adjudged. *Sydenhams Case*, *Hob. Rep. pl. 152.*

It is said it doth lie for this, *Thou art no true Subject, Sir William Walgraves Case*, *M. 32, 33 Eliz. Cook, B. R.* Or, *I am a true Subject, but thou servest one who is none at all. Sed Quere* at this; for it is said that it lieth not for saying, *Thou art no true Subject to the King. Smiths Case. 5 Jac. B. R.*

It doth lie for saying, *Thou art an enemy to the State. Chambers Case. 38 Eliz. B. R.*

It lieth for saying, *Thou wast partaker with the Rebels in the North, in their Rebellion.* But not for saying, *Thou wast partaker with the Rebels in the North, and no more.*

It lieth not for saying, *Thou hast coynd Gold, and art a Coyner of Gold.* Nor for saying, *He did make Half-crown peeces, and did carry a Cloak-bag full of clippings.* For these words are altogether uncertain, *Hughs, Rep. 391. 375.*

It lieth for saying, *Thou hast killed J. S. or murdered J. S. or poisoned J. S.* If he be revera dead, when the words are spoken. *New Book of Entries, f. 25.* Yet see *Brownl. 2. part. 219.*

And here some say, That the Plaintiff that doth sue, must aver in his Declaration that he is dead. But it is said to be adjudged to lie for saying, *Thou hast poisoned J. S. albeit he be not dead.* But this is clear, That if it appear by any part of the Record, that the Party supposed to be killed, is alive, as if the words be, *Thou hast killed my Wife*, the Action will not lie; and if the Plaintiff do not shew him to be dead (as it seems by the better Opinion he need not) then it concerns the Defendant to shew it in avoidance of the Action, *Cook 4. 16. 14. New Book of Entries, f. 24.*

It lieth for saying, *She hath sacrificed a childe, to the intent to kill my Mother. Lock versus Lock.* But it will not lie for this, *He smells of the murder lately done. Dyer 317.* Yet to say, *He is infected with the murder lately done*, may be Actionable.

It lieth for saying, *Thou hast poisoned J. S.* If he be dead, adjudged, *Bumfords Case, Pasche 7 Jac. Cook B. R.* But against this Judgment, *Miles Case*; and the reason thereof in *Hob. Rep. pl. 11.* is objected, That he doth not say he did it *ex scientia* wittingly: Hereupon, *March, f. 36.* concludes it will not lie. This Reason will shake other Cases out of question, as, *Thou art a murderer*, or, *hast murdered J. S.* or, *hast killed J. S.* For it may be with giving Physick, or otherwise, against his will, or in doing Justice, &c. For there is a Homicide lawful and justifiable. But this is the common acceptance of the word, That he killed him voluntarily, and unlawfully, and therefore I think without question Actionable. See more, *Brownl. 2. part. 299.*

It will not lie for saying, *Thou hast killed J. S. Brownl. 2. part. 118.*

It lieth for saying, *He took my Wife by the hand and said, Thou and I will be married shortly; after that he dispatched his Wife out of the way.*

It lieth for this, *I will call him in question for killing my Aunt, and I doubt not but I shall prove it.* Adjudged. *39 Eliz. Webs Case.* A. told me, *She poisoned her first Husband*, adjudged to lie for this. *Megi Case.*

This Action will lie for calling one *Witch*, and so it hath been often adjudged, as in *Lewis Case. M. 13 Jac.* And *Rogers Case. Trin. 39 Eliz.* and *Hil. 4 Jac. B. R.* And yet some Judgments have been given on the other side, and it hath been doubted. *Hob. Rep. pl. 155.* because there is a good and a bad *Witch*. But I think it is at this day unquestionable, and that Reason of little weight; for the word imports a foul charge; both of them use unlawful means, and have too much familiarity with the Devil. So it will lie for this, *The Devil appears to thee every night in the likeness of a man, and thou conferrest with him, and he giveth thee what thou askest; and therefore thou hast so much money.* Adjudged, *Hob. Rep. pl. 137. 155.* So for this, *Thou hast bewitched J. S. to death.* So it will lie also (as it seems) for calling one *Conjurer*; for the *Witch* and *Conjurer* both deal with the Devil; the *Witch* by agreement, the *Conjurer* by Prayers, and such like powerful means.

It lieth for saying, *Thou art a Witch and Inchanter, and hast bewitched Strongs children.* But not for this, *Thou hast bewitched children, that they are wasted and destroyed. Brownl. 1. part. 7.*

Sett. 6.

So it will lie for saying, *Thou dost confer with an Evil spirit*. But it will not lie for calling one *Inchanter* or *Sorcerer*; for the former have personal conference with the Devil, but these meddle with medicines, and ceremonial forms of words called *charms* without apparitions. It hath been said also, that this Action will lie for calling one *Hag*: but this is doubted by others, unless he can aver that in the language of the place it doth signifie *Witch*.

This Action will not lie for these words, *Thou seekest my life*, *Coo.4.16*. Nor for these, *Thou didst write a Letter to one, [or hire one] or give one counsel to kill me*, *Coo.4.16*. or *wouldest have killed [or robbed] me*, *Trin.4. Jac. B. R. Tanfields Case*. Or, *Thou wentest about to poison a child*, *Eatons Case*. And yet it is said to be resolved in the Exchequer-Chamber in one *Passys Case*, That it will lie for these last words, *March. fol. 12*. And then for all such like words as in the Cases before, which do carry in their sound a foul slander, and of something done. And it is agreed on all sides, that it will lie for these words, *Thou didst lie in wait to rob [or to murder] me*, *Pasch. 5. Jac. B. R.* So for this, *Thou didst procure one to lie in wait to murder me*; Adjudged.

And that in all Cases where the words import an intent, joyned with any overt act or attempt, that these words are actionable; for then the thing is punishable by the Good Behavior or Indictment. And I find it adjudged to lie for these words, *Thou hiredst a Rogue to come with thee to my house to murder me*, *Sutton's Case, Trin. 33 Eliz. B. R.* And it was said to be adjudged for this, *Thou hast sent one to kill me*. And yet it will not lie for this, *Thou hast procured a perjured Knave to seek my blood*, *32 Eliz. Sir Edw. Hastings Case*.

It is said to be adjudged to lie for this, *He sought my innocent blood*, *Sir Edward Hartberies Case, B. R.* But this is doubted; for it lieth not for saying, *Thou seekest my life*, *Hexis Case, Coo.4.* Nor for this, *Thou hast procured one to seek my blood*, *32 Eliz. B. R. Sir Edw. Hastings Case*.

It will not lie for these words, *Thou wast the cause of the death of I. S.* Adjudg. *B. R. Prows Case*. Nor for this, *Thou art a blood-sucker, and seekest my blood*, *Helliards Case, M. 37. 38 Eliz. B. R.* But it lieth for this, *He is a manslayer, and hath lain in wait to kill*, *28 Eliz. B. R. adjudg.*

It is said it lieth not for this, *He is a Felon, for he knoweth of a murder and conceal-eth it*. Nor for this (as is said) *I. S. gave W. S. money to shift him away as soon as he had killed R. T.* *Parrants Case, B. R.* But I must beg leave to suspect both these Cases, for the words are very scandalous; and I have seen the Report of a Case where it is said to be adjudged to lie for these words, *Thou art a concealer of Felons, and hast shewed such favor to a horse-stealer, that he and the horse is conveyed away, and I can hang thee if I will.* *Bondman vers. Tooker, Pasch. 7 Jac. B. R.* And I have seen a Report, that it lieth for these words, *Thou art a concealer of Felonies*, *Pendants Case*. If I had consented to C. I. S. had been dispatched out of the way: Adjudged to lie for this, as is said, *Cardinals Case*.

It is said it lieth for these words, *Thou wast arraigned at Warwick-Affizes for stealing a horse, and didst make good friends, or else thou hadst been hanged*, *M 8 Car. B. R.* And for this, *He was in the Gaol at Norwich for robbing one on the High-way*, *Sprat and Hains Case*.

And yet in *Hob. Rep. pl. 196.* it was agreed not to lie for these words, *Thou wast in Warwick-Gaol for stealing a horse*. Nor will an Action lie for these words, *Thou hast been indicted for Felony, or thou wast impeached for Felony; or, thou wast arrested, imprisoned, [or in Gaol] and arraigned for stealing a horse*: For this may befall an honest innocent man, and these Cases do differ a little from the first Case, *Hob. Rep. pl. 209, 289*. Nay, it is said that it hath been resolved by two Judges, it will not lie for these words, *Thou hast been in Gaol for coyning, and hast been burned in the hand for it*, *Trin. Jac. B. R.* But I cannot receive it without doubting of it. See *Brownl. 1 par. 16.*

It will lie for saying, *Thou didst burn a barn full of corn*, *Coo.4.14.* But it will not lie for saying, *Thou didst burn a barn*: Nor may one say, *Innuendo a barn full of corn*. *Idem new Book of Entries, f. 25.* Adjudg.

Innuendo.

It

It will not lie for saying, *Thou art a breaker of houses*, *M.9. Jac. Slaughters Case.*

It will lie for saying, *Thou art infected of Robbery lately done*, *Dyer 317.* and, *thou dost smell of it.* Or for saying, *I was robbed and you were privy thereto, and had part of the money*, *Goldsb. 137. pl. 42.* So it will lie for saying, *You were in prison in a gaol for stealing of Mr. Piggotts beasts*, *Goldsb. 130. pl. 26.*

It will lie for saying, *Thou hast stolen my two Cocks (or Hens) or Horse, or any other goods*, *Trin. 5. Jac. B. R. Benfers Case* adjudg. So it lieth for this, *Thou didst steal my horse and wast in gaol for it*, *Hob. Rep. pl. 196.* So it lieth for saying, *Thou art a Steal-gown, and the first gown that thou didst wear thou didst steal*, *Adjudg. New book of Entries, f. 23.*

It lieth for saying, *Thou hast robbed the Church of S. and taken away the lead thereof*, *Pasch. 5. Jac. B. R.* But not for saying, *Thou hast robbed the Church*, without more.

It lieth for saying, *He should have been hanged for a Rape, and it cost him dear*, *M. 39. 40. Eliz. B. R. Redferns Case.*

It hath been thought by some, that it lieth for these words, *Thou didst like of those who do maintain sedition against the King*, *Coo. 4. 12. Sed quare.*

It lieth for saying, *He hath stolen a horse, and it will be proved by twenty witnesses*, *Adjudg. Hares Case.* But it will not lie for these words, *He hath stolen a Mare*; or, *I. S. is forsworn*, *Adjudg. Pasch. 17 Jac. B. R. Barhams Case.* For this is an incertain charge.

It will not lie for these words, *It is in my power to hang thee*, *17 Jac. B. R. Pridhams Case.* Nor for these words, *Thou hast deserved hanging*, *Mich. 4 Jac. B. R. and Pasche 38 Eliz. Hollands Case.* Nor for these words, *If thou hadst had thy right, thou hadst been hanged for breaking of the house of I. S.* *Brownl. 1 part, 3. See Brownl. 2 part, 280.*

It seems it lieth for this, *I stole a Mare, and you knowing the same, conveyed her to D. to the house of I. S.* *Goldsb. 132. pl. 28.*

It will not lie for these words, *Hugh Hall hath received the three parcels of cloth from the thief again that he did steal from him, when there was a felony done*. *Goldsb. 119. pl. 1.*

This Action will lie for these words, *There is not a purse cut within twenty miles, but I. S. knows of it, and hath a share in it*, *Balls Case.* And yet the contrary is said to be adjudged.

It lies for these words, *I was rob'd, and thou wast privy to it, and hadst part of the money*, *Adj. 38 El. Redfords Case.* And it is said to be resolved to lie for these words, *A. hath half my goods, and shall be hanged for it*, *8 Jac. B. R. Long and Kings Case.* But this I cannot receive for Law: For it is said to be adjudged that it will not lie for these words, *I. had forty pounds worth of Plate, and A. hath it, and will be hanged for it*, *Trin. 12. Jac. Kings Case.* Nor will it lie for these words, *J. S. was robbed of twenty pounds, and A. had it, and will be hanged for it*, *By two Judges, Pasch. 9. Jac. Foord vers. King.* Nor will it lie for these words, *I. was robbed, and A. received part of the goods stolen, and I. could hang him for it*, *Newlins Case, P. 7. Jac.* And yet all these words import a more certain and foul slander then the first words do, *I heard it spoken that I. S. was one of them that was at Purnels Robbery, and that four of them went to his house the next morning*, *Adjudged to lie, 40. 41. Eliz. R. B. Reads Case:* yet some doubt of this.

It is said to be agreed, that an Action will lie for these words, *A. did set on me, and took my purse from me, (not saying) in the high-way.* And for this, *Thou didst set on me in the high-way, and tookst my purse from me*, *Adjudg. Stoners Case, M. 10. Jac. B. R.* And for this, *Thou didst meet me on the high-way and askedst my purse, and I gave thee five shillings for fear*, *Bonds Case.* And yet it is said to be resolved not to lie for these words, *Thou tookest away my purse in the high-way, and I will swear it.* *Quere,* for I see little or no difference between this and the last Case; the words carry as bad a report as the former words do. But it seems to be agreed that no Action will lie for these words, *Thou didst take away my money*; nor for these words, *Thou didst*

didst beat me, and take away my money: Nor for this, *Thou didst take away my money with a strong hand*, March. f. 59. pl. 91. Or, *thou didst take away my purse and twenty shillings in it*, Hob. Rep. pl. 168. Adjudged, Mich. 36. 37 Eliz. Cook B. R. Lynes Case. It will lie for saying, *He hath robbed J. S.* notwithstanding J. S. were never robbed, per Cur. M. 9 Jac. B. R.

It is said to be adjudged not to lie for these words, *I have an action against J. S. who hath stoln by the High-way side*, Denizens Case. 36, 37 Eliz. B. R. This seems to me somewhat a hard Case; and yet Hob. Rep. pl. 382. hath a Case somewhat like, *I have matter enough against him*, for J. S. hath found forgery against him, and can prove it: The Reason seems to be taken from the manner, not the matter of the Speech.

It hath been judged to lie, for these words, *There is many an honest man hanged. And there was a robbery committed, whereof I think him to be one; and I verily think him to be a horse-stealer*, Goldsb. 130. pl. 1: 7.

It lieth for saying, *Thou hast stoln my goods, and I will have thy Neck*, Brownl. 2. part. 230.

It is said also, it will not lie for saying, *Thou art a cut-purse*, Trin. 17 Jac. B. R. For he may be a Glover: So that it will not lie for these words, *Thou art a cunning cut-purse knave*; and this is said to be adjudged, Trevillians Case, B. R. These Cases seem hard to me; for the common and necessary intendment of the words, is in the worst sense; and to call a man Cut-purse (me thinks) is actionable. And it is said to lie for this, *Thou didst pick five shillings out of my Pocket*, adjudged, Drumers Case. So it will not lie for saying, *Thou art a Coyner of money*, or, *hast coyned money*, Trin. 17 Jac. B. R. For it may be his Trade: Nor for these words, *Thou gettest money every day by coyning Gold*, M. 19 Jac. B. R. Burnels Case.

It will not lie for saying, *Thou art a priggish pilfering-fellow, and hast pilfered away my Goods from my Wife and children*, adjudged Carters Case. M. 37. 38 Eliz. B. R. Nor for this, *Thou art a filching fellow, and hast filched away Ten pounds from me*, adjudged, Hob. Rep. pl. 323. Nor will it lie for saying, *Thou art a healer of Felons*, or, *Thou hast strained my Mare*; without a special Averment, that it hath such a meaning in the place, that it doth import a scandal. Brownl. 1. part. 13.

Averment.

Averment.

It will lie for these words, *Whoever is a false thief in Gloucestershire, J. S. is falser then he*. But in this Case, there must be an Averment, that there is a false thief there, Hazelwoods Case. M. 2 Jac. B. R. But it lieth not for these words, *I can finde in the Parish a falser knave then B. who was indicted for Felony*; and this knave is J. S. in Hazelwoods Case.

It will not lie for saying *Thou art a seditious knave*, or, *a thievish knave*, or, *a trayterous knave*, Cook 4. 19. And yet it hath been said, it was agreed to lie for calling one Trayterous knave Hil. 32 Q. Ward and Thorns Case. But it will not lie for saying, *Thou art a rebellious knave*; for this may be upon a Writ of Rebellion in the Chancery.

This Action will not lie for saying, *Thou maintainest a rebellious knave*, or [rebellious persons.] Nor for this, *Thou art a maintainer of thieves abroad and at home, and dost maintain J. S. in such a Castle*. And yet it is said, it doth lie for these words, *Thou art a maintainer of thieves in thy house*. And clearly to say, *Thou maintainest thieves in thy house, to rob thy Neighbors*.

It lieth for saying, *Thou dost harbor and maintain Rebels and Traitors*, Goldsb. 48. pl. 7. But not for saying, *Thou didst steal by the High-way side*, Brownl. 1. part. 143. And yet it will not lie for saying, *Thou keepest none but thieves*, [or, cut-purses] in thy house, and hast their goods, M. 17 Jac. B. R. Nor will it lie for this, *Thou art a favorer of thieves*, Dyer 75. Nor for this, *Thou keepest men which rob on the High-way* [or which, rob me,] for all this may be unawares. Nor as it seems for this, *Thou keepest men with intent to rob me*. But it will lie for these words, *Thou harborest, and maintainest traytors, conveyest them out of the Realm, and maintainest them with money there*. Pasche, 29 Eliz. Goldsb. 48. pl. 7. Accord. So it seems it will lie for this, *Thou hast been a setter of thieves to rob me*, or, *hast hired one to rob me*: If I be robbed, this is Actionable, Hil. 13 Jac. B. R. So to say, *Thou hast received thieves,*
knowing

knowing them to be so. *Matthews Case*. But to say, *Thou art a receiver of thieves*, contra.

This Action will lie for these words, *Thou hast houlstred* [or, received] goods that were stoln, knowing them to be stoln; but unless it be added, *ex scientia*, it seems they are not Actionable, *M. 17 Car. B. R. Haws Case*, adjudged. But if the manner of receipt spoken of, were such as is not Felony; the Defendant must shew how it was for the clearing of himself, *March, f. 16*. And yet if one say, *J. S. hath stoln a horse, and his son is consenting to it*; it seems the son cannot have this Action for these words, *Trin. 14 Jac. Lewkners Case*.

It hath been said, it will not lie for saying, *Thou hast stoln away my Corn*; because it doth not appear, whether the Corn were severed, *Trin. 37 Eliz.* And yet divers Judgments are recorded to be to the contrary, as this, *Hil. 14. B. R.* for saying, *Thou didst steal my Corn, and carry it into the Market*, *Glovers Case. Pasche, 7 Jac. B. R. and Pasche, 40 Eliz. Cook. B. R.* *Thou art a false knave, and didst steal my Corn*, *Harris Case. Thou art a Corn-stealer, 39 Eliz. Cook, B. R.* For saying, *Thou art a thief, and hast stoln my Corn*. Adjudged, *Kelham and Mandes Case, B. R. 2 Jac.* Also it is said to be adjudged to lie for this, *He hath stoln my Wood, 5 Jac. B. R. Litchfields Case. March. Rep. 211. pl. 248.*

It lieth for this, *Male did steal my Corn out of my Barn, Hil. 14 Jac. Cook, B. R.* adjudged. So for saying, *Thou art a thief, and hast stoln the Town-beam*; meaning the Town of *Wickham*. But not for saying, *Thou art a thief, and hast stoln a Tree*, or, *hast stoln my Maiden-head*, *Brownl. 2. part. 3. Trin. 18 Car. B. R.* And for this, *He hath feloniously taken my Wood*, *Pasche, 38 Eliz. Cook, B. R.* For this must be understood of Wood cut: But if he say, *He hath stoln my Tree*, or, *my Trees*, contra; *Arbor dum crescit, lignum dum crescere nescit, Trin. 4 Jac. B. R. Rot. 1366. Accord. March. 211. pl. 280. Accord. Brownl. 2. part. 280.* But it seems all these Judgments are not approved by the Court of Common Pleas: For there it hath been oft agreed, this this Action will not lie, for saying, *Thou art a thief, for* [or, and] *thou hast stoln my Trees*, or, *Apples out of my ground*, or, *Corn out of my field*, or, *an Acre of my Corn*, or, *twenty load of my Furzes*, *Hob. Rep. pl. 106. pl. 97. 98, 473. 406.* Nor for this, *Thou hast robbed my Hop-ground*, or, *stoln my Apples out of my Orchard*, [or] and it will be proved by stealing of my Apples in my Orchard, *Co. 4. 19.* So it will not lie for these words, *Thou art a thief, for thou tookest away my Cattle upon an Execution, and I will hang thee*, *Mich. 7 Jac. Wilks Case*. And yet some do put a difference between [and] and [for,] and say, *That for this thou art a thief, and hast stoln my Trees or Apples, &c.* it shall lie. But all agree, that it lieth not for these words, *Thou art a thief, for thou hast stoln, &c.* It was said to be adjudged, that it will not lie for this, *Thou hast robbed me, and taken away my evidence*. It will lie for this, *Thou hast stoln my Cock*, *Brownl. 1. part. 1.* And yet this is but *Petit Larceny*. It will not lie for saying, *Thou art drunk, and I never held up my hand at the Bar as thou hast done*. Nor to say, *Thou wast arraigned for Felony, or, didst hold up thy hand for Felony*, *Bro. 2. p. 273.*

It is said to be adjudged to lie for these words, *A. is an arrant thief, and he hath stoln my Apple Trees*, *M. 7 Jac. B. R. Eyres Case*. But it was moved in Arrest of this Judgment, and in *Mymors Case, M. 4 Jac. B. R.* This difference was agreed there, and it was said, It had been often adjudged there accordingly; and it seems that Court is of this opinion still. But the Judges of the Court of Common Pleas are utterly against it, and will by no means admit of this difference: And therefore they judge the Action to lie alike in both Cases, *Hob. Rep. pl. 406. 98. 17. 20.* But all agree it will lie without question, for saying, *Thou hast stoln my Apples out of my Loft*, or, *thou hast stoln the Corn out of my Barn*, or, *thou hast stoln my Wood*, [or, *Furzes*] *out of my Barton*, *Hob. pl. 258. Hil. 37 Eliz. B. R. Castle mains Case*.

It lieth not for this, *Thou art a thief, for thou hast cut off the ear-mark of my sheep, and set on thine own*, *29 Eliz. B. R.*

It lieth for saying, *Bear witness, I arrest you for Felony*, *Per curiam, M. 17 Jac. B. R. Serles Case*. So for saying, *If I could finde J. S. I doubt not but within two days to arrest H. of suspicion of Felony*, *Adjdg. Herles Case. Co. 4. 15.* And it is said it hath been ruled to lie for these words, *I charge you with Felony, and I charge the Com-*

stable to take you, *M. 5. Jac. B. R.* Also it hath been said to be adjudged to lie for these words, *Bring me to the Constables house, for I am robbed, and I will bring him to the house of I. S. to arrest him, for he setteth them to rob me from time to time, Adjudg. B. B.* And yet in other places we find it affirmed and ruled, that it will not lie for saying, *I charge you for Felony for taking money out of the pocket of I. S. Nor for these words, I arrest you for Felony; or, I charge you with Felony, Hob. Rep. pl. 381, 394, 286, 38.* and elsewhere. See *Brownl. 1 part, 18.*

And to reconcile these, I take the difference to be this. If I do arrest a man for a suspicion, and in the arrest use these words when there is cause, this is in the due way of Justice, and not actionable. But if I use these words without any just cause, or where I do not proceed in a course of Justice, but before or after the arrest, or otherwise speak any of the said words, they are actionable, *Hob. Rep. pl. 258.*

Which concern a man in his Office or place of trust.

It is said that this Action will lie for any Officer, against him that shall say, *He hath no skill in his Office.* But for a manual Tradesman, it will not lie for these words, *He hath no skill in his Trade. Sed quare of this last, Hil. 16. Jac. B. R.* It will lie for saying to any Officer, *You are an Extortioner;* or, *you have extorted twenty shillings above your due Fees, Co. 10. 61.*

Judge, Justice.

It will lie for saying to a Judge or Justice of Peace, *You are a corrupt man (or Judge) or Justice of Peace;* or, *You deal corruptly, or you take bribes, or you do not minister true justice, or you are a false Judge or a false Justice of Peace, Co. 4. 16. Bro. 112.* But it will not lie for these words, *If any man will give him bribes, Sheep or Capons, he will take them. Adjudg. Pasch. 35 Eliz. B. R. Sir Chr. Helliards Case.*

It will lie for saying to a Judge or Justice of Peace, *You are an Ambodexter, or you take money on both sides, M. 2. Jac. B. R. Dawtreys Case.* Or, *You cover (or hide) Felonies, Dyer 72. and Struckleys Case, P. 7. Jac. B. R.* Or, *You are a common Barrister, or you are a common Champertor, or you are a common maintainer of Suits, Hob. pl. 188, 145.* So for saying, *You took money of a Felon brought before you, to let him escape, Pasch. 37. Eliz. B. R. Rot. 147.* Adjudg. *Cottons Case;* and *Trin. 36. Eliz. Staffords Case, B. R.* See *Brownl. 1 part, 11.*

It lieth for saying, *I was like to be killed at his house; he enticed me into his stable to see his horses, and there he instigated I. S. to beat me, M. 2. Jac. B. R.*

It doth lie for saying of a Justice of Peace, *He hath done me wrong in returning the Recognisance for I. S. in twenty pounds, whereas it was taken but for ten pounds, Pasch. 4 Jac. B. R.*

Some think it will lie for these words, *He can hear but with one ear, Cholmleys Case.* And for these words, *He doth maintain the worst people against Gods Law. 35 Eliz. Butlers Case, adjudged.*

It will not lie for saying to a Justice of Peace, or Judge, speaking of the Tenants of his Manors, and his taking of Fines; *When your Tenant took his Land, you cozened him of his Fine, and dealt corruptly, and I will make you appear where you dare not show your face for your base dealing, Trin. 4. Jac.* And if the discourse be about health, and one say, *He is a corrupt man, M. 7. Jac. Co. B.* So if the talk be about his Estate, and one says, *He is a Bankrupt.* Or, if the discourse be about his Usury, or his fraud in an Executorship, and thereupon one saith, *He is a corrupt man, or a false man, or the like.* And therefore in such like Cases, if the Plaintiff set forth part of the words only, it will concern the Defendant to set forth the whole matter in avoidance of the Suit, *Co. 4. 14.* And yet if the words be spoken indefinitely, without any such reference as in the Cases before, they will be actionable. *Sermo relatus ad personam, intelligi debet de conditione persona. Hob. Rep. pl. 351.*

Sec. 9.

It will not lie for saying to a Justice of a Peace, *You are an Usurer, or you have not dealt honestly about a Will, Co. 4. 16. New Book of Entries, fol. 22.* Nor for saying, *He hath gotten all he hath by swearing and forswearing. Adjudg. N. B. of Entries, f. 21.*

Preacher.

This Action will lie for speaking these words to a Preacher, *You have made a seditious Sermon, and moved the people to sedition. Co. 4. 19. and Philips Case, Pasch. 24. Eliz. B. R.* But it will not lie for saying to him, *Thou art an Adulterer, or, thou hast had two children by J. S. and I will cause thee to be deprived for it, adjudged, Parreys Case, M. 38, 39 Eliz.*

It will lie for saying to a Sheriff, or any such like Officer, *Thou art an Extortioner*, Sheriff. or, *Thou hast by colour of thy Office, extorted twenty shillings above thy due Fees*, Co. 10. 61. And *Stanleys Case*, Pasche, 14 Jac. Co. B.R. And *Jones Case*, 38, 39 Eliz.

It lieth for saying to a Serjeant or Barrester, *You are a dishonest man in your profession*, or, *you have undone many men*, adjudged. Trin. 37 Eliz. Or, *You did disclose my counsel to my adversary*, or, *you are a cozening knave, and shewed a counterfeit [or forged] Deed, knowing it to be so*, M. 39, 40 Eliz. M. 20 Jac. Curia. But it will not lie for saying, *You shewed a counterfeit [or forged] Deed, without more*. It will lie for saying, *He giveth bad counsel*, or, *he is no Lawyer*, or, *he is an ignorant man in the Law*, or, *he hath no skill in the Law*, M. 8 Car. B. R. in *Cawdreys Case*. Also it lieth for this, *He is the simplest Lawyer towards the Law*, adjudged, 39, 40 Eliz. B. R. Or, *He hath no more Law than an Ape*: But to say, *He hath as much Law as an Ape*, is not actionable; and yet see the Case after, contrarily adjudged, Goldsb. 126 pl. 17. And yet it will not lie for these words, *He is no Schollar*, or, *Thou wast never any Schollar* (or to speak to a Schollar.) *He hath no learning*, or, *he is an ignorant man*; in general, without reference to his office. Nor will it lie for saying, *Thou art a drunken fellow*, or, *thou art an Ass*, in *Cawdreys Case*. It will lie for saying to him these words, *Thou a Barrester! a Barrester! thou wast put from the Bar*, adjudged, Pasche 8 Jac. Cook B. R. *Besslies Case*. So it will lie for these words, *Thou a Counsellor! thou art a concealer of the Law*, adjudged, Trin. 2 Jac. B. R. *Coxes Case*. It will lie for saying to a Barrester, *You are a bribing knave*, or, *you are a corrupt man*, or, *you are a common Barrater*, or, *you are a common Champertor*, or, *you are a common maintainer of suits*, Hob. Rep. pl. 188. 145. pl. 17. Cook 4. 16. It lieth for saying, *He hath the falling sickness*, by Tanfield Justice, Hil. 4 Jac. B. R. So it will lie for these words, *He was of my Counsel, and revealed the secrets of my cause*, Snags Case, Trin. 13 Eliz. B. R. *New Book of Entries*, f. 22. And yet it seems it will not lie for this, *Go to him, he will deceive you*, adjudged, March. Rep. 146. pl. 217. *Brownl. Rep.* 1. part. 11. To say to a Lawyer, *Thou art a paltry Lawyer, and hast as much Law as a Jackanapes*, Goldsb. 126 pl. 17.

It will not lie for these words to a Lawyer, *Thou hast nothing but what thou hast gotten by swearing and forswearing*. *New Book of Entries*, f. 22. Nor for saying, *Thou art a Bankrupt*, March. Rep. f. 8.

It will lie for saying of an Attorney, *He is an extortioner*, Hil. 40 Eliz. Cook B. R. *Stanleys Case*; or, *he is a bribing knave*, Cook 4. 16. Hob. Rep. pl. 17. adjudged; or, *he is a corrupt man, and doth deal corruptly*, Cook 4. 15: or, *his credit is falsn, he dealeth on both sides*, M. 43, 43 Eliz. Cook B. R. *Kings Case*; or, *he is an ambodexter*, or, *he taketh money on both sides [or on both hands] in suits*, M. 2 Jac. *Dantreys Case*, B. R. But it will not lie for saying of him, *He is a common maintainer of suits*, Hob. Rep. pl. 45. It lieth for saying of him, *He is a false practiser*, per 3. Justices, Pasche, 17 Jac. *Moors Case*; or, *he is a cozening knave*; or, *he is a knave*, adjudged. *Tardlies Case*, 18 Eliz. B. R. And yet, *Forging knave*, hath been doubted, Pasche 17 Jac. B. R. *Moors Case*; I know not upon what reason. It hath been adjudged to lie, in *Smails Case*, *Brownl. 1. part.* 16. And it is said it will not lie for these words, *Thou art a false cozening knave, and hast cozened my two kinsmen of their Land, and deservest the Pillory*, 26 Eliz. B. R. Nor for saying, *He cozened J. S. out of his Land*, adjudged. It lieth for saying, *You are a dishonest man in your profession*. It lieth for saying, *Thou art a common Barrater*, Hob. Rep. pl. 188. Or, *thou art a common Champertor*, Hob. Rep. pl. 183. 145. 351. Or, *thou art a Champertor*, *Boxea Case*. M. 14 Jac. Cook B. R. Or, *thou art the simplest [or foolishhest] Attorney, towards the Law*, M. 39. 40 Eliz. Cook B. R. *Martins Case*, adjudged; or, *thou hast no skill in thy Office*. But it will not lie for saying, *Thou hast no skill in Husbandry*, or the like, this is not actionable. It will lie for these words, *Thou didst disclose thy Clients counsel to his adversary*, Trin. 17 Car. Cook B. R. *Sandersons Case*; or, *thou art a suborning knave*; or, *thou art an extorting knave, and didst suborn one to be forsworn before the Lord Chief Justice*, 20 Jac. If a Suit be between R. and B. and B. say to R. *J. S. your Attorney is a bribing knave, and hath twenty pound of you to cozen me*; this is actionable, adjudged, M. 1 Jac. Cook B. R. *Tardlies Case*. But it will not lie for

saying to an Attorney, *Thou art a usurer, or, thou hast plaid the knave with me about a Will, Cook 4. 16.* And it is said it will not lie for this, *My Father was not pecked over the Bar as thy Father was, Trin. 41 Eliz. Cook, B. R.* And yet it is said it will lie for saying, *Thou wast pecked over the Bar, quere, what difference.* Nor will it lie for this, *He was or will be pecked over the Bar, Trin. 41 Eliz. Knightlies Case, Cook, B. R. Hob. Rep. pl. 145.* Nor for this, *I think thou art no Attorney, but an Attorneys Clerk; and if thou be, I shall have thee pecked over the Bar the next Term, and thy Ears nailed to the Pillory, Hob. Rep. pl. 159. Pasche, 7 Jac. Cook, B. R. Trotmans Case; for these words are of an uncertain sense.* It is said it will not lie for saying of him, *He gets his living by false Writs, adjudged, B. R.* Nor if one speak of going to him, if another say, *Go not to him, for he will conzen [or deceive] you, Pasche, 18 Jac. Ratcliffs Case.*

It lieth for this, *Brown is a good Attorney, but that he will play on both sides, Brownl. 1. part. 5.*

It seems it lieth for this, *Thou hast conzened J. S. of his Fee, I will sue thee for it in the Star-Chamber; for thou didst not come for J. S. Brownl. 1. part. 3. 15. 16. 6. 7. 2. part. 253.*

It lieth also for this, *Is he your Attorney, he is the foolishhest and simplest Attorney towards the Law: And if he do not overthrow your cause, I will give you my ears. He is a fool and an ass, and so I will prove him, 126. pl. 21.*

Receiver.

It lieth for saying of the Receiver of the Court of Wards, *Master Receiver hath conzened the King, and delt falsly with him, Trin. 17 Jac. Sir Miles Fleetwoods Case, Hob. Rep. pl. 351.* So to call an Auditor of the Court of Wards *frauditor*, is actionable in *Sir Miles Fleetwoods Case.*

Auditor.

Constable.

It lieth for saying to a Constable, *Thou hidest or coverest Felonies, or favorest Felons, Strucklies Case, Pasche, 7 Jac. B. R. and Bonmans Case.*

Self. 10.
Physician.

It lieth for saying of a Physician, *He hath no learning or skill in Physick, M. 8 Car. B. R. in Cawdreys Case.* And yet to say, *He is an ass, or hath no learning, or is no Schollar, in general, it seems is not actionable.* But it will lie to say of a Doctor of Physick, *He is a Mountebank, an Emperick, and a base fellow, adjudged, Pasche, 12 Car. B. R. Hughes Rep. 441.*

Major.

It lieth not for saying to a Major, *Thou hast conzened all thy brethren, 8 Car. B. R. Major of Tivertons Case, for the words are too general and incertain to uphold an Action.*

Jury-man.

It lieth for saying to a common Jury-man, *Thou art a common Jury-man, and hast been the death and the overthrow of a hundred men, by thy false and subtil means, adjudged, Pasche, 7 Jac. Cook, B. R. Peters Case.* With Avowment that he was a Jury-man.

Overseers of the poor.

It is thought it will lie for saying of Overseers of the poor, *That they have conzened the poor of their money, 9 Jac. B. R.* yet this some doubt. But it seemes clearly, it will lie for saying, *They have conzened the poor of their bread.*

Commissioner.

It lieth for saying of a Commissioner, *That he hath a Commission to hear and end a difference between A. and B. Thou art a corrupt man, and hast taken bribes of A. to defraud equity and justice, adjudged, Pasche, 3 Jac. B. R. Sir George Mores Case.* So to say of him, *That he put out Depositions taken, and put in some not taken, adjudged, Hil. 17 Jac. B. R. Sir Nich. Parkers Case.* So for saying, *He hath returned Depositions that were not taken, 40. 41 Eliz. B. R. Fishes Case; and whether he be nominated by the Court or Parties, it is all one in the Case.*

Arbitrator.
Weigher of corn.

It lieth not for saying of an Arbitrator, *He hath taken bribes, or, he is corrupt.* But it will lie for saying to one appointed to be a common weigher in a Market or Fair, *that did weigh Corn between us, He hath taken bribes to make false weighers.*

Steward.

It lieth for saying of a Steward in a Leet, *He hath added a presentment, which the Jury never made, M. 4 Jac. B. R. Carrs Case, especially if he keep many Courts.*

Bailiff.

It will not lie for a Bailiff that had the selling of his Masters Corn for three years, for saying, *Thou art a conzening knave, and hast conzened thy Master in selling by false measure, Hob. pl. 93.* But if he did continue in his office, and these words did make his Master put him away, *contra.*

It will not lie for saying of a Scrivener, *That he made false writings.*

Scrivener.
Measurer of
Land.

It lieth for saying of a Mathematical Measurer or Surveyor that is learned, and doth it by Art, or any such Officer, *He hath no skill in his trade, or, he is a cheater or conzener in his trade.* But to say so of one that doth measure by the Poll onely, *contra*, Hil. 16 Jac. B. R. *Londons Case.*

Out of all this, it appeareth, That where ever this Action is maintainable for any Defamation in a mans Office, the words must be spoken, either generally without any reference, and so may be referred to his Office, or with reference to his Office; for if they be spoken of any other subject then his Office, they will not be actionable, *Agree.* 16 Jac. B. R. in *Londons Case.* And the party that sues for the slander, must shew in his Declaration, that he was such an Officer at the time of the words spoken, otherwise the action is not maintainable. And it is not sufficient to say, he had been such an Officer before the time of the speaking of the words; but he need not shew that the hearers did know him to be such an officer, *Hob. Rep. pl. 104. 93. 351.* yet if the words be ambiguous, but there is a pregnant violence in them to lead the hearers and Court, to take them in the worst sense, they must be taken so, as in the Case of Sir Miles Fleetwood, *Hob. Rep. pl. 35.*

It lieth upon this ground also, against them that slander a Lawyer, or an Attorney with ignorance or unfairfulness in the Cases before set down.

Which concerns a man in his Trade or Calling, whereby he gets his living.

It will lie for saying to a Victualler or Inn-holder, *He hath the Pox, or any other infectious disease in his house;* if he lose his guests thereby, *non aliter*, *Trin. 9 Jac. Ladlams Case.* So for saying, *He keeps a house of common Bawdry*, *curia*, Hil. 4 Jac. B. R. *Thornes Case.* M. 39. 40 Eliz. And for this it seems it will lie without that consequence, and without Averment hereof. So this Action will lie for saying of any Tradesman that gets his living by buying and selling, or did so of late, and hath given it over a little while, as a Merchant, Shoemaker, Mercer, or the like Tradesman that useth buying and selling. *He is a bankrupt, and I will drive him out of the Country for a bankrupt;* M. 9 Jac. B. R. *Dayes Case*, adjudged. Or, *he will be a bankrupt very shortly*, Co. 4. 19. *Dyer 72. Langs Case.* M. 7 Jac. Co. B. R. *Seleys Case.* Pasche, 12 Jac. B. R. Or, *he is a bankrupt, and fled beyond the Sea for money*, *Trin. 9 Jac. B. R. Trunlocks Case.* Or, *I will prove that he hath been a bankrupt, and hath agreed with his creditors for five shillings a pound.* *Edmunds Case.* Hil. 3 Jac. B. R. *Ror. 855.* Or, *he is broken*, Hil. 17 Jac. B. R. *Johnsons Case.* But it will not lie for saying, *I will sue out a Commission of Bankrupt against J. S. Nor will it lie for calling a Gentleman, or one that is no Tradesman, Bankrupt.* *Finchesley 186.* Nor for saying to a Tradesman, *Thou art a branded Rogue, and a Rogue by the Statute*, M. 19 Jac. B. R. *Harrisons Case*, unless he can aver any special loss by it. Nor will it lie for these words of a Merchant. *Doth he owe you money? get it quickly and take heed how you trust him*, *Trin. 36 Eliz. Vaspicks Case.* Nor for this, *He is a false knave, and keepeth a false debt book, for he chargeth me unjustly with what I never received*, adjudged. Hil. 37 Eliz. B. R. *Brooks Case.* Nor for saying, *He is a couzening knave*, Pasche, 15 Car. B. R. And yet in these two last Cases, if the speeches be with reference to his Trade, *Quere.* It will not lie to say of a Tradesman, *He is not worth a groat;* no, nor albeit he aver that in the County, it means that he is a Bankrupt, Pasche, 15 Car. B. R. *Axes Case;* for his credit may be good, and he not worth a groat.

It will not lie for saying to a Merchant, *He is a couzening knave*, *March. Rep. f. 8. pl. 19.* But see more in *Brownl. 1. part. 4. 16.*

It will lie for saying to a Goldsmith, *Thou art a couzening knave, for thou hast sold me a Saphir for a Diamond*, Hil. 32 Eliz. B. R. But if one say to a Taylor, *Thou art a couzening knave, because thou hast sold me a chain for Gold, where it is half Copper, and thou art a couzening knave upon record, and hast been imprisoned for couzening;* no Action will lie for these words, 32 Eliz. B. R.

It will not lie for calling Rogue or Cozener, nor for saying, *He is a cozening Rogue, and hath cozened R.W. of thirty pound, and goeth about to do the like to me*, *Brownl. 2. part, 120.*

It doth not lie to say of a Carrier, *He is a common Barreter.* *Hob. Rep. pl. 183. 188.*

It lieth for saying of a Journeyman-Shomaker, *Do not meddle with him, for he will undo you, or he will cut you out of doors*; with an Averment that this word [*cut*] doth intend in the Country [*undo*.] *Pasc. 15 Car. B.R.*

It lieth for saying of a servant, *He doth defraud, cozen, or cheat his master, or will undo him*, if by this he have any special damage, otherwise not: But in the first case there must be an Averment of damage in particular. *March, f. 1.*

It lieth for saying of a Brewer, *He sells naughty Beer*, *M. 15 Car. B.R.* Or, *My Mare doth piss as good Beer as he doth brew*, if he can aver a loss by the words. *Dykes Case, March 60.*

It lieth for saying to a Brasier, *Thou didst cozen I.S. in a Brass pot*, *Adj. Pasc. 7 Jac. B.R.* So by the same reason to say to any Tradesman, *He did cheat a man in trading*. So to say of a Farmer, Badger, or any man that sells by weight and measure, *He sells by false weights and measures, or he did keep false measures, by which he did cozen the Country*. But it lieth not for saying, *He had (or he kept) false weights or measures in his house*, *Hob. pl. 93. Pasc. Co. B. 17 Car. Payns Case*. But to say this of a Bailiff that sold his masters Corn for a while, and hath given over, it seems it will not lie. But to say of a Tradesman, *He doth sell by false weights or measures*, will bear an Action, *March Rep. 119. pl. 197.*

It lieth for saying, that he kept a false bushel by which he did cheat and cozen the poor, if he shew he were a Farmer, and did sell his Corn, and that by these words he lost his Customers, *March 116. pl. 192.*

It lieth for saying to one that had oversight of a Gentlemans Farm, and sold his Corn, for these words; *Thou art a cozening Knaave, and thou hast cozened me in selling false measure in my Barley, and the Country is bound to curse thee for selling with false measures, and I will prove it; and thou hast changed my Barley which I bought of thee*. *B.R. Rep. 1 par. 4.* So for this, *Thou didst keep and sell by false weights, and in 240 bestowing thy weights were false two ounces, and I will prove it*, *Brownl. 1 part, 42.*

To say of a woman Inkeeper, *She is a pocky unwholsom woman, doth wear a skarv to hide her blanches in her neck, it is a pocky household*, may happily bear an action, *M. 9 Jac. Ludlams Case.*

Señ. 11.

Out of all which it is to be observed, that where-ever this Action lieth for a slander to a man in his Trade, the words must be spoken either generally, and so may be referred to it, or must be relative words, as *Bankrupt* or the like, or with express reference to it; for if they be spoken of any other thing, they will not bear an action: And the party that sues must set forth in his Declaration, that he was such a Tradesman in particular; and it is not enough to say, he got his living by buying and selling, but he must say he is a Merchant, Mercer, or the like, and that he was so a little before or at the time of the words spoken, else no action will lie, *Hil. 7 Car. B.R. Collins Case*, adjudged *M. 17 Car. Co. B.* But if the count be that he have been of that Trade for twenty years last past, and lay the words to be spoken within that time, it is good. But if he say that he hath been of that Trade for divers years last past, *contra Hil. 17 Jac. B.R. Johnsons Case. Hob. Rep. pl. 16. 93.*

Averment:

In all these Cases there must be a special averment of some loss by the words spoken, *Pasc. 15 Car. B.R. Axes Case*. But others upon better reason and authority hold the contrary. But all agree it to be best to allege some special damage, if the Case will bear it. *March, f. 96.*

Which tend to a mans disinherittance.

It lieth for saying of a lawful Heir to Land, before or after his fathers death, *He is a Bastard*. And this will lie, though the words were spoken before or after he hath the land in possession, and though he be not about to sell the land, and though he have no loss by the speaking of the words, *Co. 4. 17 M. 20. Jac. B. Elborows Case*: for by this the title of his Land may be called in question. But if the party speaking claim as next heir to the Land, he may justify it, and it will not bear an action, *Trin. 25 Eliz. B.R. Banisters Case. Co. idem*. And if the Plaintiff omit this, the Defendant may set it forth by way of bar. To say a man is his Villain, will not bear action now, as it seems, because Villenage is gone.

Which charge a man with an infectious disease.

It lieth for this, *He hath the French pox, or is infected with the French pox, or is laid with the pox, or the pox doth haunt him twice a year*, *Co. 4. 17. and Ludlams Case, M. 2 Jac.*

M. 2 Jac. per Fenner and Williams Justices. So, *Thou hast caught the French pox, and carried it to thy wife,* *Hob. Rep. pl. 190.* So for saying, *Thou art a pocky whore, and the pox hath eaten out the bottom of thy belly, that thy guts are ready to fall out,* *M. 7 Jac. Co. B. Miles Case. Trin. 15 Jac. B. R. Mitwards Case.* So it seems it will lie for saying, *Thou hast the great pox, 20 Jac. B. R. or the plague.* So it lieth for saying, *Thou art a leprous knave, not fit for company, or thou art a leper,* *Trin. 4 Jac. B. R. Rot. 1051.* But it will not lie for saying, *One hath the Falling-sickness,* *Hil. 4 Jac. B. R. or the Pox, Co. 4. 17.* Nor for this, *Hang him, he is full of the Pox, Co. 4. 17.* It will not lie for saying, *Thou art a pocky Whore, 44, 45 Eliz. Adjudg. Curia. M. 7 Jac. Co. B.* Nor will it lie for this, *That pocky Drab doth wear a scarf about her neck to hide her blanches, I will not eat with her for ten pounds; by three Judges, Trin. 9 Jac. Ludmans Case.* Nor for this, *Thou hast lien in Fullers tub, Chapels Case.* Nor will it lie for these words with this Averment, *That none do lie there but such as have the French pox, Adjudg. M. 44, & 45 Eliz. Boddin and Jones Case.* Nor for this, *Thou art a pocky Drab, doest wear a scarf about thy neck to hide thy blanches; you are a pocky household, and I will not eat with you for twenty Nobles.* And yet if they were speaking of the French pox, and the party speak these words, it is dangerous, *M. 9 Jac.* Nor for this, *He hath been in Fowlers tub, (meaning a Chyrurgeons tub, wherein none were but such as had the pox) I will not say of the pox, but he lay in the tub that time that Lagmans wife was laid of the pox, and his hair falls from his head, and he is a pilled and a Rascal-knave, and a Villain, and no Christian, and thinks there is neither heaven nor hell, Goldsb. 135. pl. 34.*

If I have Land, and have need, and am about to sell it, and another say, *It is his Land, and I have no right to it, or I have no Title to it, or I have no good Estate of it, or that I can make no good Estate of it;* and hereby my Chapman doth desist and fall off, I may have this Action: And albeit he or some other have a colourable Estate, yet if he have not a good Title in Law to it, this will bear an Action, *Co. 4. 18. New book of Entries, 28.* As if two have Leases of the same Land, and he hath the latter which is not good, and he say, *The Land is his, and the others Estate is not good; this is actionable.* *Mildmays Case, Adjudg. 6 Eliz. Co. B. Co. 1. 177.*

If I be about to sell my Land, and another saith, *I know one that hath a Lease of the Land, and he will not part from it at any rate; this is actionable,* *Adjudg. M. 37, 38 Eliz. B. R. Pennymans Case. M. 20 Jac. B. R. Elborrows Case.* The Plaintiff set forth he had much Land by Inheritance, and the Defendant intending to impeach his Title, said, *His wife shall not sit above mine, for her husband is a bastard, innuendo the Plaintiff;* It was adjudged to lie without any Averment. So it will lie for saying, *Your father is a bastard, 6 Eliz. Co. B.* So, *Thou art an Alien, 15 Jac. B. R. adjudged.* And yet in case where I claim an Estate, if I say so, *That I have a title, and the title of the other is not good; these words may be justified, and are not actionable, Co. 4. 18.* But there must be a special Averment of some loss; and therefore he must shew that he was the Heir, and the other intending to impeach his Title, or that there was a communication for a sale: For some hold, that if there were only an intent of sale in the Owner, and no progress, no Action will lie for the slander of the Title, *Co. New book of Entries, f. 35. M. 18 Jac. Sleeds Case.* Yet some Judges have held it will lie without any Averment; for it may cause the King or Lord to search for the Title, and bring a loss in time to come.

If one be heir to his father or brother, who intend to settle their land upon him, and another say, *He is a Bastard,* and thereupon they give away the land from him, this will bear Action, adjudged, *Hughes Rep. 451.*

If a woman be like to have a husband, or a man a wife, and one say of him or her, *He (or she) had a bastard, or she is incontinent, or lay with I. S. or I. S. had the use of her body, and he or the lose their match thereby; this Action will lie for this slander, Co. 4. 16. Hil. 4 Jac. B. R. Dame Harrisons Case. M. 8 Car. B. R.* So if a Widower be like to have a Maid or Widow, and one say to her, *I wonder you will have him, for he was like to starve his last wife, and would not allow her necessaries; and by this he lose her.* Adjudged.

If a Divine be to be presented to a Benefice, and one say to him, *He is an Heretick,*

Which consider a mans title of his land.

Sec. 12:

Which tend to hinder a mans preferment:

or a Bastard, or excommunicate; and hereby he lose his preferment, he may have this Action for this Slander, Co. 4. 16.

If a Lawyer stand for an Office, as for a Stewardship, or the like, and being in speech about him, one saith to another, *He is an ignorant man, unfit for this place*; and thereby he loseth the place, this Action lieth for this Slander, *Sandersons Case*, 17 Car. Co. B. R.

And so by the same reason, if any common servant be like to have a service, and by some slanderous speeches he loseth his service; it seems he may have this Action for his relief. *Agreed. M. 15 Car. B. R.* But in all these Cases, there must be a special Averment of the loss of the preferment; otherwise the Action is not maintainable.

Averment:

Which doth tend to the hurt of a man in his Liberty, or to bring any corporal, or mony punishment on a man.

I finde in the Judgments and Opinions of men upon this point, very great contradiction also; and so much difficulty and uncertainty in the Law in these Cases, that it is hard to give you any Rules on which you may relie herein.

Some say an Action will lie for any words which may induce any corporal or pecuniary punishment; others, the contrary. We shall say this onely in the Slanders within this degree, and the next that follow, it is good to observe how the words do sound, and what the thing said, if true, would produce. For if the words do sound Scandalous, or if the thing charged were true, it would bring any sharp punishment, especially to the body, there (for the most part) the words will bear Action; we say (for the most part) for it is not always so. But on the other side, if the words do not sound foul, as to say, *Thou buildest a Cottage, didst strike in the Church*, or the like; or the punishment of the thing charged would be but light, *As to be bound to the good behavior*, or the like; or none at all, there (for the most part) it will not lie. And yet in this Case also, sometimes it will lie, Co. 4. 17. *Kitch. 173. Co. 4. 19. Dyer 285. 37.* But if any special loss happen to the Party, by the speaking of the words there, though the words in themselves be not Actionable, yet they may be Actionable in respect of the loss, *M. 17 Car. B. R.* As if one had said, *Thou speakest against the Book of Common-Prayer*, and thereby he was vexed in the Spiritual Court, Co. 4. 17. *Marsh Rep. f. 114. pl. 115.*

It is held somewhat confidently, the Action will lie in all the Cases, and for any of the words following, (*viz.*) *Thou hast bewitched my cattle, [my milk] my beer, or any of my goods, M. 18 Jac. B. R. Sturdens Case.* But it will not lie for saying, *Thou hast bewitched my ware, that I can catch no fish.*

But it lieth not for this, *Thou art a Sorcerer or Inchanter, Brownl. 1. part. 8. 9. 14. 2 parts. 276.*

It hath been agreed, that since the Statute of 1 Jac. an Action will lie for calling one *Witch* generally. It hath been said, it will not lie for saying, *Thou art a Witch; and hast bewitched my childe*; for the words shall be taken *mitiori sensu*, of anothers bewitching. See *Quere* of this, *Hughes 341.*

It lieth for saying, *Thou hast a Bastard, Co. 4. 17.* So for saying, *Thou didst steal six pence, Hob. Rep. pl. 258.* So for saying, *Thou didst hire one [or send one] to my house to kill me, Trin. 33 Eliz. B. R. Suttons Case, adjudged.* Or, *Thou didst lie in wait to kill [or to rob] me, Pasche, 5 Jac. B. R.* Or, *Thou soughtest the life of J. S. if he be dead, adjudged, Mich. 7 Jac. Weblins Case.* So for saying of a Woman, *She is a Bawd and a Whore, and keepeth a house of Bawdry, Dame Bartlets Case, Trin. 38 Eliz. B. R. And Morgans Case, Trin. 16 Car. B. R. adjudged, and many others. See March. 212. pl. 249.*

It is said it will lie for this, *Thou didst report money was false, Finchesley 185.*

It will lie for any of these speeches, *Thou art a forger of false Deeds [or writings, or thou hast forged a Feoffment,] Bond, Lease, or Release, Dyer 285. 37. Pasche, 39 Eliz. B. R. Wades Case.* Or, *Thou art a forger of writings, 39 Eliz. B. R. Goodals Case.* Or, *This is a forged Deed made by J. S. under a hedge, Sir G. Reynels Case.* Or, *Thou hast forged the will of J. S. adjudged, Pasche, 7 Car. B. R. Mackenists Case.* Or, *Thou hast sued out a Writ against me, and got a counterfeite Warrant of thine own making, adjudged, M. 20 Jac. B. R. Stones Case.* Or, *Thou camest with a counterfeite Commission, when he had a good Commission, Yorks Case.* Or, *Thou hast forged a Re-*

a Record in Abergavein Court, *M. 7 Car. Co. B.R.* adjudged. For this is punishable by the Common-Law, though not by the Statute. But not for saying, *Thou art a forging knave*, *Goldsb. 25. pl. 5.*

It is held somewhat confidently, That it will not lie in all the Cases, or for any of the words following, *Thou art an Extortioner*, or *thou art a peace breaker*, common Quarreller, suspected to be a common Pilferer, common Rioter, a common Libeller, or *thou art a common Champertor*, or *thou art a common maintainer of Suits*, *thou art a Recusant*, or men cannot have their Cattle go in the Common, but J. S. killeth them with dogs, *Dyer 118.* *Thou hast robbed my Orchard*, *thou hast spoken against the Book of Common-Prayer*, or *thou hast set up an unlawful Cottage against the Statute*, *thou hast made a forcible entry into Land*, or *thou didst strike a man in a Church with a Weapon*, *thou art a Forestaller*, *Regrator*, or *Ingrosser*.

It would have lien, when villenage was here, for saying, *Thou art a villain to J. S.* 2 Ed. 4. 5:

It lieth for any of these speeches, *I will prove thee [or I can prove thee] perjured*, *M. 7 Jac. B. R. Roberts Case.* Or, *Thou wast perjured in the Star-Chamber*, or, *thou wast committed for perjury there*, *Co. 4 19. Hob. Rep. pl. 107. 15.* Or, *Thou perjured beast*, adjudged. 18 Jac. B.R. *Bensons Case.* Or, *Thou art perjured*, or *wast perjured*, adjudged. *M. 25 Eliz. B. R.*

It lieth for saying, *Thou art a perjured man*, 25 Eliz. B. R. adjudged. It will not lie for these words, *Thou hast got thy living by swearing and forswearing*, adjudged. *M. 9 Jac. B. R.* So, *Thou hast taken a false oath [or, hast forsworn thy self] in the Kings-Bench Court*, the Leet of S. or any other Court of Record, *Harisons Case, B. R.* As, *Thou tookest a false Oath in the Bishops Court at Excester*, or in the Leet of S. or in the Quarter-Sessions at Gloucester. 38 Eliz. Adjudged. *Castlemains Case, Co. 4. 15. Hob. Rep. pl. 346. 360.* One said, *Thou art forsworn and hast taken a false oath at Hereford Assizes against John at stile.* The opinion of the Court in this Case, was, *That the Action would not lie*: Otherwise, if he had said, *Thou art forsworn*, and *hast taken a false Oath at the Assizes against such a one*, with *Averment*, *That he was sworn in the cause*, *March. Rep. f. 7. pl. 17.*

It lieth for saying, *It is a main-sworn man*, *Brownl. 1. part. 9, 10, 11, 14, 15.*

So it lieth for saying, *You have caused J. S. to perjure himself*, adjudged. *Brownl. 1. part. 2: See Part. 2. 49.*

If one say of a witness presently after a tryal, *He hath now forsworn himself*, adjudged; it lieth for this, *Hughs Rep. 445.*

It lieth for this saying, *He was forsworn in Chancery*, and the Lord Keeper committed him for it, adjudged. *Hughs Rep. 444.* But not for saying, *He is a proper witness, he will swear any thing.* But the words must import the perjury was committed in a Court of Record and judicially there. And if the words will not bear, it cannot be strained by an Innuendo to it. As if the words be, *Thou wast forsworn*, the Plaintiff cannot make them Actionable by an Innuendo, in the Quarter-Sessions of S. and in the service of the Court, *Trin. 19 Jac. B. R.* And 48 Eliz. B. R. So it will not lie for saying, *Thou wast forsworn at Horsley Court*, Innuendo the Court Leet there, for it may be the Court Baron there. And yet it is said, the contrary hath been adjudged. So neither will it lie for saying, *Thou wast forsworn in the Kings-Bench*; for it may be the Prison so called, not the Court, *M. 42 Eliz.*

It lieth for saying, *Thou hast procured one to commit perjury*, or, *thou art a procurer of perjury*, 25 Eliz. B. R. Or, *thou hast suborned one to come ten miles to be perjured*, and given him money to do it, *Harris Case. Pasche, 5 Jac. B. R.* But if the words import he did it not, *contra.*

It lieth for charging one sworn in a Court upon a *Voyer dire*, as well as upon an Issue that he was forsworn; for this perjury is punishable by the Common Law, *M. 7 Car. Cawdreys Case:* So it is thought of these words, *You were forsworn in your Answer in the Court of Request*; for this is punishable by the Pillory. So it is said, it lieth for this, *He hath delivered an untruth in a material thing in the Star-Chamber. Sed Quere.* But not for saying, *He hath delivered an untruth in his answer in the Chancery*, 38, 39 Eliz. *Browns Case.*

See B. 13.

It will lie for saying, *Thou art a forsworn fellow; for by thy false oath thou hast hanged as true a man as thy self*, Adjudg. *Rais Case*, and 39 *Eliz. Brooks Case*. So for saying, *I. S. is mean sworn*, with an Averment that it doth signifie perjured in the place where the words were spoken. Adjudged, *B. R.*

We have shewed before, that it lieth for saying, *Thou wast forsworn in the Leet at W. [or in Hereford-Affizes, or in the Quarter-Sessions at Gloucester;]* and that is out of question. But it is said by some, it will not lie for saying, *Thou wast forsworn at the Leet at W. or at Hereford-Affizes, or at the Quarter-Sessions at Gloucester;* for it may be in ordinary discourse, and extrajudicially; and a Judgment is cited, *M. 38, 39 Eliz. B. R. Willis Case*, to be given accordingly: Yet I cannot but doubt it, for the vulgar acceptance is alike in both cases; and there is a Record of a Judgment on this side against the other Judgment, 38, 39 *Eliz. Cockins Case*. And *Hil. 1 Jac. B. R.* it was ruled to lie for this, *Thou hast taken a false oath in the Quarter-Sessions at Gloucester*. If I say to one coming out of a Court where he was sworn, *Thou hast forsworn thy self*, it is said to be actionable, *Harrisens Case*. And yet it is said, if I say to a man giving his oath in a Court, *You are forsworn*, and say not, *in your testimony in this cause*, or the like, this is doubted, *M. 7 Car. B. R. Cawdrys Case*. This distinction seems to me a very nice one. *Quare bien*. It lieth not for saying, *Thou art a false forsworn man*, 25 *Eliz. B. R.*

It is said it lieth not for saying, *Thou art a common Swearer, or thou art a common haunter of Ale-houses, or thou art a common fighter, or thou art a Sabbath-breaker, or thou art a common Whoremonger, or thou art a common Whore, or thou art a Whore, a Whoremaster, or a Bawd, or thou art a Harlot, or thou art a common breaker of the Peace, or a common Affrayer, or thou art an Adulterer, or thou art a Fornicator, or thou didst lie with I. S. or I. S. doth lie with thee, [or use thy body]* *M. 39 Eliz. B. R.* Or thou art a *Queen*, or thou art a *Thievish whore*, Adjudg. *Hil. 17 Jac. B. R.* Nor for this, *Thou art the Hackney-whore of I. S.* *Bodins Case*: Or, *thou wast rid up and down stairs*, *M. 9 Jac. B. R.* And yet for many of these one may be bound to the good behavior, and for others of them punished by Fine or great penalty. See *March. 2: part 5*. It lieth for saying to a woman, *She keeps a Bawdy-house, or house of Bawdry*. But it lieth not for saying, *She is a Bawd or Whore*, albeit she be married. And yet in London by a special custom it lieth for these words, *Trin. 17 Car. B. R. March f. 107. Brownl. 1 part, 162*.

It lieth not for saying, *Thou art a false forsworn Knaave, or thou hast forsworn thy self*, *M. 7 Jac. B. R.* Nor for this, *Thou hast but one Manner, and thou hast got it by swearing and forswearing*, *Co. 4. 15*. Nor for saying, *He was detested for perjury in the Star-chamber*, *Co. 4. 16*. Nor for this, *Thou art a perjured Knaave, that is to be proved by a stake parting the land of A. and B.* *Co. 4. 19*. So if in a cause depending betwixt *A. and B.* in the Kings Bench, certain Affidavits being openly read in the Court, the Defendant saith openly, *There is not a word true in them, as I can prove by twenty witnesses*; this is not actionable, *Pasch. 15 Car. B. R. Moltons Case. March Rep. f. 20. pl. 45*.

It lieth not for saying, *I have matter enough against him; for I. S. hath found forgery against him, and can prove it*, Adjudg. *Hob. Rep. pl. 395*. Nor for this, *Thou hast forged a Writing*, *Hob. Rep. pl. 3*. Nor for this, *Thou gettest thy living by false Writs*, Adjudged. Nor for saying, *Thou hast made a false Bond (or a false Deed)* *Pasch. 39 Eliz. B. R.* Nor for this, *Thou art a Varlet, and hast suppressed thy brothers will to deceive others of Legacies*, *Trin. 17 Jac. B. R. Godfreys Case*. Nor for this, *This is the writing of I. S. he hath forged this Warrant*, *Hob. Rep. pl. 3*. For these words in these Cases are too general and incertain to bear an Action. So if one say to another, *Whereas I. S. had made and sealed to him a Bill for 10l. thou didst shew me the Bill released, and after sealed, thou didst forge that seal*; no Action will lie for this, *Hob. Rep. pl. 48*. Nor for this, *Thou hast made the Great Seal*. Nor for this, *Thou hast made false Records, and dost verifie them*. Adjudged.

It is very much doubted whether the Action will lie, or not lie, in all the Cases, or for any of the words following; *Thou art a common Drunkard, a common Rioter*: And for this it is yet said, it hath been ruled, it will lie, *M. 8 Car. B. R. Stones Case*. Or, *Thou*

Thou art a common Night-walker, or thou art a common Evef-dropper, or thou art a common Barretor, or a common Hedg-breaker; for, for these a man may be bound to the good behavior.

But most men incline that these words are not actionable, *Thou art a branded Rogue, M. 19 Jac. B.R. Harrisons Case.* And yet the better opinion was, that it will not lie for this, *Thou hast bought Titles, Hares Case. Thou hast hired one to rob me; or thou art a setter of thieves to rob me; or, thou keepest men with intent to rob me; or, thou keepest men to rob me, Hil. 13 Jac. B.R.* But if I be robbed, these are dangerous words. But to say, *Thou keepest men which do rob me, or which have robbed me, contrâ.*

And yet it is held, that for most of these words in this last rank, if they be spoken in reference to mens Trades, &c. or if any special loss can be averred to come to the party by the speaking of them, that then they may be actionable. *Co. 4. 15, 17, 20 M. 19 Jac. B.R. Harrisons Case.*

It is held somewhat clearly, it will lie for this, *If one say to a Lord of a Mannor, Thou art a cozening knave, and keepest cozening Courts to cozen men of their Fines, 4 Jac. B.R.*

Which tend to a mans disgrace and reproach only.

It is held somewhat clearly, it will not lie for these words, and in these Cases following: *Thou art a Varlet; or, thou art a Rogue; or, thou art a Rascal; or, thou art of evil name; or, thou art a Villain; or, thou art a Slanderer; or, thou art a Cheater; or, thou art a cheating Knave; or, thou art a Pillory-Knave; or, thou art a cozening Knave, a Vermine of the earth. a false brother, 25 Eliz. B.R.* Or, *thou art a false fellow; or, thou art a Lyar; or, thou art a Conspirator; or, thou art a Railer; or, thou art a sower of discord; or, thou art a Malefactor; or, thou art a Miscreant; or, thou art a Drunken fellow; or, thou art a Bastard; or, thou art an Heretick; or, thou art a Schismatick; or, thou art an Hypocrite of the Church; or, thou didst famish thy last wife with thy wretchedness; or, thou art an Extortioner.* It will not lie for saying, *Thou art a cozening Knave, and hast cozened me of a hundred pounds, and I will make thee stand on the Pillory for it, Adjudg. 30 Eliz. B.R.* Nor for this, (unless it be of a Goldsmith) *I will prove thee a Cozener, for selling me a Saphir for a Diamond, Brownl. 2 part. 100.* Nor for this, *Thou gettest thy living by cozening, or, thou hast cozened I.S. in buying Saddles for him, Pasch. 27 Car. B.R.* Nor for this, *Thou hast cozened me and all my kindred, 18 Eliz. B.R.* Nor for this, *Thou art a false Knave, and hast cozened me and my two kinsmen, Adjudg. 26 Eliz. B.R.* Nor for this, *Thou hast cozened all the Town of Coventry, Adjudged.* So it lieth not for saying, *He is a very bad fellow, for he made I. S. drunken in the night, and cozened him of a thousand marks, Goldsb. 125. pl. 12.* It lieth not for saying of any man, *He is a Papist, and hath a Pardon from the Pope, and can help you to such a one, if he will.* Or thus, *He is an arrant Papist, and, it were well if all such were hanged for they would have the Crown from the Kings head, if they durst, Brownl. 2 part. 166.* To say, a man is a Recusant, or received a Recusant-Priest, or hath committed a Riot, or the like words, that, if true, would bring one in question and danger upon a penal Law; with Averment of special damage by them, will bear Action, otherwise not. See *March. f. 114, 115. and Brownl. 1 par. 9, 11, 12.* It will not lie for saying, *Thou art a Papist, and hadst a Pardon from the Pope, Brownl. 2 par. 166.* It will not lie for saying, *Thou art a Hornsby, and a Cuckoldly knave, Trin. 9 Jac. Palmers Case.* Nor for this, *Thou hast cozened the Earl of Hartford of as much as thou art worth, Trin. 9 Jac. B.R. Tucks Case, Curia.*

It is very doubtful whether it will, or will not lie in these following Cases; *Thou didst hold up thy hand at the Bar, or thou hast deserved hanging, M. 4 Jac. B.R.* It is in my power to hang thee, *7 Jac. B.R.* Thou didst deserve hanging, *Trin. 16 Car. B.R.* Or, *Thou deservedst the pillory, or hast deserved to have thine ears nailed to the pillory, Pasch. 37 Eliz. B.R.*

To me there seems great reason, that these five last should bear an Action; for they necessarily imply the doing of such a thing as hath deserved it: yet the current Opinion and Cases go the other way.

And yet it is held for many, if not for any of these words, if any special loss can be averred to come to the Plaintiff by them, that he may have this Action for the speaking of them; also many of these words having reference to a man in his Office or

Trade,

Of an Averment in this Action, and where and what Averment is necessary, and what other thing must be shewed in the Declaration to maintain the Action, or not.

SECT. 14.

Trade, are actionable, Co. 4. 15, 17, 20. *M. 19 Jac. B. R. Harrissons Case.*

It matters not whether the Plaintiff set forth all the circumstantial words as they were spoken, so as he set forth the very words truly. As if he set forth the talk be, *Will you be present at such a Trial between A. and B. and in truth it was between R. and B. (or the like) and he say, I'll warrant you B. dare not be there, for he is broken.* Hil. 17 Jac. B. R. Johnsons Case.

An Action will lie for these words, *I will justifie that Barns is accessory to the Burglary for which C. D. was hanged,* without averring that he was hanged for such a Burglary, Trin. 9 Jac. B. R. Adjudg. *Barns and Hunts Case.*

If an Action be brought for saying words, as, *Thou hast strained my Mare, art mean sworn,* or the like, there must be an Averment that the words have such a meaning in that Country; but this is confidently denied by others. See in *March. f. 18.* The safe way is to aver it.

If an Action be brought for saying, *A man hath killed I. S.* and he sue for this slander, it need not be averred, that the party said to be killed is dead, Adjudg. B. R. Co. 4. 16. *Hob. Rep. p. 11.* And this seems to me clear Law, yet hath been much opposed, *March. Rep. 109. pl. 187.*

If the slander be upon a Report, it must be averred that there was no such Report, Hil. 4 Jac. B. R. *Lady Morrissons Case;* and *Pasch. 42 Eliz. Co. B. Morleys Case,* adjudged.

If an Action be brought for saying, *Thou wast in the gaol at S. for robbing, &c.* he needs not aver that he was not in gaol, but this is the best pleading. *Sprat and Hayns Case.* To call one *Bankrupt,* if one bring Action, he must aver he is a Tradesman.

By the better opinion, this Action will lie for a slander in another tongue, or by a strange word, without averment of the meaning of the words, *Hob. Rep. pl. 165, 268. March. f. 18.* But an Averment of special damage is not necessary, in case where the words touch or concern a mans life, liberty, or member, or any corporal punishment, or which scandal a man in his Office or Trade, or which charge him with any great infectious disease, by reason of which he must be separate from humane society. But if they be in scandal of a mans Title, or in other cases, there must be an allegation of particular damage; yet the best way in all these Cases is to allege some special damage, if the Case will bear it.

If any words be spoken (in themselves not actionable) of a young woman or man, charging them with Incontinencie or otherwise, by which they lose their match; or of any man, by which he loseth an office, service, or preferment he stands for; his loss of the match, or office, &c. must be specially averred, or else it is not good, *Pasc. 15 Car. B. R. Axes Case, Sandersons Case, Trin. 17 Car. Co. B.*

So if any words of passion only, not actionable, be spoken; as to say, A man is forsworn, he is a Rogue, Villain, or the like; if any Action be brought upon them, it must be maintained by a special Averment of loss, Co. 4. 15.

There are other words which concern matter meerly spiritual, and determinable in the Ecclesiastical Court only; as for calling a man a Bastard, a Heretick, a Schismatick, an Advouterer, a Fornicator; for calling of a woman a Whore, or charging her with any particular act of Incontinencie, or the like. Yet in these Cases, with an Averment of a particular damage, an Action will lie at the Common-Law, as it is adjudged in *Anne Davis Case, Co. 4. 17. a. & f. 20. a. 27 H. 8. 14. Regist. f. 54.*

By Popham Chief Justice, if one say of a woman that is an Inholder, *That she hath a great infectious disease,* by which she loses her Guests, an Action will lie. This must be taken with an Averment of that particular damage; otherwise an Action will not lie, unless the disease be such for which she ought to separate herself, or to be separated by the Law from common society, Co. 4. 17.

Axe and Moods Case cited before; The Plaintiff being a Dyer brought an Action for these words, *Thou art not worth a groat;* Adjudged that the words were not actionable, because that many a man in his beginning is not worth a groat, and yet hath good credit with the world, *Pasch. 15. Car. B. R.* But in this Case it was agreed, that if the Plaintiff had averred specially that he was thereby damnified, and had lost his credit,

credit, so that none would trust him, with such an averment the Action would have layen.

The brother of the Defendant spake these words to the Plaintiff, *Thou thief, thou Gaol-bribe, thou hast stolen a peece of silver from my master*: and hereupon the Defendant spake these words, *That which my brother spake is true, I will justifie it*. And in this case it was agreed, that Action will not lie for them, without averment that he had notice of his brothers words. *Brownl. 2 par. 100.*

In the Case of the Foreman of a Shoemakers Shop, cited before, for these words, *It is no matter who hath him, for he will cut him out of doors*; the Plaintiff averred, that the common acceptation of these words *inter Calcearios* is, that he will beggar his Master and make him run away, and shewed a special damage by the speaking these words, and it was adjudged that the Action would lie, which I conceive was only for the particular damage: For to say of a Servant, *That he doth cheat, cozen, or defraud his Master, or that he will beggar his Master*, or the like, will not bear an Action without an averment of a particular damage. *M. 15 Car. B.R.*

And in this case it was said by the Court, that for some words an Action will lie without an averment of any particular damage, as for calling of a man Thief, Traitor, and the like: And some words will not bear an Action without an averment of a particular damage; as if a man shall say of another, *That he kept his wife basely, and starved her*, these words of themselves will not bear an action; but if the party of whom they were spoken were to be married to another, and by these words is hindred; in such case, with an averment of the particular damage, an action will lie.

So likewise in the Case of *Dicks and Fenne*, which I cited before, where one said of the Plaintiff, being a Brewer, *That he would give a peck of mault to his Mare, and lead her to the water to drink, and he should pifs as good Beer as the Plaintiff brewed*: It was resolved that the words themselves were not actionable, because of the impossibility of them; but it was agreed by the Court, that if there had been a special damage alleged, as loss of custom, or the like, the action would have layen, *M. 15 Car. B. R.*

Haws Case cited likewise before; one said of him, that he had spoken against the Book of Common-Prayer, and said, *That it was not fit to be read in the Church*; for which he brought his action, and shewed how that by reason of the speaking of these words by the Defendant, he was cited into the Ecclesiastical Court, and had paid and expended several sums, &c. Adjudged that the words themselves were not actionable, because if they had been true, they charge him only with an offence against a penal Law, which doth not inflict corporal punishment, but for non-payment of penalty, *M. 17 Car. B.R.* But it was resolved, that for the particular damage the action would lie. See *Brownl. 1 par. 10. 13. 2 par. 100. 129.*

That in all Cases for words, where there is any thing that is the cause or ground of the Action, or tends necessarily to the maintenance of it, in such Case the Action will not lie, without that thing be expressly averred to be, or not to be, as the Case requireth, *Haslewood and Garrets* Case cited before; *Whosoever is he that is falsest Thief, and strongest in the County of Salop, whatsoever he hath stolen, or whatsoever he hath done*, Thomas Haslewood is falsest then he: Resolved that the words were actionable, with an averment that there were Felons within the County of Salop; but fault of such averment, the Judgment given in the Common-Pleas was reversed in this Court. *Pasch. Jac. B.R.*

Note Reader, if there were no Felons in that County, (which will rather be intended, if it be not averred that there were some) then the speaking of the words could be no slander to the Plaintiff, and so no action can lie. *Hob. Rep. 309.* *Blands* Case cited before: He brought an action against *A. B.* for saying, *That he was indicted for Felony at a Sessions holden, &c.* and did not aver that he was not indicted; and after a Verdict for the Plaintiff, Judgment was stayed, because there was no averment, *ut supra*. Note, if he were indicted, which he doth tacitely admit, yet no cause of Action, for the words in themselves are not actionable, *Hob. pl. 2. 9.*

Johnson against *Dyer*; the Defendant having communicated with the Father of the Plaintiff, said to him, *I will take my oath that your son stole my Hens*; and the Plaintiff

Plaintiff did not aver that he was his Son, or that he had but one Son, and therefore adjudged, that the Action would not lie in this Case, if he were not his son, then no cause of action, *M. 15 Car. B.R.*

Self. 15.

One *Clark* said that he had a son in *Nottinghamshire* who had his Chest picked, and one hundred pounds taken out of it, in one Locksmiths house, and I thank God I have found the thief who it is, it is one that dwelleth in the next house, called *Robert Kingston*. Upon which, *Kingston* brought an action, and had a verdict, and it was moved in Arrest of Judgment, because that he did not aver that he dwelt in the next house, *Pasche 7 Jac. B. R. Crook*. One said that *Pritchards* man robbed him, who brought an action, and did not aver that he was *Pritchards* man, and therefore it was held that the action would not lie, and the Justices in this case would not give Judgment.

Non constat in this Case, that the Plaintiff was the party of whom the words were spoken; for there might be another of the same name dwelling elsewhere; and therefore he ought to aver that he dwelt in the next house, that he may be certainly intended to be the same person of whom the words were spoken. See *Brownl. 7. part. 13: 2. part. 100.*

What shall be said a good bar or plea in this Action.

The Defendant may plead not guilty; or if the Plaintiff sue upon some of the words, when all together, are not actionable, the Defendant must set them forth at large, (*Co. 4. 13. 19.*) as he spake them, and traverse, or justify, or plead not guilty to the rest of the words, as the Case is. *Co. New Book of Entries, f. 24. a. 25. a. 26.* Or, if the words be true, and he be able to prove it, he may justify the speaking of them; as if I say *7. S.* was perjured, I may shew he was so in the Star-chamber; or he is a thief, I may shew he was attainted of *Petit Larceny*.

Justification.

It is not a good Justification for calling one Murderer, to say there was a murder done, and the Plaintiff was indicted for it, or that the common fame was he did it: *Dyer 236. Broo. 127. New Book of Entries, 26, 27.* Nor can one justify for charging one with a Felony after he hath a pardon, *Hob. Rep. pl. 106. 71.* To say a man was indicted for Felony at *S.* it may be justified, if it be true, *Hob. Rep. pl. 289.* but the words are not actionable. So in a charge of *Perjury*, it is not a good justification to say, he swore such a thing in a Court falsely, unless he add this, knowing it to be false. *M. 38, 39 Eliz. B. R. Willis Case.* See *Brownl. 1. part. 10. 11. 14. 13. 2. part. 49. 272.*

If one call a man Thief, he may justify it, for that he stole a sheep, *Hob. Rep. f. 258. 27 H.8. 22.* If *7. S.* say to another, *7. S.* is a Thief to *7. S.* and to me, and in an Action brought by him, I justify for a Felony done to me onely, this is not sufficient, for the charge is of a double Felony, and the justification to a single Felony, *M. 21 Jac. B.R.* See *Brownl. 1. part. 2. 5. 7. 13: 2. part. 100.*

Where the Verdict of the Jury will maintain the Declaration and the Action, or not.

That where the words that are found, do not agree with the Declaration in the substantial and essential form, that in such case they do not warrant the Declaration: But if they do agree in the substantial and essential form, though they agree not in every word, yet they do well warrant the Declaration, and by consequence maintain the Action.

Sydenham against *Man*, for these words, *If Sir John Sydenham might have his will, he would kill all the true Subjects in England, and the King too; and he is a maintainer of Papistry, and Rebellious persons.* The Defendant pleaded other words, and traversed the speaking of the words *Modo & forma, &c.* The Jury found that he spoke these words, (*viz.*) *I think in my Conscience that if Sir John Sydenham might have his will, he would kill, &c.* and finde all the subsequent words before alledged. In this Case, it was resolved against the Defendant, *Hob. Rep. pl. 252. pl. 213.* But this Case notwithstanding is doubted by some.

Fenner against *Mutton*, in an Action upon the Case for words, which were thus, *Nicholas Fenner procured eight or ten of his neighbors to perjure themselves;* the Defendant pleaded not guilty; and the Jury finde that the Defendant said, *That Nicholas Fenner had caused eight or ten of his neighbors to perjure themselves, M. 4 Jac. B.R.* This was doubted by *Tanfield* Justice, and by him held not a sufficient Verdict to maintain the words.

Chipsam

Chipsam against *Jeek* for these words; *Chipsam* is a Thief, for he hath stolen a Lamb from A. and Geese from B. and killed them in my ground. Issue was joined whether the Defendant spake the words *modo & forma, &c.* the Jury find that the Defendant said, That the Plaintiff was a Thief, for he hath stolen a Lamb from A. and killed it in my ground; but they find he spake nothing of the Geese: yet it was resolved, that the finding of the Jury did well warrant the Declaration of the Plaintiff. *Hil 3 Jac: B. R.*

Norman and Symons Case, the Plaintiff brought an Action for words, and declared that they were spoken *falso & malitiose*; the Jury find the words spoken *falso & injuriose*, and it was adjudged that the Action would not lie, because the finding of the Jury doth not warrant the Declaration in the substantial form of it. *Trin. 7 Car. B. R.*

Burgis brought an Action for these words, *Burgis* is a maintainer of Thieves, and a strong Thief himself: Issue was joined whether the Defendant spake the words *modo & forma*, and the Jury found all the words except the word [strong] and in this Case the Plaintiff had Judgment, 6 E. 6. *Dyer* f. 75. 21. Here we may observe, that though every word alleged in the Declaration be not found, yet the essential and substantial form of the words being found, that is sufficient to maintain the Declaration. This, I say, you may observe, not only by this Case, but the Cases also before put.

Barber brought an Action against *Hawley* for these words, *John Barber and his children be false Thieves, men cannot have their Cattell going upon the Common, but they will kill them and eat them, &c.* Issue was joined whether the Defendant spake the words *modo & forma*, and the Jury found that he spake these words, *viz. Men cannot have their Cattell going upon the Common, but John Barber and his children will kill them with Barbers dogs*; in this Case it was adjudged for the Defendant.

The Action is brought for saying, *I know him to be a Thief*; and the Defendant pleaded other words *absque hoc*, and the Jury find he say, *I think him to be a Thief*; this is not sufficient. See *Hob. Rep. pl. 213.*

If one say to another of a woman passing by, *She is a Witch, and hath bewitched my child* [innuendo the Plaintiff] and Verdict is given for the Plaintiff, now it is out of question. *Vasch. 18 Jac. B. R. Roberts Case.*

If the Declaration say, that the Defendant spake of the Plaintiff these words, *Eyres* [innuendo the Plaintiff] is a Thief, and Verdict be given hereupon for the Plaintiff, this is good and made certain. *Eyres Case, adjudged M. 7 Jac. B. R.*

If one bring this Action for divers words, whereof some are, and some are not actionable, and the Jury assents damages for all together, this is Error and cause to arrest the Judgment. But if it appear they do distinguish them, then it is well, 25 *Eliz. B. R.* Out of all this take notice, it is good policie, when one lays his Action for words, to suppose the Action for divers slanders, as for words spoken at several times and several ways; that in one of the Charges the Plaintiff may be sure to hit the very words, or the substance thereof.

St. B. 16.

Of an Action of the Case upon an Assumpsit.

AN *Assumpsit* is nothing but a voluntary promise made by word of mouth only, *Assumpsit, what* by which a man doth assume or take upon him to do or pay any thing to another: *New Terms of the Law.* *it is.*

If it be in Writing and by a Deed, it is of another consideration; we meddle not with this. But an *Assumpsit* seemeth to differ from an Agreement, but as the *Genus* and *Species*: For an *Assumpsit* is but a special kind of agreement, and every Executory Contract hath an *Assumpsit* in it, *Co. 4. 44.*

There are two considerable parts of it; the Consideration of the *Assumpsit*, and the *Assumpsit* or Promise it self.

This Action of the Case upon an *Assumpsit* (as the Contract) is either express, as when one for good cause doth promise that himself or some other shall pay money, make a House, seal a Bond, make a Lease, or the like: Or implied, and supplied by the

the Law, as in every Executory contract there is an *Assumpsit* implied: *Co.* 3. 19. 4. 94. 49. *Plow.* 308.

They that are exprefs, are also absolute or conditional: And these are also some of them, such as have a consideration called *Quid pro quo* in them; and some of them are without consideration called a bare or naked promise, which is where a man bargaineth or selleth his lands or goods, or promiseth to give one money or a horse to build a house, or do any thing by a day, and there is no recompence appointed to him for the doing thereof; this is void, and no Action lieth for the not doing thereof; for the rule is, *Ex nudo pacto non oritur actio*. Also these *Assumpsits* are either Real, or Personal.

Every Promise must have a Consideration; and that must be of some benefit to him that makes it, or disadvantage to him to whom it is made. *March.* 202. *pl.* 143.

What shall be
said a good
implied *Assumpsit*, or *Assumpsit* in Law,
upon which an
Action will
lie, or not.

If I intreat one to be bound for me, there is in this an implicate *Assumpsit* that I shall save him harmless; and upon this if he be molested, he may have this Action. 2 *Car. per Just.* Richardson at Northampton-Assizes; for the *Assumpsit* is implied.

If any goods besides money be delivered to one to deliver over to another, or to the use of another, or to be employed to any other purpose, or on condition that if he do such a thing, he shall keep them; in all these and such like cases, some think there is an *Assumpsit* implied, upon which this Action will lie in case of breach of the trust. *Dyer* 21, 22, &c.

If I bid one do work for me, and do not promise any thing, the Law makes it, and he must say it was worth so much, and that which he deserves is recoverable in this Action. *Trin.* 8 *Car.*

Every Executory Contract doth imply an *Assumpsit*: So every Debt that is not upon a Specialty (or for Rent upon a Lease) but which may be turned into Damage, as upon an Account, or upon a Buying or an Agreement, hath an implied Promise, and the Plaintiff may say that the Defendant did promise to pay it, and make the Debt the Consideration. See divers Cases *infra*.

An Executor cannot be charged in account for any Receipt or Occupation by the deceased, nor in debt upon the Contract of the deceased; but an action of the Case it is thought will lie in the first, and it is clear will lie in the last Case, upon the implicate Contract. *Co.* 4. 8. 94. 133. As if one receive my money to account, and he and I cast it up and agree in certain what is due, and then he die; in this case it seems I may have this Action against the Executor or Administrator, albeit I cannot have an Account. *Hil.* 13 *Jac. per Ch. Justice*.

A bare submission to an Award without any exprefs promise, is sufficient to yield this Action upon the *Assumpsit* in Law. Adjudged. *Neals Case*, *M.* 37, 38 *Eliz. B.R.* and in *Trin.* 18 *Jac. B.R.* *Brooms Case*. And so in divers other Cases.

What shall be
said a good
exprefs *Assumpsit*, on which
this Action
will lie, or not.
For the man-
ner.

Sell. 17.
Matter.
Assumpsit im-
perfect.

As touching this point, the manner and the matter is considerable. As to the manner, it matters not in what form of words the *Assumpsit* is made, so the sense be clear; and therefore if one promise me twenty pounds when I have done a work, or to do a work, or if I do a work, or so as I do a work, all these are good *Assumpsits*, *Plow.* 5. 305. So if one promise me twenty pounds, if I marry his daughter, or with the marriage of his daughter, these are good, *Plow.* 305. Or if you will satisfie me, I will do such a work.

As to the matter, it is considerable together, or apart. Together; and as to this, this must be known. 1. That the whole agreement must be consummate. If *A.* and *B.* agree, that *A.* shall lend *B.* twenty pounds for a time, and for this that *B.* shall mortgage to *A.* such Land upon request; and after *A.* upon request of *B.* deliver wares to *C.* for part of this twenty pounds, and hereupon *B.* doth promise to accept it for part of the mony, or to redeliver it to *A.* upon request, this Contract is perfect and good to give action, *Old book of Entries*, f. 4. So if *A.* owe *B.* one hundred pounds, and *C.* being a Clothworker to *A.* having clothes of his in his house, and they three agree that *B.* shall have these clothes for his money, and that *C.* shall deliver them,
this

this is good, and sufficient. *Adjudged.* So one possessed of a Field of Corn, agreeth with another, that he shall have all the Corn there for Twenty pounds, to be paid him at *Michaelmas* next, *Co. 4. 92.* But if the agreement be onely in inchoation and not perfect, no action will lie upon it. And therefore if two speak together about an agreement, and they in the midst of their discourse break off, and say they will talk further of it to morrow, no Action can be brought upon any of the conference of this day. See *Contract, chap. 15. sect. 4.*

If two be in Speech about marriage between their Children, and one say to the other, I intend to give my daughter One hundred pounds to him that shall marry her with my consent, this is imperfect. 2. It must be sensible and certain.

If an agreement be between me and another, that for Ten pounds paid he shall give me a Horse, or a Watch such a day; this is good and certain enough, *Fitz. Debit. 89.* So if the agreement be that he for good cause shall make good such a house, this is good, and shall be taken for repair of it, *M. 2 Jac. B. R.* So if the agreement be about a horse for Twenty shillings in hand, and Ten pounds more to be paid at the death or marriage of the buyer, for which he shall become bound with sufficient surety by their writing obligatory, that for this, the seller will deliver the horse upon request; this is certain enough and good, *Hob. Rep. pl. 79.* But if the agreement be such as cannot be made certain and sensible, it is void. And therefore if the agreement be, to save harmless, and not for what, or against whom, this is void. So if it be agreed between *A.* and *B.* that *A.* shall keep *B.* without damage against *J. S.* for ten pounds, in which the Obligee is bound to the Obligor; or, if the Assumpsit be, that *A.* shall pay to *B.* his part of the sum of moneys that shall be levied for the trying of the customs of *M.* these are all insensible and void, on which no Action will lie. See *Co. 1c. 102. 76. Dyer 356.* 3. It must agree. If one in consideration that I have given and delivered to him one horse, and have promised unto him, that upon twenty pounds paid to me, I will deliver him such an Indenture, and he assume to pay me this twenty pound at *Michaelmas*; this is not repugnant, but good to give Action for the Twenty pound at *Michaelmas*, if not paid, *Co. 5. 37.* But if the agreement be repugnant and contrary to it self, it is void. If it be agreed between *A.* and *B.* that *A.* shall do such a work, and *B.* shall give so much for it, but *A.* shall not sue for the money: this is void, and will not binde on either side before the work be done. But after the work is done, it may perhaps bear an Action, *Queres, 7 H. 6. 44. 21 H. 7. 24. 3.*

Assumpsit insensible and uncertain.

Assumpsit repugnant.

In the matter considerable apart, there are three things to be considered. 1. The persons to the Assumpsit, and for or against whom this action doth lie. 2. The cause or consideration of it. 3. The promise it self.

As touching the persons to the Assumpsit, these things are to be known. 1. The persons that do promise, must be able in Law to Contract; otherwise the promise will not binde; and therefore regularly the Assumpsits of Infants, Women that have Husbands, and such like, do not binde; yet generally promises made to them are good. But see how and more of this point in Contract before. 2. A promise to the Wife is all one as if it were to the Husband; and therefore, if one say to my Wife, that if I will let *A.* out of prison, being there in execution for a debt owing to me, that if the prisoner pay it not to me by such a day, he will pay it; in this Case I alone without my Wife may sue him, *27 H. 8. 24. 3.* If a promise be made to my Servant to my use, I may have an Action upon it, and suppose it to be made to my self, *M. 36, 37 Eliz. B. R. Jordans Case.* But of this, and of Contracts made by, or with Servants, for their Masters, enough already hath been spoken. But otherwise it is of Contracts made with a Stranger to my use; and therefore if there be Mother, Son, or Daughter, and the Mother having a Joynture on her Sons Land, the Son in consideration that his Mother doth surrender, doth assume with her to pay the Daughter One hundred pounds at a day; in this Case the Daughter (at least in a Court of Law) cannot sue for this Hundred pound, but the Mother must sue for it. And yet it is thought the Daughter may sue in a Court of Equity for it, *Adjudged. Trin. 18 Jac. B. R.* If one in consideration that I have paid him Ten pounds, assume to a stranger to assure me an Acre of Land, no Action will lie for me at Common Law

In respect of the persons to the contract. Women covert. Infant. Non compos mentis.

Servant.

Stranger.

Executor.

upon this. But in a Court of Equity, happily I may have relief, *Jolleys Case*. *Pasche*, 9 Jac. B. R. by three Judges. 4. This Action lieth for an Executor or Administrator, upon a promise to the deceased. And if a man promise to pay money, or to pay that which is in the nature of a debt, or where the ground is a true debt, and he die before it be done, the Executor or Administrator shall be charged with it. *Hob. Rep. pl. 278. Co. 9. 68. Plow. 182.* But otherwise it is when it is to do some Collateral thing, as to build a house, or the like, or when it is to pay money in consideration of some Collateral thing, as in consideration of the enlargement of a man out of prison, or the like. And upon this difference it hath been oft adjudged, *Trin. 3 Jac. B. R.* yet see *Co. 10. 77.* That for the Assumpsit of the Testator to pay a debt or perform a duty, an Action of the Case lieth against the Executors, *New Book of Entries, f. 1, 2.* 5. If an Assumpsit be made by two or more, they must be sued together, and one of them cannot be sued alone, as long as the rest live. But if one of them die, the rest may be sued alone, *M. 7 Jac. B. R. Curia.*

Assumpsit by two or more to a person in certain.

If another and I be speaking about marriage between his Daughter and my Son, and in conference I use these words, *That I shall give him One hundred pounds that shall marry my Daughter with my consent*: No Action will lie upon this, though he do after marry my Daughter with my consent, *Pasche*, 3 Jac. B. R. *Goldsmith ver. Weston.*

In respect of the cause or consideration.

To make the cause or consideration of an Assumpsit good, it must have all these qualities. 1. It must be valuable, that is, it must import some gain to him that makes the promise, or (at the least) some loss to him to whom it is made, or both. But the proportion of the value is not considerable; for a penny, or pint of Wine, will as much engage a promise of One hundred pound, as more. *Hob. Rep. pl. 6, 7. Trin. 7 Jac. B. R. Friends Case. Co. 10. 102: 76.* But in that Case the Jury will probably give damage accordingly, as the cause is. And the Law is all one in this, when the Contract is in a writing, ora writing sealed and not delivered. But if it be in a writing sealed and delivered as a Bond or Bill, there the consideration is not at all material. *Fitz. Debt. 126. Broo. Action of the Case, 40.* But if there be two parts of the consideration, and one part is valuable, and the other not, it is good. But in a Non-Assumpsit both parts must be proved, or the Action will fail, *M. 4 Jac. B. R. Lees Case*; but care must be had in giving of damages, See *Brownl. 2. part. 274.*

S. B. 18.

If A. delivered to B. the eighth of May, One hundred French Crowns, and delivered also as many the ninth of May, and B. in consideration thereof did then and there assume to deliver six shillings in silver for every Crown upon a Non-Assumpsit, verdict for the Plaintiff, and entire damages, the Judgment was reversed; for the Assumpsit goeth onely to that which was last delivered. *M. 42, 43 Eliz. Pilsworth and Seals Case.*

2. The consideration must be lawful, for if the consideration moving the promise, be either *Malum in se*, or, *malum prohibitum*, it is void. And yet if part of the promise be lawful, and part unlawful, there it may be good. *Dyer 359. Co. 30. 102.*

3. If the consideration be Executory, there it must be duly performed, 9 H. 7. 13. otherwise the action will not lie. And therefore if one promise to me, so I will help him to gather his Tithe-Hay and Corn, he will pay me Ten pounds: If I help him to gather his Hay onely, I cannot recover the Ten pounds, *M. 7 Jac. B. R. 8 H. 7. 13. See Brownl. 1. part. 8. 2. part. 137, 138, 279.*

All these things are valuable and good considerations, money paid, or any valuable thing done, paid, or delivered to suffer a Tenant at will to hold the Land longer, *M. 9 Jac. B. R. Coventrias Case. Loan of money, New Book of Entries, f. 1, 2.* To marry ones childe or friend, *New Book of Entries, f. 2.* To Ear Land, Solicite Suits, to deliver one in prison on an Execution for debt, out of prison; to forbear a Suit for a certain time, to make, or give up, or release an estate or interest into Land, *Plow. 20. Keth. 69. 77.* To stand to an Award to be made, not to trouble a man upon a Judgment I have against him, *Hofebours Case*; to become bound as a surety with another, *M. 9 Jac. B. R.* to keep goods safe committed to him, *Old Book of Entries, f. 9.* To marry my Daughter or Kinswoman, or (as it seems) any other at the request of him that makes the promise. To make an Obligation; and finally, any thing which

which for the matter of it may be good in a Promise, may be good in a Consideration. See for these things more, *Brownl. 1 par. 41. 2 par. 274, 279.*

In consideration that a stranger shall surrender a Lease to me at the request of the Plaintiff, and that the Plaintiff shall cancel an Indenture, is a good consideration, if it be done to produce an Action, *Pasch. 9 Jac. B.R. Collins Case.*

If *A.* be indebted to me, and for payment thereof deliver me goods, and *C.* in consideration that I will deliver him the goods, doth promise to pay me the money, this is a good promise. *Brownl. 1 part, 3.*

Tenant at will of Land sowed surrendreth to him in Reversion, and for this he promiseth; it seems this is no good consideration: but if he be a Tenant for any Term of years, it is otherwise. *Brownl. 1 par. 6.*

If *A.* owe to *B.* fourscore pounds, and *A.* in consideration that I will be bound with him for the money to *B.* promise to enter into a Bond of one hundred pounds to me, and I become bound with him, this is a good consideration to give an action upon his breach of promise. *Adjudg. M. 9 Jac. B.R. Knevatts Case.* So also a promise to do any such thing, may be a good consideration of another promise; for one promise may be a good consideration of another promise, if they be made together at one time, for otherwise they are both void. *Hob. Rep. 16. 116. M. 2 Jac. Co. B. Somes Case, and M. 4 Jac. B.R. Cadels Case. Brownl. 1 par. 10.*

If one for forty shillings paid, assume to deliver me forty quarters of corn at such a time and place for ten pounds to be then paid, this is good; and if I bring the money at the time and place, I may sue for the corn; if he bring the corn, he may sue for the money. *Plow. 182. Co. 4. 91.* Goods, or a promise of goods may be a good consideration for goods, or a promise for goods, as well as money. *Fitz. Debs. 68.* But if there be none of this in the Case, it is but *Nudum pactum ex quo non oritur actio.* One doth promise me in consideration that I will not enter a Caveat against the Probate of the Will of *I.S.* that he will pay me ten pounds, this is a good consideration, whether I have any cause to do so or not. *Adjudged in the Exchequer-Chamber.*

If *A.* and *B.* be bound in a Bond jointly and severally to pay money, and in truth *A.* is principal, and *A.* saith to *B.* Pay the money to the Obligee, and I will repay you; this is a good promise, and if *B.* do pay it, he may recover it again by this action. *Adjudg. 9 Car. B.R.*

If I have a Judgment against a man for twenty pounds, and I promise him that if he will pay me the money, I will give him five pounds, this is a good consideration to bind the promise; for it will cost me charge and pains to recover it. *Trin. 38. Eliz. Dixon versus Adams.* So if one take away my goods wrongfully, and I promise him, so he will let me have mine own goods, to give him ten pounds. *Adjudg. Pool & Clifsons Case, temp. Car. R.*

If one say to me, that if I will depose before the Maior of *A.* the truth of that which I do affirm, he will pay me twenty pounds, this is good; and if I do voluntarily depose it before the Maior, I may recover the money by this action. *Hil. 38 El. Co. B.*

If *A.* owe to *B.* twenty pounds, and *C.* say to *A.* Pay him his twenty pounds, and I will pay it to you again; this is a good consideration to make good the promise. *Adjudg. M. 7 Car. B.R.*

If one have a Judgment against me for one hundred pounds, and he promise me, so I will pay him fifty pounds, he will acknowledg satisfaction or release the execution of the hundred pounds by a day; this is a good consideration to give an Action, if it be not done. *Adjudg. Cook & Harvies Case, and M. 38 Eliz. Co. B. Reynolds & Pynhams Case.*

If one have goods delivered to him in pawn, and another desire him to deliver the goods pawned to him, and he will pay him the debt for which they were pawned, this is a good consideration; and the certainty of the goods need not be shewed in the count, as in case where goods are demanded or damage for them. *Brownl. 2 part, 274.* So a consideration to go to *Westminster*, to cure a poor man, or marry a poor woman, are good considerations.

If I be bound in a Bond of 20^l. to pay 10^l. by a day, and fail at the day, and after the Obligee bid me pay twelve pounds to *I. S.* and he will deliver me up the Bond by a day,

day, this is good to give an Action if he do not deliver it. *Harveys Case*, 4 Jac.

If one that hath my Goods, promise me, so that I will let him have them for a moneth, that he will deliver them to me; this is a good consideration to uphold an Action against him, if he do not deliver them, *Pasche*, 37 Eliz. Co. B.R. *May vers. Alvers*.

These also are good considerations, That upon account between them, the Defendant was found so much in debt to the Plaintiff, *Hob. Rep. pl. 117*. So that he was in debt to him, and in consideration of forbearance promised to pay it, *Co. 10. 77*.

The Plaintiff declared, That the Defendant in an Account between them, was found in arrearages; and in consideration that the Plaintiff would defer the day of the payment of his debt, for a little time, he did assume to pay it; it was judged good, *Goldsb. 48. pl. 6*.

An Action was brought by *Richard Body* against *A.* and declared, That whereas *K. Rawly* was indebted to *Body*, and the said *A.* indebted to *R.* in Fifty pound, in consideration that the said *K. R. allocavit eidem A.* Fourteen pound, & *promissit ei ad exonerandum eundem A.* Fourteen pound, *puncel. predict.* Fifty pound; the Defendant did assume to pay the Fourteen pound. It was adjudged a good consideration, *Goldsb. 49. pl. 8*.

If the Executor or Administrator of one that did ow me money, in consideration thereof, and that he hath assets in his hands, assume to pay me such a day; this is a good consideration to make the promise actionable, especially if I give any time for it. But if there were no debt originally due, or no assets in their hands to pay it, some say no Action will lie, *Co. 9. 93, 94*. But Justice *Hutton* at *Sarum Assizes*, 21 Jac. held the Action will lie, though there be no assets, and without giving time; and so was it held in *Barns Case*, *Pasche*, 9 Jac. B. R. *per cur.*

If an Executor ow me Five pounds for the Testator, and buy of me Six Barrells of Beer, and in consideration hereof, promise to pay me for both; this is a good consideration for both, to charge him *De bonis propriis*, *Trin. 37 Eliz. Co. B. R. Wheelers Case*.

If *A.* ow *B.* One hundred pounds, and *C.* being a Clothworker to *A.* have clothes of his in his house, and they three agree that *B.* shall have these clothes for his money, and *C.* promise to deliver them; this is a good consideration to binde *C.* to deliver them, for hereby he shall be discharged against *A.* adjudged. *Trin. 2 Jac. B. R. Warder versus Chapman*.

If I demand Ten pounds of another, and he promise me, that if I can prove it to be a true debt, he will pay me; if I prove it as I may in the same Suit for it; this will be a good consideration, adjudged. *M. 18 Jac. Stat. vers. Mary, Co. 11. 59. 10 Ed. 4. 11*.

If a Scrivener promise me in consideration, that I will let him have the putting out of my money, that he will take good security for it; this is a good consideration, and makes a good Assumpsit, *M. 7 Jac. B. R. Kellingworths Case*.

If I deliver one Ten pounds to redeliver to me again, and he do not so, it seems I cannot have this Action for my relief, but I may have an Action of Account; but if there be a promise to redeliver it, perhaps this Action will lie, *Hil. 37 Eliz. Co. B. R. Howdells Case*.

If one in consideration of a Lease for years made by me, promise to pay me a sum of money; for this money I may have this action. But if for this he promise to pay me a yearly rent during the Lease, it seems I cannot have an Action of the Case, but my proper remedy is an Action of Debt, *Lis. Brook, Sect. 452. Fitz. Debt. 129. Morgans Case, M. 18 Jac. B. R.* And yet if I promise another the Herbage of my Ground for a year, and he promise me Twenty shillings for it, either of us may have this Action against the other, adjudged, *M. 17 Jac. B. R. Sir George Marshalls Case*.

If one promise me in consideration, he is indebted to me, so much rent reserved on a Lease for Land, that he will pay me by a day; this is not a good consideration; other-

otherwise it is if it be for herbage, or for the forbearance of a Rent reserved on a Lease of Land, 14 *Jac. B.R.* Sir George *Marshall's* Case, adjudged, *Hill. 9 Car. B.R.* *Bret and Heath's* Case.

If one in consideration of Land sold to him by me, promise me Twenty pounds at a day certain : or I sell my Land for Twenty pounds to be paid me on a day certain ; in these cases I may have this Action for the money, though the Land be not assured ; for he may compel me in Chancery to assure it, 3 *H. 7. 14.* 2 *H. 7. 12.*

If I promise in consideration of a surrender to be made to me of such Land to pay Ten pounds, and a surrender is made, but it is not a good surrender in Law ; this is no good consideration to raise the Action, *Hill. 37 Eliz. B. R. Sleight vers. Bateman.*

If I buy Land, Trees, or Corn of a man for money, and he promise to make my assurance, or deliver the Trees or Corn by a day, and do not, or sell it to another, I may have this Action, 21 *H. 7. 41.* *Dyer. 22. Co. 10. 130. Old Book of Entries, 6.*

If I be seised of Copyhold Land in Fee, and am in debt to *J. S.* One hundred pounds, and lying very sick, I make *W. L.* my Executor, and declaring my minde to be to surrender it to the use of my Executor, to enable him the better to pay the debt, and *L. S.* (heir to the Copyhold) perswades me not to surrender, but to let the Land descend to him, and he assume to pay the Hundred pound to *J. S.* This is a good consideration to give this Action to the Executor, *Hil. 9 Jac. Grayer's* Case.

If I promise to one in consideration, he will be bound for my Friend, I will save him harmless ; this is a good consideration to give an Action, *M. 9 Jac. B. R. Somershal's* Case.

If I promise to one in consideration, he will lay down his own money to pay for cloth bought by *J. S.* for me, that I will pay it him again ; this is good, *Trin. 9 Jac. B. R. Moors's* Case.

If one in consideration of a Pint of Wine promise to assure me Land by a day, and do not ; this is a good consideration to give this Action upon the Assumpsit, adjudged, *Friends's* Case. *Trin. 7 Jac. B. R.*

If I request one to sollicite a business for me, and after he hath done, promise him Ten pounds for it ; this is a good promise, and not naked : For the request, and the merits are joyned together ; but if it be a meer voluntary courtesie, it is otherwise, *Hob. Rep. pl. 128. 72. Dyer. 355.* And it hath been said to be adjudged to lie in this Case, when I do request *B.* to bail my servant, and after I say to him, In consideration that you have at my request bailed my servant, I will pay you Ten pounds such a day ; that this is good. See *Brownl. 1. part. 7. 8. 73:*

If one be about to buy goods or borrow money of me, and another before the sale or loan, tell me, That if the buyer or borrower pay not, he will ; or if he bid me deliver the things, and if the buyer pay me not, he will pay me on request ; these are good considerations. But otherwise it is when the promise comes after the borrowing or buying, 12 *H. 8. 12. 44 Edw. 3. 21.* But here must be a Demand before the Suit begin.

But if I promise to another Twenty pounds, because he is my Kinsman or acquaintance ; this is not good, it is but *Nudum pactum* onely, *Plow 309. 302.*

If one on the Eighth of *May* deliver me Ten pounds, and I do the Ninth of *May*, promise him in consideration hereof to repay the Ten pounds ; this is no good consideration. But if it were at the same time, it were good, *M. 42. 43 Eliz. Piffworth's* Case. So if I sell one all my Lands or Goods, and nothing appointed by the agreement what I shall have for it ; it is good, and I shall have the worth of it.

If one buy a horse or some other thing of me for money, and no money is paid, nor earnest given, nor day set for payment, nor the thing delivered ; in these Cases no Action will lie for the money, or the thing sold, but I may sell it to another ; it is *Nudum pactum*, *Plow 309. 302.* So if I promise to pay one money, to give him a horse, build a house, or the like ; and nothing, and no recompence appointed to me for doing it ; these are void promises, upon which no Action will lie.

If I promise in consideration of something past, as because he hath builded a house, quitted me a Trespass, or hath let my friend have Wares, that I will pay him money,

SeB. 19.

Demand.

Nudum pactum.

money, or do any thing else; this is *Nudum pactum*, *Plow* 5. 302. yet see *Brownl.* 8. 9. So if I say to another to whom *J. S.* doth ow money, If he do not pay you, I will pay you; this is *Nudum pactum*, *Do. & St.* 105, 12 *H.* 8. 12. *Dyer.* 21. 27. This hath been often adjudged. So if one promise me, if I will deliver him One hundred Crowns, he will deliver them to me again. But if he do deliver me Twenty Crowns, and in consideration thereof, I did at the time promise to redeliver them; this is a good promise, adjudged.

If I without other cause promise to give one Twenty pounds towards his losses by fire, or to build his house anew: These Assumpsits are not good to give an Action, 17 *Ed.* 4. 4. *Plow.* 308. So if *J. S.* ow me money, and another say, That he will be my pay-master, and pray me to take him debtor for it; this is not good. *Fitz. Debr.* 126. If one promise me Twenty pounds, because I have built him an house, or, if one ow me Twenty pounds, and another come to me, and pray me to take him debtor for it; or, if he say, if the other do not pay it at *Michaelmas*, he will: These are not good considerations to raise Actions, 9 *Edw.* 5. 14. 44 *Edw.* 3. 21.

If I promise to one so [*or, if*] he will marry my Daughter, [*Kinswoman, or Servant*] that I will give him [*or pay him*] Twenty pounds, or if I promise twenty pounds with my Daughter in marriage; in all these Cases the party may have this Action for this money, *Plow* 30. *Fitz. prohib.* 3. *Do. & St.* 104. So also it is said, That if one promise me One hundred pounds in consideration that I have married his Kinswoman; that this is good to give an Action, because the consideration doth continue, *M.* 8 *Car. B. R. per curiam*, and in *M.* 4 *Car. B. R.* it is said to be so adjudged. But against this it is said to be adjudged in the Exchequer Chamber *inter Sandil & Jenny*, That if I entreat one to marry my Daughter, and after the marriage, say, That in consideration he hath at my request married my Daughter, that I will pay him Ten pounds such a day, this Action will not lie; yet the former Judgment seems most to agree with the Cases before, and with Reason. So if I promise to a Woman, that if she will marry with my Son, I will give her to her marriage, the one half of all my goods; this is good and actionable. See *Brownl.* 1. part. 18.

If a Bail pay the debt, and hereupon the Plaintiff promise to deliver to him the principal Obligation, and a Letter of Attorney to sue the principal; this is no good consideration to raise an Action, adjudged in the Exchequer Chamber, 38, 39 *Eliz.* *Dixon vers. Adams.*

If I promise to a Woman, having a Husband who hath a Daughter and Heir to Land, That if she will give her consent I shall have her Daughter, I will pay her Ten pounds: This is a good consideration, adjudged. *Hob. Rep. pl. o.*

If I promise Twenty pounds to a man in consideration he will not beat me: This is no good consideration to make the Assumpsit Actionable, 21 *Jac.*

One did declare, that in consideration that he had sold a horse to him, that he would pay him Five pounds, it is said to be adjudged in the Exchequer Chamber good, albeit it had implied time past, *Pasche*, 8 *Jac. Co. B. R. Mary Andrews Case.*

If the Obligor pay the money to the Obligee after the day, and thereupon the Obligee promise to deliver the Bond, and do not, no Action will lie; for the consideration is not good, nor hath the Obligor any remedy but in a Court of Equity,

Forbearance.

If *A.* ow to me Ten bushels of Corn, and deliver them to *B.* to deliver to me, and *B.* pray me to forbear it till *Michaelmas*, and he will pay me the Corn, or the worth of it; this is a good consideration and Assumpsit, *M.* 18 *Jac. B. R. Jacksons Case.*

If I be in debt to *J. S.* and I deliver goods to *B.* to pay the debt to *J. S.* and *J. S.* require the debt of *B.* who doth desire him to forbear it three weeks, and he will pay him: this is a good Assumpsit to give an Action. *Williams Case. M.* 7 *Jac. B. R.* But he shall recover damage onely for Forbearance; for the debt is recoverable still as it was before, *M.* 4 *Jac. Lees Case, B. R.*

If *A.* and *B.* be bound jointly and severally to *C.* who releaseth to *A.* and after *B.* and *C.* being talking together of the debt, *B.* in consideration that *C.* would forbear him

him till such a day promised to pay it; this is no good promise, for by the Release to one the other is discharged, and the debt gone, no good consideration therefore. *March. 201. pl. 243.*

If I have a Writ against *J. S.* and *J. S.* knowing of it doth pray me to forbear to go any further on that Writ, and he will pay me twenty pounds; this is a good consideration, *Hob. Rep. pl. 278.* and he need not shew any cause of the first action. But if the consideration be to forbear, and say not how long this is no good consideration, *Tardlies Case, Hob. Rep. pl. 287.* But if one owe me money, and he himself or another on his behalf promise me that so I will forbear him [or not sue him] till such a day, or not go forwards in my suit begun against him till such a day, that he will pay me; this is a good consideration to give an Action. *Co. 9. 9. 94. New Book of Entries, f. 8. 10. 47. Sir Moyl Finch's Case, M. 4 Jac. B. R.* But if *re vera* no debt were originally due, some doubt whether the Action will lie or not: And so if the Promise were by an Executor that hath no Assets in his hands. *Co. 9. 9. 94.*

If one owe money to me, and he promise me that in consideration that I will agree to give further day for the money he owes me for six moneths, he will secure it to me; this is no good consideration; for he may agree to give day, and sue after. *M. 7 Jac. B. R.*

If one be bound by obligation to me to pay *J. S.* money on such a day, and the Obligor promise *J. S.* that if he will forbear him till such a day, he will then pay it, this is no good consideration, for *J. S.* had not cause of suit, *per Justice Bridgman.* So if an Infant buy wares or other unnecessary apparel, and when he comes to full age in consideration that he had a good bargain, he doth promise if the other will forbear him a moneth, he will pay him; this is no good consideration. *Adjdg. 30 Eliz. Withipoles Case.*

If one promise to build me an house, make me an estate or any other thing, and there is nothing given or promised by me for it; this is no good *Assumpsit*, but a *Nudum pactum*. And where one doth promise to do a work by a day, and it is not agreed what he shall have for his pains, or when, or if it be agreed, no part of the money is paid; he cannot sue for the not doing of the work, nor the workman for his money till he have done the work. But if there be a mutual promise of work, and of recompence for the work, they may have mutual actions on both sides, *3 H. 6. 36. Dyer 21. Plow. 5.*

If I promise money to a Physician to cure another poor man, or to a Labourer to mend a high way, these are good considerations in *Assumpsit* on which this Action will lie in respect of the nature of the works. *Do. & St. 105. Plow. 35: 17 Ed. 4: 5: Hob. Rep. pl. 278.* and if the day of payment be come, they may sue for it before the work be done.

If a Prisoner promise the Sheriff in consideration he will let him escape, he will save him harmless, or pay him ten pounds, the consideration is naught, and the promise void: So if one promise me ten pounds if I will maintain him in such a suit, this is naught, *Co. 10. 76. 102. Dyer 356* But if one be in debt to me, and deliver me goods in pledg for the debt, and a stranger promise to pay me the debt if I will deliver the pledg; this is a lawful and good consideration. *Levitts Case, adjudged.*

If one promise to me in consideration I will seal a Release to *J. S.* he will pay me ten pounds, and after at his request I seal it to *J. D.* in this case I cannot bring this Action for the money, because I have not pursued the consideration. *Trin. 4 Jac. B. R. Cranfield vers. Green.*

To make the promise or *Assumpsit* it self good, it must have all these qualities.

1. The thing promised must be such a thing as is lawful: For if the thing promised be that which is either evil in it self, as to kill a man, or a prohibited evil, as to forestal Corn, or the like, it is no good *Assumpsit*, let the consideration be never so good. *Dyer 356. Co. 10. 102.*

2. The thing promised must be possible to be done; for if one promise to do a thing impossible, as to go to *Rome* within three days, or the like, this is not good.

3. There

3. There must be certainty in it; for if a promise be of a thing altogether uncertain, it is altogether void.

4. It must be serious and weighty; for if it be frivolous and idle, it is void.

A promise to do any lawful thing, as to deliver or to give Corn or other goods, *Plow. 182. Fitz. det. 68.* To ear Land, make a house, make or release an estate in land, *Plow. 308. Kelm. 69. 77. Finches ley 49.* To save a man harmless from a Bond entred into, or the like engagement, *M. 9 Jac. B.R.* To stand to an award, *Ca. 5. 78.* To keep goods safe, *Old B. of Entries, f. 4.* That goods shall come safe to Dale, *Co. 6. 47.* From the Lessor to the Lessee at will of a house, not to out him, but to suffer him to enjoy it till such a time. From a Creditor that hath a Judgment for his money, that upon payment thereof he will acknowledg satisfaction, or deliver up the Bond, *Trin. 38 Eliz. B.R.* To marry a daughter or kinswoman. To pay an Annuity of ten pounds a year for life, *Pasc. 9 Jac. B.R. Collins Case.* Not to molest one upon a Judgment, *M. 9 Jac. B.R.* To save the Lessor harmless and without loss by reason of his inhabitation in his house, *M. 9 Jac. B.R.* That an Attorney shall retain a Rent he is to pay to his Client for Fees due from his Client to him, *M. 9 Jac. B.R. Jarvis Case.* To deliver up a Bond to stand to the award of l. s. or pay twenty pounds, *New B. of Entries, f. 3.* And finally, whatsoever (for the matter of it) is good in the consideration, will be good in the promise.

If one lay his Action in consideration of ten pounds lent by him to the Defendant, that he assumed to pay the same to the Plaintiff; this is good. *Brownl. 2 part, 40.*

If one having made me a Lease for years, assume that I shall quietly hold it without the let of any person whatsoever, this is a good promise; and disturbance with or without Title, is a breach of it to give Action. *Dyer 328.*

If one in consideration that I will be bound for his appearance, he being arrested on a Recognizance, promise me to appear at the day, and do not, I may have this Action against him, *Adjudge. Trin. 9 Jac. B. R. Rolls Case.* And it will not excuse him that a *Certiorari* came to remove the Record; for I must appear notwithstanding.

If one sell me Land for money, and promise to make me an Assurance of it, or put me in possession of it, upon request, by a day, and do not, I may have this Action, *Old B. of Entries, f. 5.* and recover damages. And if I will, I may waive this, and compel him to make me an Assurance of the Land in Chancery, per three Justices. *Pasc. 9 Jac. B. R. Jolleys Case.*

If one sell me a horse for ten pounds, on condition that I pay him this ten pounds in corn; in this case I must pay him in corn, or he may for his remedy have this Action. *Fitz. Det. 68.*

If one be arrested at my suit for a debt, and make an obligation for the money to pay it at a day to come, but do not deliver, but in consideration of his enlargement promise to seal it upon request; this is good to produce an Action. *Pasc. 9 Jac. B. R. Bassets Case.*

To save harmless.

If one in consideration I will be bound for him promise to save me harmless, this is a good Assumpsit; and if I be any way troubled, I may sue him upon it by this Action, *Somerton's Case.* So for any thing else that I do at his request, *Boynston versus Vaughan, P. 19 Jac. B. R. Old book of Entries, f. 111.*

If A. promise K. a woman, that if she marry his kinsman and outlive him, that A. will pay her twenty pounds, and she do so, this Action will lie. *Hob. Rep. pl. 179.*

If one promise for good consideration to pay me Ten pounds, or give me a ground such a day, this is certain enough and good; and if one of them be not done at the day, this Action lieth; and before the day, he that is to do it hath the election; but after the day, he to whom it is to be done. *Fitz. Det. 89. 9 Ed. 4. 39.*

If a Chyrurgeon for good cause warrant or promise to cure a man, or warrant the cure, or a Farrier a horse, and do not the cure, though he be not negligent, this Action will lie against him: And if he undertake the cure only, and make no warranty, and be negligent, an Action of the Case lieth. *Plow. 305. Doff. & Stu. 105. 17 Ed. 4. 25. 5.*

If

If a Terre-tenant of Land promise to me in consideration, that I do assign to him a Statute I have chargeable upon his Land, by way of discharge, that he will pay me twenty pounds; this is a good consideration to produce this Action. But if the assignment of it were to be to a stranger by the consideration, *Contra*. Adjudged, *Pasche*, 38 *Eliz.* *Perrow. vers. Gray.*

If my debtor who hath Statutes from other men, deliver them to me towards my satisfaction, and die, and one that is neither his Executor or Administrator request me to deliver him the Statutes, and he will pay me the debts; this is consideration good enough, *Hob. Rep. pl. 7.*

If one promise to me in consideration that I will make him a Lease [generally] that he will pay me ten pounds, this is no good promise: For the consideration is void; for the Lease may be a Lease at will, and he may avoid it as soon as he makes it, *Pasche*, 39 *Eliz.* *C. B. Burkins Case*, adjudged. So if the consideration be to forbear a Suit, and say not how long. So if the consideration be to relinquish my Suit; for I may relinquish it, and begin it again presently, *Pasche*, 39 *Eliz.* in *Lurkins Case*.

Sett. 21.
Certainty.

If a promise be to pay money, and say not when, it is good enough, and must be paid presently. So if a promise be to make a Lease for years, and say not when it shall begin; this is good, and shall begin presently, *Co. 10. 76. 102.*

If one promise to make good a house; this is good, and shall be taken to repair it, *M. 21 Jac. B. R. Keyts Case*.

If one ow me money, and another for good cause promise to make it good to me, this is good, *M. 21 Jac. B. R. Keyts Case*.

If one promise me all that he can recover in such a suite, or upon a composition upon such a Bond, this is good, *Trin. 19 Jac. B. R. Morris Case*. And all these are certain enough. So if one promise to content me for my work, *M. 17 Jac. B. R. Griffins Case*. So if one promise to give me a childes part, this is good; or so much as he shall give with any child, this is good; for it may be made good by Averment. *Id certum est quod certum reddi potest*; for if he give one hundred pounds by his will to another child, I may recover one hundred pounds of his Executor. *Trin. 17 Jac. B. R. Bolles Case*.

If one ow me twenty pounds by Bill, and I promise, to deliver him the Bill, and he promise to bring me two sufficient Sureties, and give Bond for the money by a day, this is a good promise on both sides: For a promise is a good consideration of a promise. But if the promise be conditional, *contra. M. 38, 39 Eliz. Gowers Case*, adjudged. See *Brownl. 1. part. 11.* And therefore if the agreement between me, and *J. S.* be, that if he deliver twenty broad clothes, or if he make me an assurance of such a piece of Land, I will pay him one hundred pounds, in these Cases I cannot be sued for the money, till I have the things. So if I promise to make new pales, if I may have the old pales, 37 *H. 6. 42.* 27 *H. 8. 34.* *Perk. Sett. 713. Dyer. 76. 14 H. 8. 20.*

If a Lessee for years assign his Lease, on condition that the purchaser shall get the good will of the Lessor, and pay the Lessee so much as *J. S.* shall arbitrate; in this Case when he hath gotten his favor, and *J. S.* hath arbitrated, he may have this Action for the money, 14 *H. 8. 20.* *Brownl. 1. part. 14.*

If one in consideration that he doth ow me five pounds Rent, on a Lease of a Ground for a year, or a Bond, promise to pay it to me upon request, it seems this is not a good consideration, *Hob. Rep. pl. 305.* For it is real and certain, and I have debt for my Rent and Bond, and may not have two Remedies. And yet if one, in consideration he doth ow me five pounds on a Contract, promise to pay me such a day, this is good, adjudged. So if one indebted to me on a Bond, or for a Rent, promise in consideration of forbearance of the debt to pay it; in this case the promise may be good.

If one promise to pay, or do a thing which is unlawful, the Assumpsit is void. Against Law; And therefore if one promise to do that which to do is maintenance, it is void. But if a Solicitor sue upon a promise for money for soliciting a Suit, this is good; for it is lawful, and may be without maintenance, *Hob. Rep. pl. 72. Dyer 356.* But to promise

promise to do any thing of that nature which is not maintenance, or a lawful maintenance, is good.

If a Sheriff for ten pounds, promise the prisoner that he shall escape; this promise is not good, nor will it give an Action, *Co. 10. 76. 102. Dyer 356.*

If *A.* be sued on a Bond, and I become bail for him, and Judgment and Execution is had against me, and the Plaintiff doth promise me, so as I will pay him, he will assign me the Bond and the Debt, and make me a Letter of Attorney to sue for it in my own name; this is not a good promise, for it is against Law, being Champerty, adjudged. *Dixons Case, Trin. 38 Eliz. B. R.*

If *A.* and *B.* be Mercers, and they agree that *A.* shall sell to *B.* all his Mercery Wares, and take his shop of him, in consideration whereof, *A.* doth promise that he will not set up his Trade in the same Town; this is a good Assumpsit. But if one be bound not to use his Trade at all; this is not good, *March. 77. pl. 121.* See more Covenant Conditions in the Titles. But a Bond not to use his Trade in such a Town, is not good.

If one promise an Officer more to do his duty then his just Fees, which to take is Extortion, this promise is void, *Hil. 22 Jac.*

If I owe a man One hundred pounds, and promise to him, in consideration he will forbear me six moneths, I will give him One hundred pounds; this is naught, though part of it be lawful; for the excess is usury, *Trin. 20 Jac. B. R.*

If I arrest a man, to the end he should engage himself to me for money, where none is due, and he do so being in prison, so that it be made by Duress of imprisonment; this is not good. But an engagement for a due debt by a prisoner for his liberty, is not against Law, *Pasche, 9 Jac. B. R.*

Uncertain.

If I promise one, so he marry my Daughter, to give him as much as I shall give with any other Childe; this is good: And if by my last Will, I give One hundred pounds to another Childe, he may sue my Executor for a Hundred pound, *Glocester Assizes, 6 Car. Whistlocks Justice.*

Impossible.

A promise to do an impossible thing, as to go to *Rome* in three days, or the like, it seems is void, and not Obligatory.

Frivolous.

If one give me twelve pence, and I promise to him in consideration thereof, that if I do not cause him to be whipt to morrow about the Cross in *Glocester*, I will give him five pounds, and he is not whipt; yet no Action will lie for this five pounds upon this frivolous promise. See more in *Bargain*, and *Sale*; and *Contract*.

How the pleading in this Action must be. What Aver. ment or Allegation is necessary in the Declaration, or not.

If one promise to pay me ten pound, in consideration of something to be done by me *in futuro*; if I sue for the ten pound, I must set forth and aver that I have done this thing; and till it be done, no Action can be brought for the promise: As if I promise to another, in consideration he will forbear his debt till such a day, I will pay him; I must aver that I did forbear him till the day: For if in this case he sue for his debt within the time, the Assumpsit and Action upon the promise is gone, *Hob. Rep. pl. 128.* Otherwise it is where one promise is the consideration of another, there nothing but the promise is to be shewed to maintain the Action, *Curia, M. 4 Jac. B. R. Hil. 38 Eliz. B. R. Thorntons Case. Hob. Rep. pl. 7. 27. 8 H. 8. 34.*

If one for good cause promise to do a thing to me in consideration of another thing to be done by me at such a time, or in such a place; if he sue upon the promise, he must aver he did the thing in the consideration at that time and place, *Brownl. part. 1. 21. 2. part. 137, 138.*

If all or part of the consideration of a promise be to stand to the arbitrement of *J. S.* or to make a surrender, in a thing for this promise, he must set forth that he hath performed the award, or made a surrender; for it is not sufficient to say; *Quod fuit paratus stare, &c.* or, *Quod fuit paratus cursum reddere, M. 9 Jac. B. R. Hofboots Case.*

If one sue upon a promise for a Childes part, as much as he shall give with any Childe, in the Declaration he must shew how much he did give with a Childe in certain, or it is not good, *Trin. 17 Jac. B. R.*

If one sue upon a promise to satisfy one [or to content one] for a work done, he must

must say in the Declaration how much he deserved for the work, or it is not good. *M. 17 Jac. B. R.*

If I sell a thing without a price, I must in suing for it aver it to be worth so much.

If one promise to deliver me twenty of his sheep before his flock is shorne, if I sue for this, I must aver that the flock is shorne, for he hath time to do it till that time.

Sett. 22.

M. 9 Jac. B. B. Cadels Case.

A Tenant at will of a house, in consideration that the Lessor would suffer him to continue in the house till such a time, doth assume to keep the Lessor free and indemnified from all loss and detriment by reason of his inhabitation in the house, and that for every farthing-worth of hurt he will satisfy him two pence, and his servant by his negligence suffers the house to be burnt; this Action will lie, albeit the master dwell not there; but in his count he must aver how many farthings it came to, and demand two pence for every farthing in a gross sum. *M. 9 Jac. B. R. Coventries Case.*

Demand.

If an Executor be sued upon the Assumpsit of the Testator, the Plaintiff needs not to aver that he hath Assets, but it must come on the other side to be averred if it be not so. *Co. 9. 90.*

The Plaintiff declared that the Defendant, in consideration that the Plaintiff would be bound for his son, assumed to save him harmless from all such obligations as he at the request of his son should enter into for him, and shewed that he was bound for him such a day &c. to &c. which obligation he was forced to satisfy. And this was adjudged to be a good pleading, though he did not lay any request or notice, for he was not bound to give notice to the father. *M. 9 Jac. B. R. inter Somershal & Barnaby.*

Notice.

The Plaintiff declared that *I. S. emissit equum* at such a price, and the Defendant *ad tunc & ibidem ratione premissarum* did assume to pay the money; this was adjudged to be naught, for the sale did precede the consideration. *Pasch. 9 Jac. B. R. Farmers Case.*

The Plaintiff declared, *quod cum* the Defendant was in debt to the Plaintiff in Twenty pounds for meat, drink and lodging for himself and two others, that he did such a day assume to pay it to him; this is no good consideration. *Curia, Steedmans Case.* A. Executor of B. declared against C. upon a promise made to B. that C. would repay to A. all such sums of money as he should lay out of his own money for cloth bought and delivered to the use of C. This is a good Consideration to raise an Action, without averring that the cloth did come to his use, *Trin. 9 Jac. B. R. Moors Case.* A. sued B. and declared that B. was indebted to him Ten pounds for Wheat, Agistments and Wares had of the Plaintiff, and in consideration thereof did assume to pay the same to the Plaintiff; it was adjudged good and certain enough. But this were not good in an Action of Debt upon the very Contract, for that must be more certain, *Hob. Rep. pl. 8.* But to declare thus, That whereas the Defendant was indebted to the Plaintiff Ten pounds, he promised to pay it to him, is not sufficient; for it may be for Rents on Leases, or Debts on Especialty, for which no Action will lie upon a new promise, *Idem.* And yet upon the consideration of forbearance of a Debt due for Rent, or on a Bond, this Action will arise well enough. *Adjudg.*

If the Plaintiff saith that he had a Writ out in such a Term against the Defendant for Fifty pounds, and the Defendant knowing of it prayed him to go no further on that Writ, and he would pay him the Fifty pounds on request; this is sufficient without shewing the cause of the debt. *Hob. Rep. pl. 278.*

A. declared against B. that he accounted with the Defendant for divers sums of money due to the Plaintiff from the Defendant, and upon the Account the Defendant was found in arrear Ten pounds, and in consideration thereof did promise to pay the money at a day; this was adjudged good, notwithstanding he did not shew for what the money was due, whether for Wares, money lent, &c. *Hob. Rep. pl. 16.*

A. declared against B. that in consideration that he had given him time for three months for a Debt of Ten pounds that he owed him, that he would pay the Ten pounds

pounds after verdict; it was adjudged good enough, albeit he did not shew for what the Debt was, *Hob. Rep. pl. 31. Sir Moyl Finch's Case. M. 4 Jac. B. R. Trin. 9 Jac. B. R. Deans Case.* But where it is grounded on an *Indebitatus Assumpsit*, in which Case the Debt it self is the consideration of the promise, there the Case must be averred; for a general count in an Action upon the Case, *Quod cum indebitatus fuit*, in such a sum *super se assumpsit*, without shewing the cause of the Debt, is insufficient; but where there is another consideration, *Contra*, as here the Forbearance, often adjudged, *Hob. Rep. pl. 32. Co. 10. 77. Fuller and Thorns Case, Pasche, 14 Jac. B. R. accord.*

If one declare against an Executor, that whereas the Testator was in debt to the Plaintiff Ten pound, the Executor in consideration thereof assume to pay it without shewing the cause; this is not good, *M. Jac. B. R. Ingram's Case*; yet see the *New Book of Entries, f. 2.* And yet if in these Cases the Defendant shall in pleading aver there was no cause at first. *Quere.*

If *A.* in consideration that *B.* is indebted to *C.* Ten pound, assume in consideration that if *C.* will forbear it till *Michaelmas*, that if *B.* pay it not, he will; this is good without averment of the first cause, *Hil. 14 Jac. B. R. A. declares against B. that he bought of B. a horse for Twenty shillings, paid in hand, and for Eleven pound more to be paid at the death or marriage of A. for which he should become bound with sufficient Surety by their writing Obligatory. B. in consideration hereof promised to deliver the horse on request; avers that he offered to become bound to him, but doth not set forth in what sum, nor with what surety, nor that he did offer to deliver it, being sealed; and for these causes after verdict, the Judgment was staid, Hob. Rep. pl. 79. 96.*

In an Action of the Case upon an *Assumpsit*, if the consideration be Executory, then the Declaration must have time and place where it was made, and after it must be averred *in facto*, when it was performed accordingly. But if it be by way of Reciprocal agreement, then he may say, That in consideration he hath promised to do for the Defendant, the Defendant hath promised to do another thing for him; there need no such setting down of time, &c. and Averment. *Brownl. 2. part. 137.*

An Action is maintainable against an Executor upon the *Assumpsit* of the Testator, without Averment of Assets above, for Debts by Especialty, *Brownl. 2. part. 138.*

Request or Demand.
Notice.

If I promise for good cause to pay Ten pound to *J. S.* when he shall purchase White-Acre, he must give me notice ere he can sue. But if it be when a stranger shall purchase White-Acre, it seems otherwise: For this is as much in the knowledge of the Promisor, as the Promisee, *Brownl. 1. part. 9. 10. 3. 46. 64.*

If one promise for good cause to save me harmless from such an Engagement, and I be sued. I am not bound before I sue him, to give him notice of it, nor to allege it in the Count, adjudged, *M. 9 Jac. B. R. Somersbals Case.* But if he have promised to deliver goods to me upon request, I must make an Actual request ere I can sue for the goods, *13 Car. B. R.* But if I deliver goods to redeliver upon request, here it seems no request is needful. But when the thing promised to be done, doth lie as much in the knowledge of the Promisor, as of the Promisee, as the death or marriage of a stranger, there generally no notice need to be given, *Co. 7. 29.*

If I promise for good cause to pay a man Ten pound, and say not when I shall pay it, no demand in this Case is needful to be made: If a promise be laid in consideration of a marriage to be had with *J. S.* that the Defendant, if the Womans portion shall not amount to Four hundred pound: will make it up so much upon request, the Plaintiff must aver a request in his Declaration: But it seems he need not prove it upon a *Non Assumpsit* pleaded. *Glocester Assizes, 17 Car. per Baron Henden.*

If a Suit be going on to Tryal, and the Defendant in consideration that the Plaintiff shall not go to trial, and give him a note of the charge, promise to pay him at his first coming to *Glocester*: In this Case if he sue, he must aver not onely the forbearance of proceeding, and the giving of the note of charges, but the giving of notice of his first coming to *Glocester, Hob. Rep. pl. 63.*

Sett. 23.

If I have Ten quarters of Corn, and I sell one quarter to *J. S.* to pay me half a year

year hence, after the rate as I sell the rest, I must give him notice how I sell the rest, or I cannot sue: And this giving of notice must be averred in my Action; *Hob. Rep. pl. 56.* otherwise it is of an Award.

If I promise on good consideration to pay Ten pound on demand, it seems here no demand is needful. But if the promise be to do a Collateral thing, as if I promise to pay Ten pound lent to another, if he do not pay it himself at *Michaelmas* upon demand; in this Case he must demand it ere he can sue for it: Therefore in his Declaration he must set it forth so, 12 H. 8. 12. 17 Jac. B. R.

If I promise money to the marriage of my Daughter or Kinswoman, in this Case it seems no notice is needful, unless the promise be penal; as if you marry her, and I do not pay you Twenty pound in three weeks, I will pay you Forty pound: Here the Forty pound must be demanded: So also if I promise a Woman, that if she will marry with my son, I will give her the one half of my Lands and Goods; in this Case it seems there must be notice given before a Suit be begun, *Old Book of Entries, f. 4. New Book of Entries, f. 2.* So also if I promise a man Twenty pound when he marrieth any Woman whatsoever; in this Case also he must give me notice ere he can sue for the money.

If one be arrested for my Debt, and he make an Obligation to me for his delivery to pay the money at a day to come, but doth not deliver it as his deed, and doth promise to deliver it upon request; in this Case I must make a request. And therefore if I make no request till the day of payment be past, I am remediless at Law, and must sue to the Court of Equity, *Pasche, 9 Jac. B. R. Bassett's Case* by two Judges.

The Plaintiff declared, that in consideration he would die divers Cloths which he counted to Sixty, that the Defendant did promise to pay him for every Cloth Ten shillings, and avers he did Dye them all, being Fifty nine Cloths, and that the money came to so much: So that Fifty nine was put for Sixty, but after verdict adjudged good, *Hob. Rep. pl. 120.*

The Plaintiff declared, that he had sold to the Defendant so many Oats as according to the rate of Fifteen shillings nine pence for every quarter, and shall amount to Fifty two pound to be delivered at such a time, and that the said Oats after such a rate came to Ninety six quarters and six bushels, which the Defendant hath not delivered, &c. Which money the Plaintiff was to pay at a day certain: After verdict it was adjudged good, notwithstanding the mistake; for the Ninety six quarters of Oats after the rate came to Fifty two pound three quarters, *Hob. Rep. pl. 114.* But generally in all special Actions of the Case upon a promise, if any substantial variance be between the laying of the Action, and the Evidence, it will be fatal: Wherefore it is policy in the Plaintiff in all these Cases, to suppose several promises as near the matter as he can frame, that he may be sure in one of them to hit the very promise it self, or at least the substance thereof.

No Traverse can be of consideration executed alone; but a consideration executory may be traversed alone, *Hob. Rep. pl. 128.*

If the Lessor assume to his Lessee on good consideration, that he shall hold the Land without the let of any person whatsoever; this shall be taken a let by one that hath no title, as well as by one that hath a title, and either of them will be a breach, and give an Action, *Dyer 328. Gambles Case, M. 7 Jac. B. R.*

If I promise to another, to whom I owe money, to pay him at *Michaelmas*, in consideration that he will give me day till then, and he arrest me in the mean time; this doth not take away the Action, otherwise it is, if it be in consideration, that he will not sue till *Michaelmas*, *Goldsb. 146. pl. 65.*

If my Tenant at Will of my house, promise upon good cause to save me harmless and indemnified from all loss and harm, by reason of his Inhabitation in the said house, and by the neglect of his servant, the house is burnt; this is a breach to give an Action, *Coventries Case.*

If I promise to J. S. that his goods shall come safe to Dale, and they be arrested by the way; this is a breach of the promise, and Actionable, *Co. 6. 47.*

If one for good cause promise to make a Feoffment of Land by a day, and before the

What Errors
in pleading are
fatal or not.

Traverse.

How an Assumpsit shall be taken; and what shall be said to be a breach of it; or not.

the day he Enfeoff another, or grant a Rent-charge out of it; this is a breach of the promise. So if he promise me Trees out of a Wood, and before the time he sell them away. So if he promise me the delivery of a horse, and before the day he sell him to another, *Dyer*. 22. 21 *H.7.* 41. *Co.* 10. 130. *Kelm.* 77. 20 *H.6.* 34. *F.N.B.* 99. k. And albeit he make the Feoffment, yet this is no good performance, *Old Book of Entries*, f 7. 3 *H.7.* 14. *Fitz.* 8. B.

If one promise to deliver Wares, and he deliver false and sophisticated Wares; this is a breach of the promise. So if he promise to make a Surrender of an Estate, and he make a Surrender that is not good; this is no performance, but a breach, *Dyer*. 75. 23, 24. *Hill.* 37 *Eliz.* B. R. *Sleighs Case*.

Election.

If a promise be to do one of two things by a day, till the day be past; he that made the promise hath the Election. But after the day, he to whom it is made, hath the Election, 9 *Ed.4.* 39. *Co.* 9. 94. 6.

If it be part of the agreement to give a Bond with Sureties, and say not what Sureties, nor in what sum, the Court must judge what Sureties, and what sum, *Hob. Rep.* pl. 79.

If for good cause the promise be to pay money, and no time set, it shall be presently; and if it be to make a Lease for years, and no time set when it shall begin, it shall begin presently, *Co.* 10. 77. *Co.* 6. 33. But if one promise to deliver me goods, or make me a Lease, or the like, and no time is set; in this Case he shall have all his life time to do it, except I hasten it by request.

If one promise for Ten pound paid him in hand, to build me a house; this is a conditional promise, and the money must be paid ere the promise will have virtue to produce an Action, and is not like as where one promises to build a house, and the other doth promise Ten pound, there they are reciprocal, and they have equal remedy.

Sett. 24.

If one binde himself by promise to pay money yearly or quarterly at several days, upon the breach of the promise one day, this Action will lie; but an Action of Debt will not lie upon the Contract till all the days are past, 11 *H.* 6. 18. *Breo.* 108. *Dyer* 113. *Co.* 4. 94.

Where a promise good may become void by matter *Ex post Facto*, see *Contract*. For *Pleading*, see *Brownl.* 1. part. 14, 15, 17, 18. 8. 9. 12.

Of an Action upon the Case for a Nuisance.

What it is.

How many kinds there are.

What shall be said a Nuisance, or not; for which, this Action of the Case may be had, or not.

A Nuisance is where any thing is done by a man upon his own ground, or elsewhere to the unlawful hurt and annoyance of another that is his Neighbor, in his Free-lands, or otherwise. And this is either common, when it is or may be a grievance to many, or special when it is onely or especially a hurt to some few, or particular when it is or may be a hurt onely to one particular man, *Old. N.B.* 108, 109: *F.N.B.* 193.

A Nuisance may be by stopping or annoying a mans Water, Way, Light, or Air, by building, diverting, stopping, digging, or the like; for remedy whereof the party grieved may have this Action. And therefore if a man set up a house upon a new Foundation so near to my house, that thereby he stop up my Windows, and take away my light and prospect, I may have this Action: But if his building be upon an old Foundation, and where there was a house before, no Action will lie for this, *Cujus est solum, ejus est usque ad Cælum*, *New Book of Entries*, f. 19, 20. *Co.* 9. 55. 5. 10. *Hughs Case*. So if a man do over-build my house, so that his House-eves do drop upon my house, and cause it to perish, or trouble my dwelling, I may have this Action, 22 *H.6.* 14. And yet in *Trin.* 42 *Q. Inter Nicholson & Bradshaw*, Lessee for years of a Shop, brought an Action against one that was Tenant at Will of a Kitchen over the Shop, for suffering it to decay, and to spoil the Wares of his Shop, and after a Judgment for the Plaintiff, it was reversed. See *Brownl.* 1. part. 4.

The erecting of a Die-house, Pig-stye, House of Office, Brew-house, or Chimney, may be a Nuisance to the Neighborhood; for which, he that is hurt, may have his Action, *Pasche*, 5 *Jac.* B. R.

If I have a building beneath, and another man hath a building above me, and I suffer mine to decay, so as to hazard his, or he suffereth his to decay so, as to harm mine; in this Case each of us may have this Action against the other, *Old Book of Entries*, f. 21. *Kilm* 48. If one set up a Pig-stye under my house, and keep Pigs in it, on a House of Office, Lime-kiln, or Brew-house, and use it so near my house, that the smell thereof doth annoy me, and hazard my health, or the smoke of the Brew-house or Lime-kiln destroy or hurt my Trees: In these Cases, and for these Wrongs, I may have this Remedy, *Co.* 5. 73. 101. *M.* 8 *fac.* Adjudged. *Aldreds Case*. The building of a Brew-house, or the keeping of a Chandlers, or a Butchers shop by my Neighbor, in a place inconvenient, to the offence of my Garden or House, may be a Nuisance; for which I may have this Action, *Trin.* 13 *Car.* B. R. But if such a man do set up his Trade by me, though this be offensive to me, yet I cannot have this Action, *per Cook* and *Warborton* Justices, *M.* 8 *fac.* And *Pasche*, 5 *fac.* B. R. If a man have a house very near mine, and he suffer it to decay, and fall, and throw down some of mine; it seems I may have this Action for this, *Co.* upon *Lit.* f. 56.

If I have a private way to my house or ground, and a man stop it or mar it, that I cannot have it in all or part; this is such a wrong, as for which I may have this Action, *Co.* 5. 73. *F.N.B.* 184. But if the wrong be to the Common High-ways; this Action will not lie, but it must be punished in a Leet, or some other Court. And yet if a Nuisance be done to a Common High-way, whereby I have more special loss than another; as if he dig a pit, or lay a block there, and my horse stumble, and I fall and have hurt by it; for this I may have this Action, *Co.* *super Lit.* 56. *Co.* 9. 55. *Exod.* 21. 33. *Pasche*, 5 *fac.* B. R. *Penhams Case*: 27 *H.8.* 26.

No Action of the Case will lie for a Nuisance to a High-way, that is to be repaired by a Parish; for then every Parish might have it. But if one man by Prescription be bound to keep, and any man do mar it by any special Nuisance, he may have this Action, *March*, 136. 137.

A man being drunk rode along a High-way, which was One hundred and sixty foot in breadth, and in some green parcels of the way there were laid pieces of Timber for the use of the houses thereabouts, and the drunken mans horse stumbled at one of these, and fell, and hurt him, and he brought this Action, and the Defendant prescribed to lay his Timber there; and yet it was adjudged against him, as Justice *Bridgman* said at the *Marches of Wales* in my hearing: It lieth against one for stopping of my way *totaliter*, so that I cannot use my Common, *Pasche*, 13 *Eliz.* See *Brownl.* 1. part. 4. 6. 142. 197. 208. 211. 2. part. 55.

If I have a Water-course or Conduit belonging to my house or ground, and another man stop or mar it by Liming, Tanning, or the like, in part or in all, I may have this Action, *New Book of Entries*, 18. *Co.* 5. 73. *F.N.B.* 184. 14 *H.8.* *pl. ult.* But if the water be a common water, and belong no more to me than to others: In this Case I may not have this Remedy, but some other; and yet if in this case I have any special prejudice by the thing done, it seems I may have this Action, as well as in the Case before of a Nuisance upon the High-way.

If any one set up any House of Office, Lime-kiln, Tan-house, or lay any filth so near my dwelling, that it corruptieth the Air, and be dangerous and grievous to me, and my Family: I may have this Action, *New Book of Entries*, f. 18, 19.

If the Commoner be ousted or disturbed in the Common, by drowning, or planting Conies upon it, or the like, so that there is not enough left for him, and he cannot take it according as he ought, and hath been used to have it, he may have this Action: But if it be so small a Trespass that it doth not hurt his Common, but he hath enough besides; no Action will lie for this, *Co.* 9. 112, 113. 8. 79. 4. 39. *Dyer* 316.

If a man by building, &c. stop up my ancient Lights of my House, to my prejudice, I may have this Action for my relief, *New Book of Entries*, f. 19.

If I have a Mill upon a River, and another man setteth up a Mill upon the same River, whereby I lose part of my Custom, I cannot have this Action against him for this. And yet if he set up a Mill where I by an ancient custom have the grinding of all the Grist, and gone ought to have a Mill but my self; or, if thereby my Water be stoppt or turned, that it doth not come so freely as formerly; in these Cases

About ways.

In Waters.

In Air.

In Common.

In Lights.

In setting a Mill.

- I may perhaps have this Remedy : So if any do break down the Sluces, or throw down the Banks that the Water do not come as formerly, *Old Book of Entries*, f. 10.
- In setting up a Market.** If one levy a new Market without authority, *Ad nocummentum* of my Antient Market, I may have this Action, *M. 41, 42 Eliz. Co. B. R. Mayns* and the City of *Londons Case*.
- Wood-pile.** If my Neighbor set up a Wood-pile against my house, upon his own ground, where by my light or prospect is hurt, I may have this Action, *Co. 9. 55.*
- School.** If a Schoolmaster keep School so near to my Study, being a Lawyer, that the Scholars disturb my Study, I may not have this Action, *Curia, M. 8 Jac.*
- Pigeon-house.** So if any man set up a Pigeon-house that doth hurt by his Pigeons in the Neighborhood, *Co. 5. Hill. 39 Eliz. Co. B. R.*
- Coneys.** So if a man plant his own ground with Coneys, and they do Trespass to his Neighbors, whether it be a free Warren, or not; there is no Remedy for the party grieved, but to kill the Coneys upon his own ground, which he may lawfully do, adjudged. *Hill. 39 Eliz. Co. B. R.*
- School.** If I have a School, and another Schoolmaster set up a School by me, I cannot have an Action for this, *11 H. 6. 64. 47. 22 H. 6. 14, 15.*
- Self. 25.* If the Nuisance be by stopping a Way, Water-course, or Conduit, or hurting of a Common, and it be wholly stoppt, or the Common wholly taken away, and he whose way, &c. it is, be a Free-holder of the thing to which it doth belong; it is said in this Case he is to have some other Remedy. But if he have only a Lease for years, or a Copyhold estate of that to which it doth belong, and it be wholly stoppt or taken away, or he be a Free-holder, and it be stoppt or let in part onely: In these Cases the proper Remedy is by this Action, *Co. 5. 73. 101. 9. 113. F. N. B. 184.* See more in *Nuisance*.

Of an Action upon the Case upon a Trover and Conversion.

What it is.

THIS Action is a kinde of Action of the Case, which a man hath against another, that having gotten any of his Goods, doth refuse to deliver them upon demand, *New Terms of the Law.*

In what case it doth lie, or not, For the persons. For the nature of the thing.

It will lie against any man that hath had my Goods, and converted them; as if my horse have been sold by twenty men, I may bring this Action against either of them: And it will lie against any one that hath the possession of the Goods, though he have them by borrowing onely. *Experientia, 17 Car. per Baron Henden.*

This Action will not lie for Wood-growing, *M. 10 Jac. B. R.* Nor for things that are *fera natura*; nor for any part of a Free-hold; as for Lead upon the house, while it is so, but after it is taken off, if it be converted, it will lie for it; nor as is generally held for money at large, as for Ten pound in money; but it will lie for money in a Bag or Chest, or for so many peeces of Gold of Twenty shillings a peece, or so many peeces of Silver in certain: And it will lie for any other Goods animate, as Oxen, Horses, Hens, and the like; or inanimate, as Rings, Carpets, Woods or Trees, cut down, and the like: So for things that are *fera natura*, as Deer, Hawks, and the like, after they are reclaimed.

For the Case.

If another man get into his hands any such Goods, living or dead, being my Goods, by finding, or otherwise, in any Case whatsoever, where he hath not a right in property or possession to the thing, and he waste it or convey it away, sell it, or otherwise convert it to his own use, or keep it from me; I may have Remedy by this Action. And therefore if I lose my Goods, and another man finde them; as if he take up my Hawk that is escaped, or my Horse or Beast that was straid away; or if a man who is Executor to another, have my Goods that were in the keeping of the Testator, come to him amongst the Testators Goods, or a Felon leave my Goods within a Mannor, and the Lords Bailiffs seize them, not being waved; or if a man ride my Horse to an Inn, and the Inn-keeper keep my Horse from me: In these and all such like Cases, I may have this Action for my Remedy, *12 Ed. 4. 8. 12 H. 8. 3. 9. 7 H. 4. 3. Dyer 306. Co. 2. 25. 5. 27. 109. Old Book of Entries, f. 4. Litt. Broo. Sess. 174. 198. 382. 405. Finchessley 181. 186. Brown. 1. part. 44.*

If

If a man that is a Suitor to a woman, give her in the wooing-time gifts, and they do not go on, but break off, and she refuse to redeliver these goods, it seems he may have remedy by this Action for the goods. *Womans Lawyer*, f. 71. *sett*. 32. *Dame Fitz Case*, M. 7 Jac. B. R.

But this Action will not lie in these Cases following, viz. 1. When he that brings the Action hath neither right to, or property in, nor hath had a possession in the thing sued for; and if he bring the Action upon a possession, he must shew that he was once in the actual possession of it. 2. Where the party that hath the goods, hath them by delivery with a Trust; as where I deliver my goods to a Carrier to carry for me, and he doth keep or convey, and dispose them another way. *Wormwalls Case*, M. 9 Jac. But another kind of Action of the Case doth lie in this case. 3. Nor where the party that hath the goods hath a good property in them by sale, gift, or otherwise, as being seized for a Harriot, or the like. *N. book of Entries*, 39. 41. Co. 8. 15. Broo. 405. 193. Broo. Distress. 198. 4. Nor where the party that hath the goods, hath the lawful possession of them; as where another man doth bring my horse into an Inne, and there refuseth to pay for his meat, and the Inne-keeper detaineth him for his meat, as he lawfully may do till he be paid; or where goods are duly seized as a Waif or Estray, or the like. *N. book of Entries*, f. 10. 41, &c. Co. 8. 147. Hill. 14 Jac. B. R. *Adjudge Robsons Case*. 2. Nor as it seems for a bare finding or receipt of goods, and a possession only without any conversion. And therefore if one deliver another mans goods to me, and I do not convert them, it seems this Action will not lie; it seems then that the conversion is traversable. *Dyer* 121. *Finches ley* 186. per Baron *Henden at Gloucester Assizes*, 17 Car.

And as to Conversion, these things are to be known. 1. To do a lawful act, as distrain and impound Cattel, is no conversion; but to work them, is a conversion, *Brownl.* 1 par. 5. 2. To deny the things upon demand, is a conversion; but without Request there can be no conversion, and so no action, *The Court*, *Brownl.* 1 par. 152. pl. 79.

To maintain and bear up this Action, these things are necessary to be averred or proved in the Case. 1. The Plaintiffs right to the thing. 2. That the Defendant hath, or had it. 3. A demand of the goods, and denial; for how else shall a man that finds goods, know the owner, and to whom to deliver them? By *Serjeants Turner at Leint Assizes at Gloucester*, 23 Car. 4. Some say there must be a Conversion; and in *Trin.* 44 *Eliz. in Com. B.* it was adjudged, that if A. deliver a Chain of gold to B. and A. demand it, and B. deny it, and say he shall not have it till he can recover it, that this was no Conversion. But I take it, the contrary is held and practised at this day; and Baron *Henden at Glouc. Assizes*, 17 Car. ruled it, That a demand and a denial is a Conversion; and whatever is such an act for which Trespass will lie, is a Conversion to give this Action of the Case on a Trover. 5. And these things must be set forth in the Declaration; but the time of the Conversion is not needful to be set forth in the Declaration. *M.* 37, 38 *Eliz. Co. B. Earl of Rutlands Case.* *Goldsb.* 152. pl. 79. For pleading in this, See *Brownl.* 1 part, 8, 9, 12, 16, 17.

What must be proved or averred to make good this Action.

Of an Action of the Case for a Conspiracie or Confederacie.

A Conspiracie strictly taken, is, where two or more persons do purposely and maliciously conspire and labour together falsely and unjustly, and without any ground at all to indict another for some Treason, Felony, or other offence, and after he which is so indicted is upon that indictment after a lawful Trial purged and acquitted. In this case, and for this wrong, as he may have other remedy, so he may have remedy by an Action of the Case, wherein the Plaintiff shall recover damages according to his hurt. Co. 9. 56. *FNB.* 114, 115, 116.

What it is.

If two or more falsely and maliciously conspire to indict or appeal another of any offence against any Law, and after he that is so indicted is acquitted, a Writ of Conspiracie lies. *FNB.* 114, 115, 116. Co. 5. 56. And in all Cases where the practice and procurement is such by one person, that if there were more joyned with him, a Writ of Conspiracie would lie, there a general Action of the Case will lie. *FNB.* 116. L.

Where and in what case this Action will lie for a Conspiracie, or not, and how,

Sect. 26.

If one man only falsely and maliciously cause another to be indicted for Felony, Barretry, or the like, who is thereupon acquitted, an Action of the Case in the nature of a Writ of Conspiracie lieth. This hath been often adjudged; and in this case the Plaintiff that brings the Action, must be sure to make it good that it be false and malicious; for the malice is the ground of the Action: For if upon the Trial it doth appear, that either it was forced in a course of Justice, or there was *probabilis causa* for the indictment and prosecution, no Action will lie. *March. f. 130. 41, 42 Eliz. Co. B. Sheringtons Case.* And in this case the Plaintiff need not say that he was *legitimo modo acquiesatus*, as he must in a Writ of Conspiracie. *P. 3 Jac. B. R. Marshams Case.* And if a man do procure another to be arrested, brought before Justices, examined or imprisoned for a Felony, with a plot to vex and disgrace him albeit he be not indicted for the Felony, it seems for this only he may have this Action of the Case, *Co. 9. 56, 57. Co. 4. 14, 15. F. N. B. 116, 114.* And in these cases, and for these wrongs, it is better to bring this Action of the Case, then to bring a Writ of Conspiracie, which is a special Action in the nature of an Action of the Case. For in all Cases where a Writ of Conspiracie lieth, there must be these things incident to the Case.

1. There must be two or more in the plot, for this Writ of Conspiracie will not lie against one, nor against a man and his wife (who are but one in Law) unless the Writ be that they *simul cum* others did it. And hence it is, that if this Suit be begun against divers, and all but one are discharged of it to all intents, as being acquit by Verdict, hereby he is discharged also. *F. N. B. 114, 116. 18 Ed. 4. 1. Br. Conspir. 21.* But if the Writ be brought against two, and the one of them is attainted, and the other doth bar the Plaintiff by a Demur in Law, or one doth appear and plead, and his plea is found against him; in these cases the other is not discharged, but the Plaintiff shall recover, though the other be not attainted. And yet in this case perhaps he may refuse to answer without the other; or if all the Conspirators but one be dead, there the Writ may be had against him alone. *F. N. B. 116, 115. 40 Ed. 3. 19. 38 E. 3. 3. 35 H. 6. 14. 24 H. 6. 25.*

2. The party that brings this Action of Conspiracie must be indicted, arraigned, and acquitted; for it will not lie for a plot or preparation without an execution: *Non efficit conatus nisi sequatur effectus. Co. 9. 56. F. N. B. 114.*

3. The proceeding and prosecution must be voluntary. And therefore neither this Action, nor an Action of the Case in general will lie against such men as do prosecute by constraint or compulsion; as when men are obliged to it by oath or office, as Justices of Peace, or Jurors sworn to present such offences, or Witnesses called to testify their knowledge of such things, or one doth come into a Court voluntarily and discover a Felon; for all this is justifiable: *27 Aff. pl. 12 Ed. 4. 18. 21 Ed. 3. 17. 7 H. 4. 31. 35 H. 6. 14. 20 H. 6. 5. F. N. B. 115. 1. Broo. Conspir. 4. 4.*

4. The proceeding must be malicious. And therefore if one man do prosecute another upon good ground, as when a Felony is done, and there is some cause of suspicion of that person more than another, either by the common fame or otherwise; as when a man is robbed, and the next Village upon a Hue and Cry doth make pursuit, and take a man they suspect, and thereupon the party robbed doth indict that man, and he is acquitted; or a Coroner after a murder, sitting *super visum corporis*, cannot find out the murder, and then enquiring of the first finders of the body, they present that *I. S.* killed him, and thereupon *I. S.* is indicted and acquitted; these proceedings are not punishable by any Action. *Broo. Conspir. 4. Trin. 9 Jac. B. R. Wall v. H. Hill.*

5. The charge and accusation must be false. And therefore if the Conspiracie be supposed to indict a man for murder, and upon his arraignment it is found he killed the man, but the killing was lawful *per infortunium* or *se defendendo*, this Writ will not lie. *Fitz. Conspir. 21. Stamf. lib. 3. ch. 12.*

6. The party indicted or appealed must be *legitimo modo acquiesatus*, (*viz.*) he must be acquitted upon his Trial by the Petty-Jury, after Indictment found by the Grand-Jury; or if he bring an Appeal, be Non-suit, or the like. And therefore if the acquittal be by a general or particular Pardon, or he is discharged by the insufficiency

ficiencie of the Indictment, or the party be indicted, and an *Ignoramus* be found upon the Bill; in all these cases this Writ of Conspiracie will not lie, 9 Ed. 4. 12. *F.N.B.* 114. Co. 4. 45. And yet the last Case is doubted of some, and the contrary is said to be twice adjudged in 41 Eliz. B. R. and 20 Jac. See 19 R. 2. tit. Brief. 926. See *Brownl.* 1 par. 9.

It is a good Plea in Bar to this Action, that there hath been an Accord made between the parties, and the same is executed, 21 H. 6. 28. So it is a good Plea to shew, that the Indictment or Acquittal was erroneous, albeit the party indicted did not take advantage of it, Co. 9. 26. 9 E. 4. 12. So it is a good Plea to say, That there is no such Record as the Plaintiff sets forth, 9 H. 6. 26. So any of the things before may be pleaded, That that which was done, was done by compulsion and *ex officio*, as by Jurors and Witnesses, or the like, 20 H. 6. 5. But it is no good Plea to say for one, that another is dead, hanging the Writ, 18 Ed. 4. 1. Nor to say, that the Plaintiff was guilty of the Felony whereof he is so acquitted: Nor to say that the Record is, that the Plaintiff and divers others are indicted besides the Plaintiff, 9 Ed. 4. 23. See *Conspiracie*.

What matter shall be said a good bar or plea in this action, or not.

Of an Action of the Case for a Disceipt.

Disceipt is said to be a Writ, either Original, when it is brought against a man for some deceit he hath used or done; or Judicial, where upon some Writ directed to the Sheriff, he doth make a false Return, and thereby the Defendant doth lose his Land: In both cases he may have an Action of the Case for his relief; and in the last case, the act unduly done will be avoided also. *New Terms of the Law*, 154. *F.N.B.* 95.

What it is.

If a man make his Attorney in a real Action brought against him, and the Attorney by agreement suffer Judgment to be given, and the Land be lost, his Client may have this Action for his remedy. *F.N.B.* 95. Co. 6. 9. *Old book of Entries*, 2. So if he use any falshood or deceit whatsoever, sue me for another, or another appear or plead for me without warrant, or if my Attorney in a suit for or against me shall do any thing without warrant, and I be hurt thereby, I may have this Action against him, Co. 7. 12. *Dyer* 361. 13 *F.N.B.* 98. k. So if the Attorney for Plaintiff or Defendant do any way do against or besides his office, *Idem.* 20 H. 6. 25. 15 H. 7. 14. *Old book of Entries*, 2.

What shall be said to be a Disceipt for which and where this Action lieth, or not? Against an Attorney.

If I appoint my Attorney to take an obligation for me in my own name, and he take it to himself and in his own name, I may have this action against him, 20 H. 6. 4. 25. 3 H. 7. 14. *Br.* 117. So if it be to buy a Lease, and he buy it for himself, 3 H. 7. 14. 17. 20 H. 6. 25.

If my Attorney or Counsellor discover my Conveyances or other secrets which I have shewed to him, to my prejudice, I may have this remedy against him, 11 H. 6. 18. *Broo.* 108. Or procure himself to be retained for the other side, *Old book of Entries*, f. 2. But if another that is not a Lawyer discover my Evidences I have shewed to him, *contra.* 11 H. 6. 18.

If any mischief come to me in any suit between me and another, by the false Return of a Sheriff, I may have my remedy by this action, *Co. super Lit.* 259. Co. 6. 9. *F.N.B.* 97. 98. Co. 9. 32. *Dyer* 353. *March Rep.* f. 99. pl. 169. But if a Judgment be had by default against me, being all that time in prison, and I be summoned according to Law, I cannot have this action, *Co. super Lit.* 259.

Against a Sheriff.

If in a suit or action, another person will come in Court, and pretend he is the party to the suit, and so let Judgment be had, or some other prejudice be done to the party himself, he may have this remedy against him that doth it. As for example, if one purchase a Writ out of the Chancery in my name, and upon that Writ a Fine is to be paid to the King; or if I have cause to bring an action, and another bring it in my name, and let Judgment go against me by Nonsuit, or the like; or if one acknowledged a Judgment, levy a Fine, suffer a Recovery in my name, and all this is done without my leave or privity; in all these cases this action lieth for remedy, *F.N.B.* 96, 97, 1 Co. 19 H. 6. 44. *F.N.B.* So for any other thing a man shall do in my name,

In personating another man.

and for me in a Court, without my agreement, *Idem. March, Rep. fol. 48. pl. 76.*

If a Writ be brought against two as Executors, and one of them is no Executor, and he that is Executor confesses the Action, the other that is hurt hereby may have Remedy by this Action, *F. N. B. 98. 9 Ed. 4. 15.*

If one acknowledge a Statute, Recognizance, or enter into a Bail in my name, if I be hereby damaged, I may have reparations by this Writ, *19 H. 6. 44. F. N. B. 100.*

By Forgery.

If any man forge a Deed in my name, and it be given in Evidence, or made use of against me, and I receive any hurt by it, I may have my Remedy by this Action, *5 Ed. 4. 126. 116. F. N. B. 99. k.* But for a forging only this Action will not lie the same.

If one that is not the true Executor or Administrator get a Statute made to the Testator, and come into the Chancery, and shew the Testament proved, or the Letters of Administration, and so getteth out Writs and hath Execution, the true Executor may have this Writ against this counterfeit one. So if he do in the life time of the Counsellor supposing him to be dead, *2 R. 3. 8.*

Sett. 27.
Delays in
Suits.

If a man in a Suit will procure a protection for a year, and do not pursue it accordingly, but remove the suit, or do any such act, which by matter *Ex post facto* shall appear to be but to make delay, the party grieved may have this Action for his relief, *F. N. B. 97. 20 H. 6. 10. Co. 5. 34.* So if he get a Writ of Privilege as a servant to one of the Clerks in Chancery, when in truth he is not so, *11 H. 6. 8.* So if the Essoynor cast an Essoyn, and warrant it not at the day, the Demandant that is hereby delayed, may have this Remedy, *Bro. Disceit. 40.*

If I enter into a Statute to pay money by a day, and pay it, and after another get the Statute and sue it against me, I may have this Action against him that doth it, *F. N. B. 100.* So if any man sue me in anothers name without his privity, I may sue him in this Action, *Fitz. Action on the Case 3. F. N. B. 100. 96. 97.*

If one procure another to sue and vex me without cause, I may have this Remedy against the procurer, *F. N. B. 98. 116.*

If one counterfeit a Letter in my name, and deliver him to my servant, and the effect of it is to persuade him to deliver the counterfeiter money, and my servant doth deliver it; in this Case I may for my relief have this Action against the counterfeiter, adjudged. *Trin. 7 Jac. B. R. Tracies Case.*

If a Tenant in antient Demesne levy a Fine of his Land at Common Law, it seems the Lord may have this Action, *Plow. 370. F. N. B. 98. 99.*

In Play.

If one that doth play with me, doth use false Dice and couzen me of my money thereby; I may have this action against him, *Co. 11. 87. F. N. B. 95. New Book of Entries, 8.*

In a Contract
or Bargain.

If a man sell me any living or dead thing, as Cattle, Cloth, or the like, and at the time of the sale he doth warrant it to me good and right, and it be otherwise, I may have this Action for my Remedy; and this will lie, albeit I have not paid all the money for the thing bought, *Kelw. 89. 9 H. 7. 22. 5 H. 7. 41. F. N. B. 94. Old N. B. 50.* And if the seller say he will warrant it, but doth not say to me yet this a good warranty, *Pasche, 3 Jac. B. R. Curia. Old Book of Entries, 9.*

Upon a War-
ranty.

If one sell me any Land, or make me a Lease of that wherein he hath no right, I may perhaps have this Action, *Goldsb. 123. pl. 8.*

If one sell me Clothes, and warrant them to be of a certain length, and they be not so; I may have remedy by this Action, *F. N. B. 98. 11 Ed. 4. 2.*

If one sell me a Horse, and warrant him sound, wind, and limb, and he hath some secret disease known to the seller, and not visible to the buyer; as if he be shoulder-shot, or the like; this Action lieth for this, adjudged. *Trin. 18 Jac. B. R. 11 Ed. 4. 6. 13 H. 4. 1.* But it is held by some it will not lie upon a warranty, when the fault is such as the seller did not know of it, *F. N. B. 94.* But the Books are general, and it seems the Law is otherwise: So it is said, it will not lie upon the warranty, when the fault is apparent that the buyer may discern it by one of his five senses: As when the seller doth warrant the Clothes to be Red, and the buyer having seen them and they be Blue; or he doth warrant a Horse to be sound, and he hath a splint, spavy, oyl, or is lame, *13 H. 4. 2. 7 H. 4. 14. 5 H. 7. 41. 20 H. 6. 37. 31 H. 6. 11.* So when

when the warranty doth extend to a thing to come, as that a Horse shall carry a man thirty miles a day, *Finchesley* 188. So when the warranty is made after the thing is sold, and is no part of the Contract, and yet such a warranty *Ex post facto*, if it be by Deed, may amount to a Covenant, 5 H. 7. 41. 11 Ed. 4. 6. F. N. B. 98. *Pasche*, 3 Jac. B. R. *Goldsmiths Case*. Covenant:

If one sell me corrupt Victual or Wine, as if he mix Wine and Water, or the like, without any warranty, I may have this Action against him for his Deceit, *Kelw.* 91. 11 Ed. 4. 6. But if one sell corrupt or false and sophisticated Wares, it seems no Action of the Case will lie upon this sale without a warranty be made, *Dyer* 75, 76. yet see *Kelw.* 89. 7 H. 4. 10. 13 H. 4. 2. 9 H. 6. 52. 11 H. 6. 22. 19 H. 6. 49. F. N. B. 88. So if one sell me an Horse which is unsound, and I know him to be unsound, without warranty I cannot sue him for this, F. N. B. 94. 31 H. 6. *Stratham action*, *Sur. le Case*, pl. ult. 7 R. 2. *Monstrance de faulse* 160. So if one sell corrupt Wine or Victuals, if the buyer or his servant taste it before-hand, and like and accept it; in this Case this Action will not lie, 7 H. 4. 16. 13 H. 4. 2. Without a Warranty.

If one be about to sell me a Lease, and I tell him that J. S. bid me a hundred pound for it, and thereupon he giving credit to my report, is moved to give me one hundred pound for it, and J. S. did never bid me a hundred pound for it; he cannot have this Action against me for this falsity, for it was his Error to believe it, adjudged. B. R. 41 Eliz. *Taylor's Case*.

If one sell me Land or Goods that are none of his own to sell, and it is after taken away from me; or I be molested about it by the right owner, I may be relieved by this Action, Co. 4. 18. 42. Aff. 8. Bro. *Action of the Case*, 85. *Fitz.* 4.

If one sell me Land, and agree to make me an Estate by a day, and before the day he doth make it away, or some Estate out of it, or charge upon it to another, and then doth make the Estate to me, I may have this Action for my relief, 3 H. 7. 14. F. N. B. 98. 20 H. 6. 34. 2 H. 7. 12.

The Plaintiff declared that he sued D. The Defendant in an Action of the Case for words, and upon not guilty, the Defendant to take away the Plaintiffs credit, gave evidence, that he was a common lyer, and so recorded in the Star-Chamber; by reason whereof, the Jury gave very small damage, &c. It seemed to the Court not actionable, *Brownl. 1. part. 2.*

If one convey his Land to J. S. to that intent, that J. S. shall convey it to J. D. to whom the Feoffor had sold it, and J. S. refuse to convey it to him, and sell it to another: In this Case, the first owner of the Land may bring this Action against J. S. for his breach of Trust, *Hughes*, Rep. 64.

As for Deceit in breaking of promises, we have spoken to it before in an Action of the Case upon an *Assumpsit*. See *Deceit*.

*Where an Action of the Case will lie for other misdoings,
or not doings, or not.*

THis Action of the Case lieth for wilful or negligent Misfeasances or Non-feasances in all the Cases following. (*viz.*)

If one stop a Ditch or River, or set up Flood-gates, so as to make the Water overflow and drown my ground adjoining to it, or stop or divert a Water-course running to my Mill or House; so that I cannot have that benefit by it I was used to have; I may have this Action for my Remedy, Co. 486. *Dyer* 248. 320. Co. 9. 50. F. N. B. 88, 89. 21 H. 7. 20. F. N. B. 92. But if a man stop or divert Water to amend a mans Banks or Mills, having by a custom such a liberty and power; this is justifiable, and will not bear an Action, 39 H. 6. 32. Bro. 77.

If one do procure another falsely and maliciously to indite me for any offence, or Indictment, cause me to be arrested, imprisoned, bound over, or arraigned for an offence, without any colour or cause of suspicion, I may have this Action against him for my relief, M. 4 Jac. B. R. *Marshams Case*, adjudged. Trin. 17 Jac. B. R. *Olivers Case*. M. 7 Jac. B. R. *Gambels Case*: See for this in an Action of the Case for a Conspiracy. Yet I have seen the report of a Case, that this Action will not lie, but where the party

party indicted is acquitted upon a Trial, *M. 5 Jac. B. R. Myn versus Tailor*. But the contrary is practised every day; and therefore I cannot receive that for Law.

If one put such things in the water as do occasion the drowning of my ship, I may have this Action against him, *F. N. B. 91*. If my sheep be passing over *Severn*, and one of the passengers force one of them into the water, and all the rest follow and are drowned, I may have this Action; but whether I shall have damages for all, or one only, the Jury must well consider of it.

If one put Cats into my Warren amongst my Conies, it seems I may have this Action against him, *Old book of Entries, f. 13. Mich. 2 Jac. B. R. by two Justices*.

Self. 28.
Hindring my
Execution.

If one hinder me of my Execution, as if a Sheriff come to another mans house where the goods of the Defendant are, and the door of the house being open, another man, not the owner of the house, shut the door and keep him out, or the owner of the house or any other man convey away the goods, and so prevent the Execution; this Action will lie for this, *Adj. Hil. 20 Jac. B. R. Woods Case. New Book of Entries, f. 13*. But if it be his own house, or to defend his own goods against the Execution, he may justify it, *Co. 5. 91*.

Executor.

If I have a Judgment against an Executor, and he do secretly and fraudulently make away his goods to prevent Execution, I may have this Action against him, *M. 2 Car. B. R. Curia*. If an Officer be coming to arrest a man, or attach his goods at my suit, and another man convey away the goods or the person, so that he cannot do the work, I may have this Action against him, *F. N. B. 102. 21 H. 7. 40. 18 Ed. 3. 3*. If a man be arrested at my suit, and another man rescue him, and so he get away, in this case I may have this remedy and recover the debt in damage from him, *Hil. 20 Jac. B. R. nullo contradicente, & 7 Jac. B. R. Hawks Case*.

Removing a
Distress.

If another mans cattel be on my ground damage fasant, and a stranger of his own head remove them, so as I cannot distrain them damage fasant, I may (as it seems) have this Action, *Finches ley 200. Co. 5. 91*. So if I be coming to distrain my Tenant for my Rent, and he hearing thereof drive away the cattel and prevent my distress, *Hil. 20 Jac. per Just. Haughton*.

If I have provided wood for a special purpose, as to make Iron, or the like, and a stranger take it away, I may have remedy for this Action, *New book of Entries, 36, 37*.

Abusing a
Distress.

If one distrain my Kine great with Calf, and by driving they lose their Calves, I may have this Action, *F. N. B. 86. Brownl. 1 part, 12*.

Burning a
House.

If my neighbor, his servant or any other that shall come into his house by his good will and agreement, shall wilfully, or through negligence fire his, and thereby my house, I may have relief by this Action, *2 H. 4. 18. Exod. 22. 6. Old book Entries f. 8*. But if my neighbor without negligence, and against his will, and thereby my house is burnt, *contra. 2 H. 4. 18. See Brownl. 1 part, 197*.

Menacing.

If one threaten me, my wife, servants or children, that he or some other shall do us some hurt, and do afterwards lie in wait to do it, and by this means we be so put in fear that we dare not follow our business, as if my servant by this means dare not go abroad about his work, or depart away out of my service, and I have hereby any particular loss, I may have remedy by this Action. But for a bare threatening, without some doing or endeavor, as lying in wait, or the like, no Action will lie, *Co. 7. 1. Kelm. 40. 9 H. 7. 7*.

Dog killing
Cattel.

If another man hath a dog that hath been used to kill cattel, and the owner of the dog hath had notice given him thereof, and this dog happen to kill my cattel, I may have this action against the master of the dog, *Dyer 25. Co. 4. 18. Exod. 21. 29, 35. 36 H. 6. 6*. So there must be three things in the Case to bear up the action. 1. The dog must be used to bite. 2. The owner must have notice of it. 3. It must be his dog when he doth it, *Pasc. 9 Jac. B. R. Londars Case*. And it was held by Baron Denham, and accordingly he gave direction to a Jury, That if *A*. have such a dog, and *B*. take him out with *A*. without his privity, and then he kill my cattel, that I may sue *A*. for this.

If one remove a meer-stone, and I be hurt by it, I may have this Action against him that did it, *Old Book of Entries*, f. 9. Removing bounds.

If one stop Water, and put it out of his old course, and by that means it surround my ground to my hurt, I may have this Action, *New Book of Entries*, f. 18. Nuisance.

If one take out an Execution upon a Record in any Court, when he knoweth the Record is removed by a Writ of Error into another Court; it seems I may have this Action, *Trin. 39 Eliz. Co. B.R. Willis vers. Stroud*. Abuse of Justice.

If one cast a false Protection, the party delaid hereby, may have this Action, *Trin. 19 Jac. B.R. 21 Ed. 4*.

If one sue me in a Court that hath not jurisdiction of my person, or sue me for a thing whereof that Court hath not jurisdiction; for this unjust vexation, I may have this Remedy: As if one sue me in the Admiralty or Spiritual Court for a thing not triable there, or sue me in the Kings-Marshalsey, when neither of us are of the Kings house; in these Cases this Action lieth: But if one sue me in an improper or unjust Action, this Action will not lie for this; for here I shall have costs in the same Suit for my relief, *Co. 10. 76. Stat. 2 H. 4. 11. Fitz. Estoppel. 18. 10 H. 6. 13. Trin. 3 Jac. B. R. Dame Waterhouse Case*. And yet if one sue me for Tithes, where I ought not to pay Tithes, which is forbidden by the Statute of 32 Eliz. 7. I may not have this Action for this, adjudged. *Partridge Case*. But if one take a false Oath against me in a proper Court, whether he come in by or without Proces, and I be prejudiced by it, I cannot have this Action against him, *M. 38. 39 Eliz. Co. B. R. Adjudged. Dampports Case. M. 18 Jac. B. R. Evers Case. Co. 4. 14*. For it is in an ordinary course of Justice, and an Act of the Court. Suits in improper Courts or Counties.

If one sue me in anothers name, without his privity, though it be upon a just cause, I may have this Action against him; and if I have any special loss by it, recover damages accordingly, *March. Rep. f. 48. pl. 76*. For this is Maintenance. False Oath.

Where one that is not of a Jury, causeth himself to be sworn in the name of one returned of the Jury, and gives his verdict; either party may have this Action against him, *March. Rep. f. 81. pl. 132*.

If one hinder the Parson that he cannot have his Tythe; he may have this Action, *Co. 2 part. Inst. 650*.

If one indict another, or sue an appeal against another, in another County, then that wherein he dwells; this Action lieth against him for this wrong, *Stat. 8 H. 6. ch. 10. 6 H. 6. ch. 1. Kelw. 21*. So if one sue me in a Forreign County, and there secretly pursue me to an Out-lawry, I having no notice of it; this Action lieth for my relief, *New Book of Entries*, f. 42.

If a Prohibition be delivered to a man, to stay a Suit he hath against me in a Court, and he proceed in that Suit notwithstanding, I may have this Action, *F. N. B. 92*.

If a man have a Judgment, and have levied goods to pay the Debt upon an Execution, and the Sheriff return that they are in his hands for default of buyers, and the Plaintiff knowing hereof, sues out a new Execution which the Sheriff doth execute; no Action will lie against the Plaintiff for this, *Pasche, 17 Jac. Co. B. R. Waterer vers. Freeman*. So if one be to pay me money at Michaelmas on a Bond, and pay it, and after I sue the Bond, he cannot have this Action against me, *Pasche, 17 Jac. B. R. per Ch. Justice*.

If a Guardian be to sue for an Infant, and do it not as he should, the Infant may have remedy by this Action, *Dyer 361. Kelw. 135. Broo. 118*.

If I be bound to appear in a Court at a day, and before or against the day, one cause me to be arrested of purpose and malice to prevent my appearance, and to cause a forfeiture of my Bond; in this Case I may have this Action for my relief, *7 H. 6. 45. Fitz. 4*.

If a Lessee for life do make a Lease for years, and this Lessee for years doth commit waste, for which the Lessee for life is punished; in this Case he shall have this Action against the Lessee for years, and recover as much as the Lessor doth or may recover of him, *Pasche, 38 Eliz. B. R. Germies Case*. So if Lessee for years of a house, Lease it for part of the time, and that time expire, the Lessee continue in possession, Between Lessor and Lessee, or Lord and Copibolders.

possession, and pull down part of the house, the first Lessee may have this Action, adjudged, *Trin. 6 Car. B. R.* If the Lessee will not suffer his Lessor to come into the house to see if any Waste be done in it, the Lessor may have remedy by this Action, *Hil. 20 Jac. B. R.* adjudged. See *Brownl. 1 part, 197, 329, 370.*

If the Lord cut down the Copiholders trees without his leave, though he leave the shrouds behind him, yet this Action lieth for the Copiholder against the Lord, *M. 3 Jac. B. R. Cross vers. Abbot*, unless the Lord be by custom to have the trees, & *Trin. 17 Jac. per Just. Haughton.*

If a Lord cut down a tree whereof the Tenant is to have the lops, *Brownl. 1 part, 197, 231.* See more in 142, 197, 208. 2 part, 55, 331, 332. So of a Copiholder, where the Lord doth cut down all the trees, that he cannot have fireboot, &c. *Brownl. 1 part, 231.*

If I deliver to another cloth to keep, and he keep it negligently; I may have this Action or Detinue against him, 2 H. 7. *Brownl. 1 part, 152.*

If I be a Baker, and buy Corn of another to deliver me such a day, and he do not deliver it, I may have this Action or Debt for it, by 20 H. 7. *Brownl. 1 part, 79.*

If a Tenant at will of a house, or his servant, or his Lessee at will, which is his servant, do voluntarily burn the house, the first Lessor may have remedy by this action, *M. 17 Jac. B. R. per Ch. Justice.* But if he suffer the house by negligence to be burnt, or the trees negligently to be cut down, no action will lie for this, *Co. 5. 13.* But in the first Case it seems the proper remedy is to be against the Tenant at will by a general action of Trespass, and not by this action; for if he burn, pull down the house, or cut trees, the Will is determined, *Dyer 122. 15 Ed. 4. 20. Lit. f. 15.*

If the Lessor put out the Executors of the Lessee out of their term, they may have this action, *Co. 4. 18. F. N. B. 92.*

Disturbance in
way, Isle-
office, &c.

If I be hindered in all or part of my Common, private way, or private water, Walk or Foldage, which time out of mind by prescription or otherwise I have good right unto, I may have remedy by this action, *New book of Entries, f. 9, 11, 14. Co. 5. 76. 13 H. 7. 26. Co. 1 part, Inst. 56.* So if the inhabitants of my Parish have by prescription a watering place, and it be disturbed, every one of us may have this action, *Finches Ley, 187. 27 H. 8. 27.* See *Brownl. 1 part, 197, 231.*

If one inclose Land which should lie open in a Manor, in which the Commoners have Common, or eat up the Common so that the Commoners have not sufficient, every Commoner may have this action against the Disturber, *Co. 9. 113, 11, 54. F. N. B. 145. 21 H. 7. 40.*

Self. 29.

If I have an Office, and another disturb me in it, that I cannot use it, this action is given me for my relief, 6 Ed. 4. 9. *Broo. 94. Co. 9. 50. F. N. B. 94.* So if one hinder me in my Fair or Market, that I cannot have the Toll, or distrain one to come to his Leet that ought to come to my Leet, I may have this action, *Old B. of Entries, f. 5, New B. of Entries, f. 10. 11 H. 4. 64.*

If I and my ancestors time out of mind have had an Isle in a Church for seats, and funeral of such as die in my house, as belonging to my house, and the Parson or any other disturb me, I may have this remedy, *New B. of Entries, f. 9.*

If one grant me to have hay and straw in his house for my two Kine all the winter long during my life, and I be disturbed of it, it seems this Action lieth, *Fitz. 17.*

If a Statute forbid a thing without a penalty, and it be broken, and I have any special loss by it, it is thought I may have relief by this Action, *F. N. B. 90. Trin. 3 Jac. B. R.*

Escape.

If a Prisoner escape by the Gaolers means, either wilfully or negligently, I may have remedy against the Gaoler; and if he go against the Gaolers will, and he be forced in this Action to make me amends, he may have this Action against the Prisoner for his counter-remedy, 7 H. 4. 14. *Broo. 34.*

For spoiling
my goods.

If I deliver Goods to W. and he deliver them over to I. S. to my use, and I. S. do impair them, I may have this remedy against I. S. 12 Ed. 4. 13. *Broo. 96.*

If one cancel my Deed, or mar my Goods delivered to him, I may have this Action; and I may have this Action for marring my Deed, albeit the Deed be naught, *Old B. of Entries, f. 7. Broo. 382. M. 9 Jac. B. R. Constables Case.*

If

If one have my Cattel to keep, and they die by Gods hand, this Action lieth not; nor albeit he promise to keep them safe, *per Just. Bridgman*. But if one have my Cattel to keep, and suffer them to die by his negligence, I may have this remedy,

2 H. 7. 11. *Dyer* 12. Co. 5. 14.

If I pledg my goods for money to another, and at the time of payment of the money I tender the money, and require my pledg, and he will not deliver it, I may have this Action against him, *Old B. of Entries*, f. 8. *F.N.B.86*. And if they perish by his default, I may have this Action; but if they perish by accident without any default of his, I can have no Action for this, *D. & St.* 129.

If one that findeth my goods doth lose them, or suffer them to be impaired by his default, I may have this Action against him. But if they be left in a house which by chance is burned or falleth, or they be delivered to another to keep who doth run away with them, in these cases it seems the Finder is not chargeable for them. But if one find my goods, and they be afterwards hurt or lost by casualty without any default of his, no action will lie for this, *D. & St.* 38. 1. 9.

If one for hire borrow my horse to ride to London, and he ride him further, or ride him out of the way, or forwards and backwards, and forwards again, in and upon the right way; in all these Cases I may for this have this action, and especially there where the horse is hurt. So if the borrower ride him excessively, so as to hurt him. So if the borrower put him into an old rotten house ready to fall, and the house fall down and kill him. So if any one borrow or hire my goods to use to one purpose, and he use it to another; in all these cases this action is given to me for my relief, 12 E. 4. 8, 13. 21 E. 4. 79. *D. & St.* 129, 128. Co. 8. 146. 2 H. 7. 11. But if one that doth borrow my horse, by hard riding make him very weary only, so that he will do no work in a good while after; or if a horse so borrowed die suddenly without any default in the borrower, in doing that for which he was hired; or if he put him in a strange house which doth casually fall and kill him, in all these cases no action will lie, *D. & St.* 128, 129. *Exod.* 22. 14, 15. 40 *Ed.* 3. 6. If one lend me a horse for hire for a time, and he take him from me within the time, I may have this action against him, *F.N.B.86*. See *Brownl.* 1 part, 8, 9, 17.

Upon a Loan.

If I be Executor to a man, and the goods be in another mans house, and I come in time convenient to fetch them away, and he do actually disturb me, so that I cannot have them, I may have this action against him. *M. 7 Jac B R.*

If one take my beasts or goods from me, and another take them by force from him, I may have this action against the second taker, 12 E. 4. 12.

If I be to have Corn I have sowed upon another mans Land, and be disturbed in it, I may have this action, *Finches Ley* 187.

For a disturbance and detainer.

If I buy Corn of one, and pay him part of the money, and leave it with him, and pray him to keep it till such a time, and he convert it to his own use, I may have remedy by this action; and if the Corn were in bags, I may have also a Detinue for it, *Kelm.* 77.

Detinue.

If I leave my goods with one to keep, or I leave them with him, and he take them into his custody without any words, and the goods be lost or wasted, I may recover the worth of them in this action, albeit he be to have nothing for keeping them: But if when he doth receive them, he receive them with a special caution and agreement, that he tell the owner he will not answer for them, or he will keep them as his own, or keep them as well as he can; in these cases no action will lie unless there be an Assumpsit, and good consideration for it in the Case, Co. 4. 83. 5. 13. *Exod.* 22. 9, 10, 11. *Kelm.* 77. 12 E. 4. 15. 2 H. 7. 11. Co. *super Lis.* 89. *Old book of Entries*, 3, 9.

Bailment.

If a Gaoler use me (being his prisoner) extremly, I may have remedy by this action, *F.N.B.93*.

Gaoler.

If a Ferriman undertake to carry any thing for me over the water, and by his default it doth take hurt or is spoiled in or after the carriage, I may have this remedy against him, *Adjudg. Partridges Case*.

Ferriman.

If a common Carrier (although he be but newly a Carrier, or carry but for some persons only, if he carry for money) take any thing for me to carry, and do hurt or

Carrier.

impair it himself, or suffer it to be hurt by his apparent negligence, as if he over-load his horse, and by that means he fall into the water, and so it is marred; or he drive his horses by night, or out of the way, and is thereby robbed, I may have this Action for my relief. And yet a Carrier by a special agreement in the undertaking of the carriage may avoid the Action. If therefore when he takes them to carry, he saith, and agreeth that he will not answer them if they are lost, he shall not be charged, as in case where he undertaketh them generally, *D. & St.* 139. 38. *Fitz.* 14, 15.

Servant.

If my Bailiff that doth keep my Cattel, kill them, or cut down my Trees, or my Butler break my Hamper, or the like; I may have remedy by this Action against them, 18 *Ed.* 4. 20. 27. *Broo.* 95. Or rather by a general Action of Trespass, for by this the privity and trust is determined, *Co.* 5. 13. If my Ploughman that hath the charge of my Plough, drive so hard as to kill or harm it, I may have this Action against him, 7 *H.* 4. 14. *Broo.* 34. If I put a confidence in a man, albeit he come to my goods by his delivery, yet if he be negligent, I may have this Action. As if my Shepherd that I do trust with my Sheep, keep them so carelessly, that they be drowned; or turn shabby by his neglect, I shall have remedy by this Action, 2 *H.* 7. 1. *Co.* 5. 14. If one undertake to do a work for me, as to set plants, or the like, and do it deceitfully, I may have remedy by this Action, *Old Book of Entries*, f. 13.

Smith.

If a Smith refuse to shooe my horse, being requested, or clie him in his shooing of him, so that I loose the use of him for a time, I may have this Action against him, 14 *H.* 7. 22. *Kelm.* 40. *F.N.B.* 94.

Tailor.

So if a Tailor spoil my Garment in the making of it, or a Barber shave me with an unwholsome Razor, so that my face is hurt, or cut my face with any Razor, I may sue him in this Action. And so for other men that undertake to do work of their calling, and do it amiss, *F.N.B.* 94. 7 *H.* 6. 5. *Old Book of Entries* f. 2. 46 *Ed.* 3 19.

Señ. 30.
Inn-keeper.

If an Inn-keeper refuse to lodg me, or herbage my horse when he hath room and may do it, I may have this Action against him, and the Constable of the Town may (if he will) compel him to receive me, unless he can give good reasons for his refusal, as that his house is full, or I have the plague, or the like, 14 *H.* 7. 22. *Kelm.* 50. *Dyer* 158. 5 *Ed.* 4. 2. *Pasche*, 7 *fac. Curia*. But it seems he may refuse the horse or goods of any man that will not lie there himself, *Pasche*, 7 *fac. B. R.* *Walbrooks* Case. If I loose any thing out of an Inn, or common Hostelry, I may have this Action for my relief against the Inn-keeper or Hostler; and this Action will lie, albeit the Inn-keeper did at the first refuse me, and albeit the goods lost were never delivered to the host, or he were never charged with it, and albeit his house be full of guests, and albeit I kept the Key of my Chamber-door my self, and leave open the door my self, and albeit I be robbed by my Chamber-fellow, if the Inn-keeper placed him with me, *Co.* 8. 32. *F.N.B.* 95. *Dyer* 58. But in all Cases where this Action is maintainable, these things must be in the Case. 1. The thing must be lost. 2. The person to be charged must be a common Host, he must be one that doth receive such, *Co.* 8. 32. For if one leave his horse with one that is no common Inn-holder, and it be lost, he shall not answer it, *Dyer* 166. 158. And yet if he have but newly set up, he shall be chargable. 3. The party that lost the goods must be a stranger or traveller, and therefore if it be a friend or neighbor that hath lost it, he shall not have this Action, *Co.* 8. 32. 4. The thing lost must be gone out of the Inn, the House, or the Stable; and therefore if the owner bid the Hostler put his horse to grass, and it be lost there, the owner must bear it; but if the Host of his own head, put him out to grass, and he be lost, the Host must bear it, *Co.* 8. 32. 5. It must be lost by the negligence of the Hostler, or his Servants, as in the Cases last before. If the Host or his man put the guests horse to grass, without the privity of the guest: If a horse die in the Stable without any default of the Host or his man, they are not chargable, *Pasche*, 12 *fac. Co. B. R.* *Whitakers* Case. So if the guest be robbed by his own servant, or his Chamber-fellow of his own choice, no Action will lie for this, *Co.* 8. 32. It must therefore appear that the goods came into his hands. 6. The party that doth loose must be a guest to the house, at the time of the loss; for if he be a friend invited, to lodg all night by the Inn-keeper, he is not chargable for this loss, *Pasche*, 7 *fac. B. R.* *Walbrooks* Case. 7. The goods must be lost whilst the owner is there; for if one leave

his

his dead goods with the Inn-holder, and he do not lie there himself, and the goods are stole, the Host shall not answer them, *Idem*. And yet if it be a horse or living thing which is left, by which the Inn-keeper gets, he must answer it. But if a man leave other goods, as Hats, or the like, and the Host saith he will keep them safe, and the guest come not in many days, and these be lost, he shall not be charged. But if the guest go away in the morning, and come at night, *Contra*, adjudged. *Brownl. 1. part.* 254. And Inn-holders.

If an Officer take Toll of me, where none is due, for my relief herein I may have Officer-
this Action, *F.N.B.* 94.

If an Officer of a Court get a priviledge for one, supposing him to be his servant who is not so, and is sued by me, and thereby my suit is delayed, I may have this Action against him, 31 *Ed. 4.* 22. It is said by some, that if a publick Officer whose Fee is tendered to him or recoverable by Law, do refuse to execute his Office, that he is liable to this Action. And therefore if a Sergeant at Law, refuse to give advice to, or an Attorney to be retained by me, that I may have this Action against him; otherwise it is of a Barrester, for he cannot sue for his Fee: Of this opinion was Justice *Bridgman*, 17 *Car.* If a Sheriff, Bailiff, or any such like Officer do misdemean himself in not doing, or neglect, or misdoing his office, the party hurt by this, may have this Action, especially, if he give him or tender him his Fees before-hand to do it, as if he refuse a Writ, or have a Writ or Warrant to Arrest a man, and may do it, and doth it not, the Plaintiff in the Action may have this remedy, *Co. 9. 60. 5. 89. Plow. 48.* So if the Sheriff refuse to return a Writ, or make a false return of a Writ, the party grieved by it may have this Action, 41 *Affize*, pl. 12. 21 *Ed. 3.* 43. 10 *H. 7.* 23. *Old Book of Entries*, f. 111. *March. Rep. f. 99.* pl. 169. So if an Officer make a false Certificate, he that is hurt by it may have this Action, *Co. 11.* 94. Or if the Sheriff refuse to receive a Writ against one he hath in execution, the Plaintiff may have this Action, 41 *Aff. pl. 12.* *Co. 5.* 87. So if the Sheriff have a Writ against a man at my Suit, and I shew him the man, and he do not Arrest him, I shall have this Action, and albeit it be on the Sabbath day when I do shew him to him, yet he is bound then to Arrest him, *Pasche*, 18 *Jac. B.R. per 3 Justices.*

Smith sued the Sheriff of *London* for not putting his name to the Return of a *Venire facias*, by which the Judgment was reversed for Error, and the Plaintiff recovered damages by this Action, *Brownl. 1. part. 3.* 12. 50.

If the Sheriff do Out-law a man, and do not proclaim him according to the Statute, 10 *H. 7.* 23. *Broo. 122.* Or if he return a man of a Jury that hath a Charter of Exemption, and hath given notice thereof to the Sheriff; in these Cases this Action lieth, 18 *H. 8.* 5. If the Sheriff or his Bailiff enter upon any Franchise or Liberty to execute Writs, I may have this Action, but the Arrest is good, and no false imprisonment lieth upon it, *F.N.B.* 95.

False Imprisonment.

Escape.

If the Sheriff suffer a man arrested upon an Execution to Escape, the Plaintiff in the first Action, may have this Action for his relief, 15 *Ed. 4.* 32. *Co. 4. 95.* *March. Rep. f. 1.* So if the prisoner be rescued, otherwise it is, if it be on a mean Proces. If the Sheriff proceed in his Court after the Cause is removed into another Court, this Action lieth, *F.N.B.* 99. If the Sheriff or his Bailiff attach goods, and deliver them back again, the Plaintiff in the first Suit may have this Action for his remedy, *F.N.B.* 92. If an Escheater had returned any other thing then what was found by the Jury, 9 *H. 6.* 66. *Fitz. 6.* So if an Ordinary or other Officer doth so, the party grieved may have this Action in these Cases. But all this (as it seems) is to be understood of Ministerial Acts onely; for if they refuse to do, or do amiss, or do not their duty in Judicial Acts; it is said this Action will not lie, 12 *H. 6.* 2. 2 *R. 3.* 9, 10. 12 *H. 6.* 3. And this difference was agreed by the Court, *M. 22 Jac. B.R. Sed quare*, and study the reason of this diversity. See more of this before in an Action of the Case for a Deceit.

If there be a Charge upon any man by reason of his Tenure of House or Land, to Repair.
repair any Bank, Bridge, Gutter, or private way, or the like, and he doth it not, and hereby I have a special prejudice, I may have remedy by this Action, *Old Book of Entries*, f. 10. Or if one be bound to repair the Sea or *Severn* Banks, and he neglect it,

and hereby my ground is drowned; I may have this Action, *Trin.* 20 *Jac. B. R.* But in this Case if the decay be by an extraordinary inundation or accident, no Action lieth for this, *Co.* 10. 139.

Suit to a Court.

If one that ought to do Suit to my Court, or grinde at Mill, pay Toll in my Fair or Market, or to egest my Land with his Cattel, doth refuse to do it; this Action lieth for my Remedy, 7 *H.* 4. 9. 44. 21 *H.* 7. 16. 22 *H.* 6. 14. *Brownl.* 11 part. 204.

For not repairing.

If a Lessor do not repair the decays of the housing, having notice, where he is bound to do it, or pay subsidies, and such things as by Law he ought to do, but suffer it to fall upon the Lessee, or he be prejudiced by it; he may have remedy by this Action, 21 *H.* 7. 12. 22 *H.* 6. 14.

For damage-felant;

If one tack Cattel with me till *Michaelmas*, and the owner suffer them to stay longer, and do not take them away, I may have this Action against him for this injury, 45 *Ed.* 3. 6. 21 *H.* 7.

If one buy my Hay in my Meadow, and do not take it away in time, but suffer it to lie so long as to mar the Grass, I may have this remedy, *Fitz.* 48. So if I set out the Parsons Tithes duly, and give the Parson notice of it, and he do not take it away out of my house or ground in a reasonable time, but suffer it there to my prejudice, I may have this Action for my relief, *Stucklies Case*, *Co. B. R.* 45 *Ed.* 3. 6. *M.* 20 *Jac. Denhams Case*:

For disceipr.

If I retain a man to purchase Land for me, and he do it not; but do his endeavor to do it, no Action lieth for it: But if he purchase it for himself, for this I may have this Action, 11 *H.* 6. 18. 3 *H.* 7. 14. 17.

For detaining writings.

If I buy Land, and a stranger hath some of the Writings that doth concern the Land, and the vender and I request the Writings, and he will not deliver them, it is thought I may bring this Action, *Old Book of Entries*, f. 5.

Self. 31. Mounds.

If one be bound by prescription to make his Hedge next to my ground, and do it not, and thereby other mens Cattel come into my ground, or I am otherwise dampnified, I may have this Action for my relief against him that should make the Hedge, *Trin.* 20 *Jac. B. R.* And so for any such like thing which a man is bound to do, as to help Wares out of the Sea with a Crane, or the like, *Old Book of Entries*, fol. 3.

Against a Parson for not keeping a Bull.

If the Parson of the Parish be bound by the Custom to keep a common Bull or Bear, and do not, and any of the Parishioners have any loss thereby, he may be righted by this Action, adjudged. *Trin.* 36 *Eliz. Yaldings Case.* *Fitz.* 5c.

For not saying Divine Service.

If one ought to say Divine Service in my private Chappel, and do it not; I may have this Action, *Co.* 5. 71. 22 *H.* 6. 46. But if it be to be said to a whole Parish, no Action will lie for the neglect or omission, *Co.* 5. 73.

Upon a Robbery against a Hundred.

If I be robbed in my travel, I may recover damages for my loss of the Hundred wherein I am robbed, by an Action in the nature of an Action of Trespass on the Case, upon the Statutes of 13 *Ed.* 1. 1, 2. 28 *Ed.* 3. 11. 27 *Eliz.* 13. But for the further opening hereof these things are to be known.

Where ever this Action is maintainable, there must be these things in the Case:

1. The party robbed, must with all the speed he can, give notice thereof to, and make Hue and Cry at the next Village (be it in the same or another Hundred, or Countrey) and to some of the Inhabitants dwelling in or near the place where the thing is done. And herein it is most safe for him to give notice to the Inhabitants on that side, which way the Theeves do flie, and to give notice to many of the Neighborhood; and yet see *Goldsb.* 56. 62. the contrary.

2. He must bring his Action for it within a year after the Robbery done, and yet not within forty days after the Robbery done.

3. He must within twenty days next before the Action brought, and Test of the Original Writ, be examined upon Oath before one of the next Justices of Peace of the County, in or neer the Hundred, whether he knoweth any of the parties that robbed him; and if he doth know any of them, then before the Action brought, he must be bound by Recognizance before that Justice effectually to prosecute them.

4. The Robbery must be done in the day time, for if it be done after the night

is come; and before the day, no Action will lie for it. And yet see *Goldsb.* 56: *pl.* 10. 61. 70.

5. The Robbery must be on the High-way, for it lieth not for a Robbery upon me in my House.

6. The Felons must be fled, for if any of them be apprehended, although it be by the party robbed himself, the Action fails, but pursue without taking will not excuse the Hundred.

7. It must be a Robbery on the person; for if a man have tied his Horse to a Hedge, and be gone aside to untruss-a-point, and the while the Thief take away his Cloak-bag, or a Carrier be behinde his Horses, and not near them, and his packs be robbed before he come; no Action will lie for this.

And as to this point these things are further to be known.

1. That if my Servant or Carrier be robbed of my money or goods, I may sue, but the Servant or Carrier must be examined upon Oath; and if he will not be examined, I have no remedy; and in these Cases a man may be a witness in his own cause, but a man must make a very clear proof that he or a Carrier had so much money, or such goods.

2. In case of the Carrier, if he be robbed of my goods, either he or I may sue, unless the case be such as he is not answerable, as where he doth take the goods upon a special agreement to keep them as his own, &c.

3. If one of the Robbers be not taken within forty days, it seems the Hundred is chargeable.

4. If it be done between two Hundreds, both the Hundreds and Franchises within them shall be charged with it.

5. If it light upon any persons in particular, they must help by way of contribution from the rest, by the help of the Justices of Peace.

6. If any default have been in the following of the Hue and Cry by any other Hundred, the Hundred charged with the Robbery, may recover half their damage again of the Hundred in default, *Co.* 7. 7. *Plow.* 128. 27 *Eliz.* 13. *Trin.* 21 *Jac.* *Francis Forsters Case, Dyer* 370. 13 *Ed.* 1. 2. 28 *Ed.* 3. 11.

7. If the man be robbed of the Masters money, the Master may sue.

8. Though the party robbed, be negligent to pursue, and refuse to lend his horse to make Hue and Cry, this will not hinder him of his Action, so convenient notice be given.

9. Albeit, the party robbed do not know the Theeves at the time, and take his Oath so, and after he come to know them, and say so; yet this doth not take away his Action.

10. Notice given in the Hundred, five miles from the place where he is robbed, is sufficient.

11. Notice at one Town, and Hue and Cry at another, is good. *March. Rep.* 10. *pl.* 28.

12. All that live in the Hundred at the time of Execution, shall be contributory to the same.

13. A Servant to, or a Receiver of anothers money, may also sue the Hundred, as well as the Master. *Goldsb.* 24. *pl.* 3. See *Brownl.* 1. *part.* 155.

CHAP. IV.

Of an Account.

Self. 1.
What it is.



It is a Writ lying where a Bailiff of a Lord, Receiver, Guardian, or other hath received money, or other things of me, or of another for me, for which he ought to render an account, and he doth refuse to do it; by this means he may be compelled to account, and I may recover not only mine own, but damages also if there be cause, *Co. super Lit. 172. F. N. B. 116.*

Bailiff, what.

By Bailiff here we understand a Servant that hath the administration or charge of lands, goods or chattels, to make the best benefit for the owners.

And against him this Action doth lie, which he hath, or might have made by his industry, his reasonable charges allowed, *Co. super Lit. 171. Co. 4. 30.*

Receiver, what

By Receiver here we understand him that receiveth money or other things to the use of another to render an account, *Co. super Lit. 171.*

Self. 2.
How the Accountant shall be charged.
For the manner.

In this Action the Plaintiff must take great care that he charge the Defendant aright: For he must be charged (except it be in case of the *Keepers of the Liberties*) as Bailiff, Receiver, or Guardian; for otherwise as Apprentice, Surveyor, Comptroller, Reeve or Hayward, he cannot be charged; and therein he must be charged as he is. For if he be a Bailiff, the Writ must charge him as Bailiff; if a Receiver, the Writ must say so; if both, the Writ or Action must so charge him, *Co. super Lit. 172.* When the things of which a man doth receive the profits (whether it be Lands or Goods) be incertain, as a Manor, Hundred, or the like, that may be improved, there he shall be charged as Bailiff: But where the things (be it profits of Courts, Forfeitures, Issues, Fines or Amerciaments) be certain, there he shall be charged as Receiver, *9 Ed. 4. 40.*

If an Heir do sue his Guardian in Socage, for the Profits of his Lands taken before his age of fourteen years, he must charge him as Guardian; but if he sue him for any of the Profits after his age of fourteen years, there he must charge him as Bailiff; and if he sue a stranger that doth intermeddle with his Land, he must charge him as Guardian, *Lit. fell. 124. F. N. B. 118.*

If I deliver another Wares to sell, and he sell them to divers persons and receive the money; in this case it seems he is to be charged as Bailiff, not as Receiver, *4 H. 6. 27. Broo. Account, 18, 53.*

For the matter.

Where a Bailiff doth make a Deputy, yet the Writ must be against the Bailiff himself, *F. N. B. 119 b.*

The Bailiff shall be charged for the Profits which he hath, or might by his industry and care have reasonably made and raised, his reasonable charges and expences deducted, *Co. super Lit. 172.*

Self. 3.
The method and proceeding in this Action.

In the Suit upon this Writ, if the Defendant cannot avoid it by Plea, Judgment is first given, that the Defendant must account; and thereupon Auditors are appointed and assigned by the Court to hear and examine the accounts of the party, what he hath received, and what he hath laid out; and that being done, to present it to the Court; and thereupon there is another Judgment entred, That the Plaintiff shall recover this money of the Defendant.

Ex parte talis, what it is.

And if the Accomptant be found in arrearages before the Auditors, they may award him to prison till agreement made with the party. And in this account they must allow him his reasonable allowances and expences: And if the Auditors refuse so to do, or charge him with more then he hath received, then (for his relief) his next friend may have a Writ out of the Chancery, called *Ex parte talis*, which is directed to the Sheriff to bring his body into the Exchequer before the Barons there, with four Mainpernors, there to account before them at a certain day, and to warn the

the Lord to appear at that day; or if the Plaintiff please, he may wave this course, and bring a new Action of Debt for the arrearages found upon the Account, or he may keep him in Prison upon their Commitment, till he have paid or agreed. But if when the Defendant doth first appear, he deny he is his Bailiff or Receiver, then this Issue must first be tried; and if it be found against the Defendant, the Judgment is, *Quod computat*: and if after that he will not appear, a *Scire facias* is to be had; and if he come not, a *Capias ad computandum*, and upon that an *Exigent*. And if the Defendant appear not upon the first Writ, the Plaintiff may have a *Capias*, and *Process* of Outlawry, or he may have a *Monstravit*, which is an old Writ (now out of use) and doth lie where the Bailiff or Receiver hath no Lands whereby to be distrained, and doth lie hid, then this Writ was granted to take his body, and this was used before any *Process* of Outlawry was given in the Case; but after the first Judgment, a *Capias ad computandum* only lieth *Stat. 13 E. 1. West. cap. 11. F. N. B. 117. Plow. 393. Co. 11. 40. Stat. 52 H. 3. 24. Marlb. c. 23.*

Capias ad computandum, where it lieth. Monstravit, what it is.

The Ward may have this Writ against his Guardian in Socage, *Lit. 124. F. N. B. 118.* The Executor or Administrator, upon Accounts to be made to the Testator, *Stat. 13 E. 1. cap. 23. Dyer 23. Kelw. 131.* The succeeding against the preceding Churchwardens, *8 E. 4. 6. Broo. Account 71.* But the Parishioners cannot bring it against the Churchwardens.

Señ. 4. Who may have this Writ, or not.

One Merchant may have it against another Merchant, where they occupie their merchandizes and Trade together, *F. N. B. 117.* Also one Joint-Tenant, or Tenant in common, in case where he doth make his companion his Bailiff of his part, may have this Action against him: But if one Joint-Tenant, or Tenant of goods in common, deliver them to a stranger, he alone must have the Action, *Co. 11. 89. F. N. B. 118.*

If a stranger take the profits of my wives Land during marriage, and I die; my Executor, and not my wife, shall have this Action for the profits, *F. N. B. 119.*

Executor.

If I deliver one money to keep till after my death, and then to dispose for my soul, my Executor cannot recover it by this Action; for as to this money, he is my Executor.

It lieth (as before) against a Guardian, Joint-Tenant, Tenant in common, Merchant: But it doth not lie against a Joint-Tenant, or Tenant in common, by his companion, unless he be made Bailiff for the profits, &c. *Co. super Lit. 272.*

Señ. 5. Against whom this Action maybe brought or not. Joint-Tenant. Tenant in Common. Baron & feme.

It lieth against a man or woman Guardian, Bailiff, or Receiver, *Co. 11. 89. F. N. B. 119.*

It lieth against the husband, for the Receipt of his wife; against the wife and husband, for the Receipt of the wife whilst she was sole; but it lieth not against a wife without her husband, *4 E. 4. 25. Broo. Account, 68. 82. Dyer 202. 28.* It lieth against a Body-Politique, as against any man, *19 H. 6. 5.* It doth lie against a Se-vant that hath a command to receive for his Master, *19 H. 6. 5.* It lieth against the Keeper of a Park that hath the charge of the Deer, as Bailiff of his Park; *10 H. 7. 6.* Also it lieth against an Executor or Administrator, or any other that medleth with the Lands of the King in his case; but in the case of a common person it doth not lie against an Executor or Administrator, *Lit. 28. Co. 11. 84. 90.* Nor doth this Action lie against an Infant as Bailiff or Receiver, *Lit. 28. Co. upon it, 172.* Nor against a Disseisor for the profits of the Land, *Co. 11. 89.* upon *Lit. 73.* Nor against a Parish-Priest for Offerings, without some agreement, *F. N. B. 119.* Nor against a Surveyor, Apprentice, Comptrollor, Reeve or Hayward, unless he can be charged as Bailiff or Receiver.

Executor: Infant.

The Heir may have this Action against his Guardian in Socage, to compel him to render the profits of the Land to him; but he cannot sue him till he be fourteen years old. And if a stranger that is not a Prochein-Amy, enter upon the Lands of such an Heir before his age of fourteen years, as Guardian to him, in this case he may sue him also, and charge him as Guardian in Socage; and in this case it seems he may sue him before he is fourteen years old. But if a stranger enter upon an Infants Land without any such pretence, the Infant is to be relieved by an Action of Trespass, and not by this Action, *Lit. 124: Co. upon it, 89. F. N. B. 118. Dyer 136. 31. Doct. & St. 13.*

Señ. 6. Where and in what case the Action lieth, or not, but some other Action, or none at all. Against a Guardian.

If

Against a Bailiff.

If a man will enter upon my Land upon any pretence to my use, and take the profits of it as for me, I may have this Writ, and charge him to account for it. So if a man will take up my Rents as my Bailiff, being so appointed by me, I may have this Writ, and charge him to account for them. But if one enter so upon my Land before I enter into it, and have the possession of it, in this case it seems this Writ will not lie, *Co. super Lis.* 89, 90. *Dyer* 277.

If a Tenant by *Elegit* of my Land, do make waste upon the Land, and have received more then his due money, I may call him to an account by this Writ, 12 E. 3. 30. And if there be two Joint-Tenants, or Tenants in common of Land, and the one of them doth make the other his Bailiff of his Moity, and he will not answer him the profits, he may by this Writ compel him to it, *Co. super Lis.* 172. *F.N.B.* 118.

Against a Receiver.

If I deliver to another Money, Corn or Wares to account for, or to imploy to any purpose, as to pay over, to bestow, or the Wares to give to the poor; or on condition, that if he do such a thing he shall have it, otherwise that he shall redeliver it:

Property. Countermand.

In all these cases until the thing be done, the property is in me, and I may countermand it; and if it be not done, and the thing not restored to me, I may recover it by this Action, *Dyer* 21. 57. *Plowden* 92. *F.N.B.* 118. But in the case of Money, if

Detinue.

it be in a bag sealed, or box locked, the proper remedy is by Detinue, *Broo. Acc.* 52. If one receive Money of another to my use, or to pay over to me, and he do not pay it to me, I may have this Action against him, and so may be that delivered the money to him, *Dyer* 22. 57. 18 *Ed.* 4. 23.

Sheriff.

If a Sheriff levie money on a *Fieri facias* for me, and do not pay it to me, I have this Action to recover it, 13 *H. 7.* 1. & *Curia in Co. Banco.* *March.* f. 13. pl. 33.

Election.

If I make a Bill under my hand and seal, that I received Twenty pounds of *I S.* to bestow on Wares, and I do not bestow it accordingly, in this case whilst I live he may have this Action, or an Action of Debt against me at his choice; but after my death, he hath no remedy against my Executors but by Action of Debt, *Dyer* 20. 21.

Debt.

If I deliver to another Goods or Money beyond Sea, to be delivered to me here again in *England* at a certain place, and he deliver it not, I may be relieved by this Action, *F.N.B.* 118. 9.

Executors.

If one devise that his Executors shall sell his Land, and out of the profits thereof shall give such a sum to me; in this case and such like, where the money is to issue out of the Land, I may have remedy by this Writ, and I need not sue for it as for a Legacie, *Dyer* 151. & per three Justices.

Legacy.

If the Mortgagee after the payment of the money by the Mortgager deliver him the money again, the Mortgagee may recover it by this Action, *Adjudged, Mich.* 4 *Eliz.*

If one take upon him to receive my Rents without my agreement, and do not pay them to me, I may recover them by this Action, 4 *H. 7.* 6: *Brook Account* 65.

Election. Detinue.

If one deliver goods to deliver to me an Infant at my full age, in this case when I am of age I may recover them of him in this Action, or a Detinue, at my choice, *Fitz. Detinue*, 53.

Prerogative.

If two Joint-Merchants occupie their stocks, goods and merchandizes in common, to their common profit, one of them may have this Writ against the other; but then they must be both of them named Merchants in the Writ, *Co. super Lis.* 172. And a man could not have touched the Kings lands, or medled with his goods, but he was liable to be questioned by this Remedy, and to be called to an account in the Exchequer, though not by this Writ, *Co.* 11. 91.

Privy.

But this action of Account lieth not in these following Cases. 1. Where the party to be sued claimeth the thing to his own use. 2. Where there is no privy between the parties, neither *ex provisione legis*, called *Privy in Law*, as in the case of a Guardian, nor in Deed, by the consent of the party; as when Goods are delivered to a stranger, and not to my use, or to be delivered over to me, there is no agreement between the parties: But in the Kings case, the Law will supply a privy. 3. When he that delivereth the things, hath taken an Obligation for security of the things delivered. 4. Where the party that hath the things, hath only a bare oversight of them,

as a Bailiff of a Plough, Shepherd of Sheep, or the like, *Co. 11. 93. Dyer 114. & 20. 277. Brook Account 81. 29. Co. upon Litt. 272.*

If one by wrong enter into my Land, and take the profits thereof, I cannot bring this Action against him, *Co. upon Litt. 172.*

So if I be a Parson, and a stranger take away my Tythes after Severance, I may not have this Action against him, but some other for lack of privity: By the better Opinion, *M. 14 Q. Com. B.*

So if a Term of years be Devised to another for life, the Remainder to *7. S.* and the first Devisee is Executor, and he enter, and make his Executor, and die, and he enter and take the profits; in this Case *7. S.* cannot bring this Action for his relief, *Dyer 277.*

If a man give me goods by his Will, and his Executor will not deliver them, I cannot recover them by this Action, *Co. 11. 89.*

So neither if Goods of the Testator be kept from an Executor, he cannot recover them by this Action, *Co. 11. 89.* And if I deliver another any live or dead Goods to his own use, or to any such purpose, it seems I may not have this Action; but if he keep it, or take it away, I may have an Action of Detinue, and if he harm it, an Action of the Case: But if they be delivered to be sold, and the most be made of them, there this Action lieth, *Dyer 120. 22. 6 Ed. 4. 1. F.N.B. 118. B.*

Detinue:

Action of the Case.

If a man deliver Ten pound to Merchandize, no Account doth lie for the Ten pound, for this is certain; but for the profits thereof, which is uncertain, it doth lie: So it doth not lie for the arrears of a Lease for years, or at will, because it is certain; for uncertain things lie onely in Account, *Brook Account 81. 8 H. 5. 3.*

Auditors, what they are, and their power.

The Auditors are such as are appointed by the Court to hear, and examine the Accounts of a Bailiff or Receiver, that is sued upon this Writ in the same Court; and these are either upon the Statute of *Westm. 2. cap. 11.* and then they are Judges of Record, but then there must be two at the least; or one may be an Auditor at the Common Law; and when there is but one, he is such an Auditor, *Co. 10. 103. 2 H. 6. 41. 10 H. 6. 24.*

Such as are Auditors within the Statute, may commit the Accountant to prison if he be found in arrearages, and do not pay it, but then they must do it presently, and cannot do it afterward; but if the Lord be arrear to his Bailiff, they cannot commit him to prison; for he doth remain still at the Common Law; yet if the Lord be found in debt to his Bailiff, or one be in debt to his Receiver, they shall have their Remedy against them, or their Executors after their death, *Co. 10. 103. 27 H. 6. 8. 10 H. 6. 24. 25. Plow. 17.*

A Bailiff shall have Allowances upon his Account, but a Receiver shall have none. If therefore the Bailiff disburse any thing for his Master belonging to his Office, as pay his quit Rent, or the like; or if he be robbed, or suffer loss by other means without any default in him, it shall be allowed him upon his Account; but if he pay his Masters debts, or lay out any thing else, not appertaining to his Office; this will not be allowed him, *Co. upon Litt. 172. 14 H. 7. 14. Plow. 14.*

Self. 7. Allowances, and what shall be granted to an Accountant, or not.

A Guardian also shall have an Allowance, as a Bailiff shall have, but not a Receiver; and therefore he is not bound to Trade with the money received, *Brook Account 66.*

Some Pleas are in Bar of the Account, and some in discharge before Auditors; and some Pleas will be allowed before Auditors that will not be allowed in Bar of the Account. As to the Account, the Defendant may plead, *Ne unques son Receiver ou Bailiff pur Account Render*, or that he was sued for the same cause, and adjudged to Account, and Error brought upon the first Judgment in another Court, where it is depending, and the like, *Dyer 21. Co. 11. 8. 9 Ed. 4. 30.* And as to his discharge before Auditors, he may plead (if he be not a Receiver) he was robbed, or his disbursements, or that he hath fully accounted with the Plaintiff himself, or the like, *Co. 4. 84. 5 Ed. 4. 5.* And if a new Action of Debt be brought for the arrearages found against the Bailiff or Receiver (as it may) the Defendant may plead *Nisi debet*, or wage his Law, *Co. 6. 53. Stat. 5 H. 4. 8.*

Self. 8. Pleas in Account, and what may be pleaded, or not.

See 9.
The Judg-
ments in an
Account.

There are two Judgments upon this Writ : The first is, *Quod computet*, which is interlocutory ; the last is, *Quod querens recuperet versus defendantem*, so much as he is found in arrearages, & *damna occasione interplacitationis*.

The first is to account only, and upon this the Defendant may be outlawed : And then before Outlawry, if he appear and enter into account, and be found in arrearages, the Plaintiff shall have a definitive Judgment for the arrearages ; and after the first Judgment, no abatement can be for any cause, but a Discontinuance or Nonsuit may be.

The first Judgment is but an Award of the Court, like to a Writ to enquire of Damages, and not like to a final Judgment, for there the Action is clearly determined. And these two Judgments depend one upon another : For if Judgment be to Account, and the Plaintiff die before he hath accounted, the Executor cannot go on in that suit, but he must begin again ; and no Writ of Error will lie upon the first, till after the second Judgment, *Co. 11. 40. Broo. Account, 39. 33.*

For Accomptants to the Lord Protector, see *Prerogative-Receiver* ; and *Stat. 4. H. 6. 2. 7 Ed. 6. 1. 6 H. 4. 3. 1 R. 3. 14.* where it is set forth how they may be called to account, proceeded against. See also *Debt*, for the Recovery of the Lord Protector's Debts.

CHAP. V.

Of Acts, and Agent, and Patient.

General Rules
touching Acts.

1.



Here many join in an Act, and some of them might not lawfully do it, it shall be said the Act of him only that might lawfully do it, and not of the rest. As if a Patron that doth suffer an usurpation by six moneths, grant an Annuity to *I. S.* till he do promote him to a Benefice, and after he and the Usurper present him to that Benefice, this is the act of the Usurper in Law, and therefore the

Annuity is not determined. So if the Disseisee, and the Heir of the Disseisor that is in by descent, make a Feoffment by one Deed, and give Livery, this shall be said the Feoffment of the Heir only, and the Confirmation of the Disseisee, *Dyer 192. Littleton.*

Escrow.

2. The Law regardeth Deeds and Acts more then Words ; and therefore if mens deeds and words be repugnant, the Law will operate upon the deeds, and reject the words. As if one make a Deed, and deliver it to the party himself as an Escrow till certain Conditions, this shall take effect presently by the delivery, *Co. 3. 26.*

3. The Law doth more favor and delight in substantial Acts, then circumstantial : As in pleading, if one plead a Fine levied by a husband and wife, he need not shew how the wife was examined, nor before whom it was acknowledged, nor such like circumstances, *Plow. 10.*

4. The Law doth not require unnecessary circumstances : As that Process should be sent out to command one to appear in Court, that is always present in Court, *2 H. 6. 1.*

Political/capa-
Natural/city.

5. A man cannot do an Act to himself, and be both Agent and Patient, unless it be a man that hath a double capacity. Therefore a man cannot present himself to a Benefice, nor make himself an Officer, nor be both Judge, and party to be judged ; nor being a Sheriff, summon or warn himself, nor sue himself. But a Dean and Chapter in the politique capacity, may enfeoff the same Dean in his natural capacity, And a man may by way of Retainer do an Act to himself ; as if he disseise one of Land out of which he hath a Rent-charge, he may pay himself, *13 H. 8. 1. 2. 14 H. 8. 13. Dyer 188. 8 H. 6. 29. Lit. 147.*

Retainer.

6. A man shall not be suffered to do any thing against his own Act.

7. Every mans Act shall be expounded most strongly against him that doth it, *Plow. 140.*

8. When any Act is to be done by agreement between parties, and it is not expressed between them by whom, but it is left doubtfully, it shall be done by him that hath most skill. As if the Condition of an Obligation be, That the Obligee shall bring to the Obligors shop, being a Tailor, three Yards of Cloth (which shall be shapen) and the Obligor shall make the Obligee a Gown of it; the Obligor, that is, the Tailor, must shape it, *9 E. 4. 4.*

Condition of
an Obligation.

9. All personal Acts must be done by the person himself, and cannot be done by another, *22 E. 4. 34.*

10. The Law favoreth all Acts that are done in the right of another; and therefore a man outlawed or excommunicate may sue as Executor, *21 H 6. 30.*

Executor,
Outlawed
person.
Excommuni-
cate person.
Fine.
Act of God.

11. The Law hath much regard to the Original of every Act; therefore it is, that a woman Covert, when she hath but the beginning of a title of Dower by marriage, may bar it by Fine, *Co. 10. 49.*

12. The Act of GOD shall prejudice no man. *Necessitas non habet legem,* Necessity hath no law.

13. All the Acts of Law are very equal and just. *Aequior est dispositio legis quam hominis,* *2 H. 7. 5. Dyer 29. F. N. B. 34.*

Act of Law:

14. Acts of Law are of more efficacie then the Acts of the party. *Fortior est dispositio legis quam hominis,* *Co 8. 78. 185. 6. 40.* The disposition of Law is of more force then that of a man.

15. Acts of Law are more esteemed then Acts of men; and therefore Parceners that come to the Land by Act of Law, were enabled by the Common-Law to make partition, but not Joint-Tenants, or Tenants in Common, *49 E. 3. 15.*

Parceners.
Partition.

16. The Law favoreth things executed, more then Acts executory.

17. The execution of all executory things, hath at all times retrospect to the original cause, and it all maketh but one Act, though it be done at several times. *Causa & origo est materia negotii,* *Co. 1. 97.*

18. Acts done between persons, shall not prejudice a stranger that is not party nor privy to such Act. *Res inter alios acta nemini nocere debent,* *Co 6. 16* (1.) Things among others ought not to prejudice any man; as if a Tenant by an entire service aliens part of the Land, the services shall be multiplied, *6 Rep. 1.* (2.) No Incumbent shall be removed by the *Stat. Westm. 2.* by *2 Imp.* an Attile of Darrein-presentment purchased within six moneths, unless the Incumbent be named in the Writ, *6 Rep. 51.* (3.) If a Lessee grant a Rent-charge to a stranger, and after this surrenders to his lessor, though by the Surrender the Term be extinct, yet this shall not hurt the stranger, but that he shall have his Rent, *8 Rep. 14.* (4.) So if *A.* having a Rent-charge, acknowledgeth a Recognizance to *B.* and afterwards *A.* releaseth the Rent to the Fore-tenant, yet *B.* may extend this Rent, *7 Rep. Lit. 39.* (5.) So if *A.* enfeoff *B.* upon Condition to be void upon payment of one hundred pounds to the heirs of *B.* *B.* enfeoff *C.* and dieth; then it is agreed between *A.* and the heir of *B.* that *A.* shall pay but Thirty two pounds, but yet that One hundred pounds shall be paid, and all that shall be repaid except Thirty two pounds, whereupon such payment and repayment is made, this is no performance of the Condition; for the Estate of a third person shall not be divested by Covenous payments between other parties, *5 Rep. 96.*

Services.

Extinguishment

Condition per
forme.

19. If *A.* make a Lease to *B.* saying Render Rent generally, this Rent shall go to *A.* and his heirs; but if he saith Render Rent to *A.* this shall not go to the heir *Dyer 45.* So if *A.* enfeoff *B.* with Warrantie generally, this Warrant shall go to the heir of *B.* But if he saith with Warrant to *B.* this Warrant shall not go to the heir of *B.* *Dyer 45.*

Reservation
expound.

20. Compulsorie Acts are more favored in Law then voluntary Acts; and therefore if an Administrator pay Debts, or discharge Funerals, this shall be good and bind the Executors. In debt for Boarding, the Defendant may make his Law: But if it be by a Gaoler against a Prisoner, the Prisoner cannot wage his Law, because he is

Compulsorie
Acts.
Executors.
Gaoler.
Wager of Law.

Felony.

compellable to find the Prisoner. Acts that men are forced by necessity and compulsion to do, are not regarded: And therefore if a man be made, his hand be held and forced to kill another, this is no offence, *Plow. 19*. If a man do an Act *per duress*, it is void and shall not bind him, *Idem*. For, Necessity doth yield and give place to the Laws of God and man, *Mat. 12. Exod. 29. 1 King. ch. 21*.

Accusation.

For false Accusations and Surmises to vex men unjustly by Suits in Courts or otherwise, these things are to be known.

1. No man is to be condemned without due Trial, *Mag. Char. 29*.
2. Nor to be vexed upon any Accusation, but according to the Law of the Land, *5 Ed. 3. 9. 28 Ed. 3. 3*.
3. None may be molested by Imprisonment upon Petition to the King and his Council, without Indictment or Presentment, *37 Ed. 3. 18. Stat. 25 Ed. 3. 4. Stat. 5*.
4. And any thing thus unduly done, shall be void, *Idem*.
5. Those that preferred Accusations to the King against others, and could not make them good against other men, were to be severely punished, *Stat. 37 Ed. 3. 18. 38 Ed. 3. 9. 41 Ed. 3. 9*.
6. Damages are to be given in Chancery to them against whom untrue Suggestions are there made, *Stat. 15 H. 6. 4. 17 R. 2. 6*. See *Action, Numb. 10*.

CHAP. VI.

Of an Adwovson.

Self. 1.
Adwovson, or
Avovson, what
it is.
Patron, what
he is.



Parson, what
he is.
Parsonage,
what.
Vicar, what.

Next Avoid-
ance, what.
Voidance, what.

AN Adwovson is the Reversion of a Spiritual Living, or the Right that a man hath to him, and his Heirs for ever, to present a Clerk to the Ordinary for a Parsonage, or a Spiritual Benefice, when it becometh void. It is called also a *Patronage*, for he that doth present the Clerk, is called the *Patron*; for he by our Law is called a *Patron*, that hath the gift of such a Living or Benefice, or one that hath the Adwovson of a Parsonage, Vicarage, Free Chappel, or other Spiritual Promotion: And this Adwovson is either Incident or Appendant, and so it doth belong to some Manor or Land, or Engros, when one hath it alone, and not by reason of any other thing. And he that is presented to such a Parsonage, is called a *Parson*, and the Living a *Parsonage*; if to a *Vicarage*, a *Vicar*, and the Living a *Vicarage*; and both these are the present Incumbents of these Spiritual Livings. The Vicar is one that hath a Spiritual Promotion or Living, called a *Vicarage*, which was a certain portion of a Parsonage, to be allowed to the Minister for his maintenance, and was brought in when Disappropriations began to be made; and both these Livings are sometimes (but very improperly) called the *Church*; and so both these persons in relation to the Patron, are said to be, and are called his *Clerk*. And this grew at first by this means, because he that had this gift or power, or his Ancestors, or those whose Estate he had, did at first build the Church, or else endowed it with some part of the Revenues belonging to it, or else the Church was set upon his ground, *Plow. 495. Dyer 48. Co. 1. 102. 4. 37. 6. 39. Litt. 119. 120*. But it is now of that nature, as a mans other Inheritance, for he may give or grant it by Will or Deed, in Fee for life or years, as he may do any other thing he hath, *Co. 5. 56. 15 H. 7. 8*. Or he may present a Minister to it for once, and then he may grant the next Avoidance (that is power to another, to present to the Church, when it shall next become void, *Co. upon Litt. 120*. And Voidance is the want of an Incumbent on the Benefice,

fice, which is in Deed, by Death or Deprivation, or by Law, by taking two Benefices, and being incapable: It is opposed to Plenarty.

And here we are to know before we go further, That some of these Spiritual Livings (as they are called) are changed into another nature, which are those we now call *Impropriations* or *Appropriations*; which is said to be the improper taking of Spiritual Benefits by Temporal or Secular men; and is said to be where any Body-corporate or private, hath the right of a Parsonage or Spiritual Benefice in themselves, and power also to take the profits thereof to their own use, appointing onely, and allowing a Vicar there to serve the Cure. And this at first was tollerated onely to Spiritual persons, such as were able to administer holy things, and for their help to hospitality; and at last went further, to what we finde at this day; and these were made first by the Pope, the King and Ordinary; and when the Pope was cast out, by the King and Ordinary: And at this time, and by this means, Vicars and Vicarages came in; for then a certain portion of the Parsonage was allowed and set apart from the rest, to maintain the Vicar, who was to serve the Cure, and the Prior, Prioreesses, &c. they had the rest. See *Agreement, Numb. 5. Plow. 495.* And this might have been, and so may yet be dissolved, and again become Propriate; as if it did belong to a Corporation, which is now dissolved; or the Advowson be recovered by an ancient Title before the Appropriation; in these Cases the Appropriation is gone: So that, now at this day, we have Lay Parsons and Parsonages (as they are called) and so are these Impropriators and Impropriations, which are of the nature of other Lay Inheritances. Those that had these at first were called *Proprietaries*, and *Spiritual Parsonages* and *Parsons*, both these *Parsons* are called in our Law *Incumbents*; and these also, especially such as have the Church by Impropriation, are called *Parson Imparsones*, and are said to be perpetually appropriate, *Co. 11. 10. Plow. 49. 6.* But we in this place shall speak onely of the Spiritual Parson and Parsonage. As touching which these things are to be known.

Self. 2.

Impropriation, or Appropriation, what it is. Vicarage, what it is, and how it began.

Proprietaries, what. Incumbents, what. Parson imparsones, what.

1. Every Church Living is to be had and obtained by Presentation, Collation, Donation, or Election; and he that comes into any Parsonage or Vicarage at this day, must come into it by one of these means. And in some places there is a Nomination also (that is) a power that some man hath to name a Clerk to the Patron for the Benefice, when it is void; and then he to whom he is named, must have presented him to the Ordinary; and if he had been lett of this, he might have had his *Quare impedit*, *Dyer 327. 48.* Presentation is the Patrons gift or commendation of the Clerk elected to his Parsonage or Vicarage, by writing to the Bishop; and this man the Bishop did use to examine and allow, by taking of a Record of his name, which was called *Admission*; and thereupon he did give him Institution by these words, *Instituo, &c. I appoint thee to such a Benefice, &c.* And then after this, the Archdeacon was wont to put the Minister into Possession, by delivering to him the Ring of the Church door, ringing of the Bells, &c. And until this was done, he was not compleat Incumbent. *Articuli Cleri, ch. 12. 14 H. 7. 28. Dyer 325. Co. 5. 58. 4. 79.* But the Clerk being thus inducted, and in possession six moneths, this is a Plenarty, and gives such a Title to that Presentation, that will bar all others in a *Quare impedit*, *21 Eliz. 4. 34. Kelm. 88. Co. 4. 79. 7. 38. upon Littl. 344.* But this is not to be done at this day. The Collation to a Benefice, was where the Bishop himself did give a Benefice that was of his own gift, by right of Patronage, or that came to him by Lapse, *Stat. 25 Ed. 3. 6. 1 Ed. 4.* The Donative is where a Benefice is meerly given and collated by the Patron, without any Presentation to the Ordinary; and with this, the Bishop had nothing to do, but the Patron might have disposed it at his pleasure; and by this way now, most Clergy men come into their Livings, *Brownl. Rep. 1. part. 201.*

Nomination, what it is.

Presentation, what it is.

Admission, what it is. Institution, what it is. Induction, what it is.

Plenarie, what it is.

Collation, what it is.

Donative, what it is.

2. He that hath this Right to present to a Benefice, when it doth become void, must have presented within six moneths after the Avoidance, or he had lost his Presentment for that turn; and then that Presentment came to the Bishop of the Diocess, who had six moneths time to present; and if he did not present in this time, it was lapsed to the Archbishop of that Diocess, who had six moneths to present; and if he lapsed that time, then it had come to the King, who might have presented at any

Self. 3.
Lapse, what it is.

any time, during his life. But for this, see *Co.* 7. 27. 4. 117. 6. 22. 30. *Plow.* 49. 8. *D. & St.* 116. *Dyer* 369. *Kelw.* 49. And the new Ordinance, by which Patrons are bound to present to the Commissioners for Approbation of Ministers within six moneths after the Voidance, or else it will Lapse to the Lord Protector, *Ordin. March.* 20. 1653. But if any disturbance be, and a Suit begun within six moneths, and notice hereof in writing left with the Commissioners; this will prevent the Lapse.

3. The Parson, Patron, and Ordinary, by Common Law, in reference to diverse Acts and Considerations of Law, are Relatives; and they three together might have done any thing with the Parsonage or Vicarage; but now the Law is altered herein, for neither the Clerk Incumbent himself, nor he with the Patron and Ordinary, can do any thing to conclude, or hurt his Successor, *Co.* 2. 44. 8 *Ed.* 4. 14.

If I have such an Advowson, and the Parson Incumbent dieth, and another presenteth upon me, or before me, and hindreth me, that I cannot take the Fruit of my Presentment, I may have a *Quare impedit* for my relief. See for this *F. N. B. Plow.* 84 *Co.* 10. 130. But if my Clerk be presented, and in possession of the Benefice, and then he is put out; in this Case I must be relieved by a Writ called an *Affise of Darreine Presentment*, *F. N. B.* 36. And both these are to recover the Presentment for this time onely. For if the Right of the Advowson be in question, it must be recovered by a Writ of *Right of Advowson*; which is, where one hath an Advowson in Fee, and right to present after the death of a Parson to a Church, and he bring no *Quare impedit*, nor *Darreine Presentment*, but suffereth a stranger to usurpe (that is) to present his Clerk, and suffer this Clerk to be instituted and inducted: In this Case he must have this Writ of *Right of Advowson*, *F. N. B.* 34. *Co.* upon *Littl.* 344.

Quare impedit,
what it is.

Affise of Dar-
rein presentment
what it is.
Right of Ad-
vowson, what
it is.
Usurpation,
what it is.

Jure patronatus
what it is.

Spoilation,
what it is.

Juris utrum,
what it is.

Brief ab evesque
what it is.
Quare non ad-
missit, what it is.

Stat. 4.
Ne admittas,
what it is.
Quare incum-
bravit, what
it is.

Vi laica remo-
venda.

Commendam,
what it is.

Union or Con-
solidation, what
it is.

If two Clerks had claimed by two or more Patrons, and it was in question who was the right Patron, and whose Clerk shall be admitted, this Writ in the nature of a Commission was granted to enquire thereof.

If any difference had been between two Parsons or two Incumbents claiming under one Patron, and the Right of Patronage not in question, this was to be decided in the Spiritual Court, and was called *Spoilation*, *F. N. B.* 36. 37.

If the Incumbent alien the Land or any of it, his Successor may have a *Juris utrum*, *F. N. B.* 30.

This was a Judicial Writ that did lie where one had recovered a Presentation by a *Quare impedit* or *Affise of Darrein-presentment* to the Bishop, to command him to admit his Clerk that had recovered it: And if in this case the Bishop had refused, he might have had another Judicial Writ called a *Quare non admittit*.

This is a Judicial Writ directed to the Ordinary, and may be sued out by the Plaintiff or Defendant, to command the Ordinary that he do not admit the Clerk of the other party till the plea be determined, *F. N. B.* 37.

This is a Judicial Writ against the Ordinary for one that sueth a *Ne admittas*, and doth after recover in a *Quare impedit*, or *Affise de Darrein-presentment*, though it be after the six moneths, *F. N. B.* 48:

If debate be between two Parsons for a Church, and one of them entreth with a greater power of Lay-men and keepeth the other out by force; in this case, upon a Certificate of the Bishop to the Lord Chancellor, he might have this Writ to remove the force, *F. N. B.*

This is a Benefice which being void is commended to the care of some sufficient Clerk, until it can be otherwise provided for of a Pastor: And of this, he that hath it is only to have the custody and profits for the time, and is revocable at pleasure.

Where the Churches be small, they have had a way to put two of them together, which hath been done by this means. 1. The King did give licence to do it. 2. The Patrons of the Churches having the Fee-simple thereof, and of full age, did consent thereunto. 3. The Incumbents of both Churches, and those of full age, did consent thereunto. 4. The Ordinary did agree to it. And this was called *Union or Consolidation*. See for this *Stat.* 37 *H. 8. ch.* 21. 1 *E. 6. ch.* 9. 6 *H. 7. 12.* 38 *H. 6. 21.* And there is a way now for uniting of small Parishes and their Churches. See it in the *Service of God*.

The Incumbent of a Church might have resigned or left his Parsonage or Vicarage to the Ordinary which did admit him; and this is called a Resignation, and is like a Surrender, *Plow. 498.* Resignation, what it is.

The Incumbent was sometimes for some offence deprived and put out of his Benefice; and this was called a Deprivation. See for this, *Co. 11, 98. Stat. 13 Eliz. ch. 12. 39 Eliz. ch. 8.* Deprivation, what it is.

The Benefice might have been in some cases by the Ordinary sequestred from the Incumbent, and so might the profits have been also sequestred by him after his death for the profit of his successor, *Stat. 28 H. 8. ch. 11.* This is sequestrable still in some cases; for which see *Religion*, and the *New Ordinances.* Sequestration, what it is.

The greatest part of all this Law must now be gone, the Ordinary being gone, and no other person appointed to exercise his power, save only in the case of Probate of Wills and granting of Administrations.

Disappropriation is, where a Parsonage impropriate doth become propriate again, which is a thing may happen many ways. For which see *Plow. 497. 501. Co. 2. 49.* Disappropriation, what.

Cession is, where the Incumbent takes another Benefice being incompatible. For a Church or Benefice presentative (as every Parochial Church is supposed to be) might have become void five ways. 1. By Creation, when the Incumbent had been made a Bishop. 2. By Death. 3. By Resignation, when the Incumbent in his lifetime had resigned his Benefice to the Ordinary. 4. By Deprivation, when the Incumbent is by Judgment of Law deprived. 5. By Cession; and some call the first so: But in both these cases the first Benefice doth become void. Cession, what.

Gleebe or Glebe is that portion of Land, Meadow or Pasture, that is belonging to, and parcel of some Parsonages which have such things besides their Tythes. See more in my *Second Part of the Marrow of the Law, fol. 9.* Gleebe, what.

CHAP. VII.

Of Age-Prier.



It is where any Action is brought by, or against an Infant; there upon motion to the Court or plea, by the Infant in the one case, or other party, or a stranger in some cases, or sometimes by the Court it self *ex officio*, the Suit shall be stayed until the full age of the Demandant or Tenant, *Brook. Age in toto. Finch. 360. Co. 6. 5.* Age-Prier.

In most cases where the Heir is sued for the Land he hath by Discent, or for something out of, or concerning that Land wherein he is by Discent, and he be an Infant, there upon prayer made he shall have his Age allowed him; as in a *Cui in vita*, a Writ of Customs and Services, a *Cessavit*, when the Infant hath the Tenancie by Discent; a Writ of *Des.* brought upon an Especialty, as for an Obligation, Statute, or for a *Nomine pene*; a Writ of Error, if he be Tenant; a Writ of *Ayel*, if the Action were founded on his own wrong; a Writ of *Formedon in Descender*, *Co. 6. 5. 9. 85. 3 H 6 46. Co. super Lit. 290. Fitz. Age. Br. Joyntenantie 27. Merton cap. 3.* Where Age shall be granted to him or them who pray for the nonage of the Defendant or Tenant.

But in such Actions where the Infant is supposed to come to the Land by his own wrong, as if he be a Disseisor; and in such Actions as are found upon the Infants own wrong, as in a *Cessavit* of his own cession; and in a *Per quod servitium* against an Infant that hath the Tenancie by discent; and in a *Formedon* brought against the heirs of one that had an estate for the life of another granted to him and his heirs, where he is heir by special occupancie only; and in a *Nuper obiit*, when he claimeth as heir from the same Ancestor; and in a *Partitio facienda*, where they are both in possession; and in an Attaint; and in a Writ of *Entry sur disseison* to the Ancestor, if it be freshly pursued; Where not.

Where Age shall be granted, and suit stay for the Nonage of the Plaintiff or Demandant.

Where not.

Diversity of Ages.

perused; and in a *Cui in vita*, or *Sur cui in vita*, against the Vouchee, being Heir to the Husband within age; (a) and in a Writ of Dower, or an Appeal; (b) and in a Writ of Execution sued against his Lands, upon a Judgment had against his Father: In all these cases he shall not have his Age allowed him, neither shall the Suit stay for that cause. And so it is for personal actions; an Infant may be sued for a Trespass, and in divers other cases, for which see *Enfant*; and the Suit shall not stay for his Nonage, Co. 9. 85. Sr. 3. Ed. 1. 46. Dyer 137. Co. sup. Lit. 239. Co. 6. 4. Dyer 321. 9 H. 6. 6. 10 H. 4. 5. 9 H. 6. 46. West. 4. 46. (a) Adj. Eppecau. Tr. 4. 7. (b) Vivcau, M. 7. 7. C. B.

In all cases where it may be presumed to be in favor to, and for the benefit of the Infant; lest for want of the right and full understanding of his Case, and the truth of the matter, he be prejudiced of the right descended to him, though but a bare Right descend: As in all real actions Auncetrel of the possession of his Ancestor; and in all cases where a bare right in Fee-simple descendeth from any Ancestor to an Infant, (which right was once in possession) there in any action Auncetrel brought by the Infant, the Tenant without pleading any Plea may pray the Suit may stay, as in a Writ of Right, as Heir to his Ancestor, and lay the Esplees to be taken in his Ancestor: So in a *Formedon* in the Reverter as Heir to the Donor: So if an Infant alien within age, and his Heir being an Infant sue a *Dum fuit infra aetatem*: So if the Heir within age bring a *Non compos mentis*, the Tenant may pray it may stay. And in all actions Auncetrel possessory, as Cosenage, Belayl, Ayle, &c. where the Ancestor dies seised, the Tenant cannot without pleading pray the Suit may stay. And in *Waste*, or *Quid Juris clamat* brought by an Infant, the Tenant plead a Lease, without *Impeachment del waste*, and offer to attorn saving his priviledg, and pray the Suit may stay, it shall stay, Co. 6. 3. 985. & super Lit. 64. Glouc. cap. 2.

In all cases where it cannot be presumed to be for the benefit of the Heir within age to have the suit to stay: As where the Ancestor died seised, and the Land descended to the Infant, and he hath entred and took the profits, here the suit shall not stay. And therefore in all real actions possessory, generally the suit shall not stay for the nonage of the Plaintiff or Demandant: As in a Writ of *Entry sur disseison*, of a Disseison made to the Infant himself; in a Writ of Right upon a Deforcement to the Infant himself, of the Land he had by descent; in *Escheat*, *Cessavit*, *Droit sur Disclaimet*, *Mesne*, in *Formedon in Descender*, unless something be pleaded against him to which he cannot be party to try it within age: In a Writ of *Entry sur Disseison* to the Ancestor, if fresh suit be made to the Ancestor; and after the Writ brought, the Ancestor died before Trial could be had. See *Infant*. Co. 6. 3. 985. Westm. 1. 46:

A man hath by Common-Law for several purposes divers Ages assigned to him, viz. Twelve years, at which age he may take the Oath of Allegiance in the Torn or Leet. Fourteen years, at which age he may consent to marriage then, or agree to a marriage before; at which age also he being an Heir in Socage may choose his Guardian, and at this age he is counted to be of discretion. Fifteen years, at which age the Lord shall have aid to make his son Knight. Under Twenty one, to be in Ward to the Lord by Knights service; under Fourteen, to be in Ward to Guardian in Socage; at Fourteen, to be out of Ward of the Guardian in Socage, and then he may choose his Guardian; at Twenty one, to be out of Ward of Guardian in Chivalry. So also hath a woman divers Ages assigned to her, viz. Seven years, at which age the Lord her Father shall have aid of his Tenants to marry his daughter: Nine years, at which age a woman may deserve and have a Dower: Twelve years, at which age she may consent to a marriage then, or agree to a marriage before: Until Fourteen to be in Ward, and then to be out of Ward: Fourteen years, at which age, if she attained thereunto in the life of her Ancestor, she shall be out of Ward: Sixteen years, to tender her marriage, if she were under the age of Fourteen at the death of her Ancestor; and at, or after Sixteen years, she is past the Lords tender of a husband: At seven years of age, not before, she may promise marriage to a husband. See the *Womans Lawyer*, f. 52. Co. super Lit. 78. 34 Ed. 1. Stat. 3. Dyer 162, 213. Co. 7. 43. 6. 67. Lit. 204. 3 H. 7. 1. 21 H. 7. 31. Lit. 158. 159. 35 H. 6. 40. But at this day the Law is much changed in some of these things: For as to Wardships of men and women Heirs, they are quite taken away: And the age of a man to consent

consent to marriage, is sixteen years, and the age of a Woman is fourteen years; and before this time they cannot agree to marriage, *As. Aug. 1653.*

Also there be divers ages assigned to Men and Women both: As for the committing of Felony, any age of discretion which is in some sooner, in some longer; and of this the Judge shall enquire and judge. Seventeen years, at which age they may take upon them an Executorship, or be an Administrator. Eighteen years, at which age they may make a Testament, and make Executors for Goods and Chattels. Twenty and one, which is the full age of Male and Female, and then, and not till then, they may make all manner of Contracts, alienate their Lands and Goods, and in some places by special Customs sooner. See *Custom, Co. super Littl. 171. Doff. & Stu. f. 113.*

Two Justices of the Peace in the County, or the head Officer and two Burgeses in Cities, &c. may appoint any woman of the age of twelve years, and under forty being unmarried, and out of service, to serve and be retained by year, week, or day in such sort, and for such wages as they shall think meet; and if she refuse, they may commit her to prison till she shall be bound to serve, *Stat. 5 Eliz. 4.*

It is when one bringeth an Action, and the Tenant or Defendant either for his non-age, or the non-age of the Plaintiff or Demandant prayeth, that the Suit may stay; and thereupon the other replieth, and sheweth cause why it should not stay; this reply is called a *Counter-plea of the Age*, *Terms Ley. Counter-plea.* See more in *Infant and Westm. 1. cap. 46. Stat. Gloc. 2. Westm. 2. 10.* Counter-plea of Age.

CHAP. VIII.

Of Agreement.



Agreement is the coupling or knitting together of two or more mindes in any thing already done, or to be done. And Disagreement is the contrary to this, when their mindes are not united, *Plow. 6. Terms Ley.* Agreement.

Agreement or Disagreement is diversly distinguished. For it is either real (i.) that which doth concern Lands; or personal (i.) that which doth concern other matters: And these are also either *General* or *Special*: And both these are also *Express* or *Implied*; also *Verbal* or *Actual*; and also *Executed* or *Executory*. Assent and Disagreement.

That which is *Executed*, is either *Precedent*, as when goods are sold for money, and the money is paid; or when the Husband doth agree his Wife shall make a Will, and she doth so, or else it is *Subsequent*. As when one doth disseise another to my use, and after I agree to it; or the Executor doth assent to a Legacy given, or the Lessee agree to the Grant of the Reversion. That which is *Executory*, is also either grounded on certainty, as when the Agreement is to pay ten pounds for ten bushels of Barley at *Michaelmas*; or else it is grounded on uncertainty, as where I do agree with another at a price for all his Wood, if I like it when I see it. *Plow. 6. Perk. 45. Co. 3. 26. Stat. 25 Ed. 3. 3. 44 Ed. 3. 37. 18 Ed. 4. 15. Stat. 26 H. 8. 3. 14 H. 8. 24.*

Agreements of the parties in many cases will change the course of the Law, as the Rule is, *Modus & conventio vincunt legem*; as though a Lessee for life or years be to have Houseboot, &c. and be not to cut Timber by Law, yet by agreement he may be abridged of the one, or granted the other: Also this will help faults and errors in Proces and proceedings of Law, *juxta illud, Consensus tollit errorem, (i.)* Consent taketh away Error. Also disagreement will make a nullity of a thing that before had essence; as if a Deed be made to a Feme Covert, and the Husband do after disagree to it, *Co. 4. 62. 64. 5. 36. 40. Co. 5. 119.* 1. The efficacy and operation of Agreement and Disagreement.

2. What act
shall be said to
be a good A-
greement for
the benefit or
prejudice of
them which a-
gree.
*Action on the
Case.*
*Assent to a De-
vise.*

*Agreement to
an Estate.*
Deed.

Self 1.
*Husband and
Wife.*

*Husband and
Wife.*

Infant.

What not.

Deed.

3. When the
Agreement of
any person is
requisite for
the perfection
of any thing
done.

Tenant in Tail.

*Husband and
Wife.*

If one promise to my Wife, that if I release *J. S.* out of Execution, who is at my Suit; that if *J. S.* do not pay me the money by such a day, he will; and when I hear of it, I do enlarge him, this is an actual or implied agreement, on which I may ground an Action, 27 H.8. 24.

If one Devise a Term to *A.* for life, the Remainder to *B.* for all the Term, and make *A.* his Executor and die: And after *A.* the Executor comes to *B.* and intreats him to release all his interest in the Term to *A.* and he doth so, and *A.* doth accept it: This is an actual assent to the Devise, Co. 10. 52.

If an Estate were made in Fee-simple or tail to a man and his wife, and he die (*i.*) and he have not disagreed to it, now this is an agreement in Law, and vesteth the Estate in her, and if she after his death enter into the Land, and take the profits: This is an actual agreement, and good to binde her, though she say never a word, or do it never so secretly, Co. 3. 26. & 4. 4.

If there be Lord and Tenant, and the Tenant Enfeoff the Lord and a Stranger, and give livery to the stranger in the name of both, and after the Lord doth enter and take the profits: This is a good agreement in the Lord, Co. 3. 26. 10 Ed. 4. 12.

If Lands be given to the Husband and Wife in tail, and after the Statute of 32 H. 8. the Husband alien the Land to the use of him and his Heirs, and after Devise it to his Wife for life, and die, and after his life she doth enter, claiming onely the estate for life: This is a good agreement to bar her of taking or claiming any other estate. But if the agreement had been by word onely, it had been nothing worth, Co. 3. 26. Dyer 51.

An Agreement as an Attornment, or the like may be good in the absence of the party for whom it is, Co. 2. 69.

If the Husband and Wife sell the Land of the Wife for money by word, and after they two levy a Fine to the Vendee and his Heirs: This will binde the Wife without any writing to prove her assent or agreement, Co. 2. 57.

If an Infant a Parcener that hath made division, do after at his full age take the profits of the part allotted to him: This is a good agreement affirming the division, but the taking of the profits of a moyety doth not so, Co. super Littl. fol. 171.

If an Infant under the age of consent for Marriage endow his Wife *ad osium Ecclesie* without Deed, and after when he is of age of consent agree to it, yet this agreement will not make the Endowment good, Perk. 438.

If an Estate be made in Fee-simple, or Fee-tail to a man and his Wife, and the Husband die, and the Wife before her Entry say she doth agree to her Estate, or use the like words; yet this will not binde her where she doth demand Dower in a Court of Record, but that she may there waive it, Co. 3. 26.

If an Obligation be made to my use, and being tendred to me, I refuse it, and after again I agree to it, and will accept it: Now this agreement after will not make the Obligation that was void by my refusal good again, Co. 5. 119.

If a Devise be made of any Goods or Chattels, the agreement of the Executor is necessary, and the Legatee cannot take the thing devised without the assent of the Executor, but he will be a Trespasser in so doing to the Executor. *Vide Testament.* Co. 10. 47. Plow. 540.

If a Reversion be granted of an Estate for life or years, or a Rent in being; in most cases it is needful the Tenant for life or years, or the Ter-tenant do agree, else the grant is not good, *Vide Attornment.* Plow. 25.

If *J. S.* Disseise another to my use, I am no Disseisor, nor have any Free-hold till I agree to the Disseison, but he is the Tenant till then: And after I have agreed to it, I am the Tenant and seised of the Free-hold, 12 Ed. 4. 9: Perk. 47.

If a Tenant in Tail make an exchange and die, and the Land taken in exchange, descend to his issue; in this Case the agreement of the Issue is requisite, for the exchange is not good till then, 14 H. 6. 2.

If a Feme Covert make a Testament, the Husband must agree to it, else it is not good, Co. 4. 51.

If a Feme Covert be an Executrix, she cannot release any Debt or Duty to the Testator, without the assent of the Husband, *Co. 5. 27.*

If any Estate in Possession or Remainder, or Reversion by Devise, or act executed for life, in Fee, or otherwise be made to me, I must agree to it, until it be in me, for I may refuse it, *Doll. & Sim. 119. b.*

If a Release, Obligation, or Deed be made to me, and delivered to another to my use, here there is no need of any agreement to make the Deed good or vest the things in me: But if I disagree to it, by this I make the Deed void, *Co. 3. 26. Dyer 167. Br. 5. Co. 5. 119.*

If an Estate be made to a Woman Covert, there needs no agreement of the Husband to vest the Estate in him, *3 H. 7. 9.*

If a Woman hunt a Right or Title of Entry into any Land, and she take a Husband, and he enter, here needs no agreement of the Wife to vest the Freehold in her: So if an Infant have a Right or Title of Entry, and a stranger enter to his use, the Estate is in him without agreement, *Perk. 46, 47.*

If the Husband and Wife levy a Fine of the Land of the Wife, and the Husband alone declare the use; this will binde the Wife, and her agreement to the limitation of the uses is not needful, *Perk. 2. 57.*

If a Feoffment be made to a Woman Covert, her Husband being beyond the Sea, and when he returns, being not content with the Feoffment, he will not suffer his Wife to take the profits, nor to continue the Seison, but doth himself, and also causeth her to relinquish the occupation: Now hereby he shall be discharged of damages, for the time after his relinquishment, if the Feoffor were a Disseisor, *Perk. 14.*

If there be Lord and Tenant, and the Tenant by Deed Infeoff the Lord and a stranger; and give livery to the stranger in the name of both, and after the Lord enter; and distrain for the Seignior: This Act doth amount to a disagreement of the Feoffment, and doth divest the Frank Tenant out of the Lord, *Co. 3. 26. 12 Ed. 4. 12.*

If Lands be given to the Husband and Wife in Tail, and after the Statute of 32 H. 8. the Husband Alien to the use of him and his Heirs, and then Devise the Land to his Wife for life; and after his death she enter claiming for life only: This is a disagreement to the Estate Tail, *Co. 3. 26. Dyer 351.*

If a Woman Covert have a Joynture made to her after marriage, and after her Husbunds death, she brings a Writ of Dower for her Thirds: This is a disagreement to the Joynture *Co. 4. 5.*

If an Infant marry *Infra annos Nubiles*, and after before any agreement when he is of age of consent, he marry another; this is a good Disagreement, without any words of Disagreement at all. And it seems that Disagreement, though it be not before the Ordinary is good, and they may not marry elsewhere, but the Ordinary may punish it, *Robinsons Case, Curia. 7 Jac. Broo. Gard. 124. Co. super Littl. fol. 79. a. b.*

If one Devise Land to his Heir in Tail, the Remainder over to a stranger, and the Heir enter and disagree to the Devise, and say he will have it in Fee, yet he shall have but an Estate Tail only, *Plow. 545. Perk. 569.*

If one agree to give me Twenty pounds for a parcel of Wood, if he like it when he see it, and when he see it, he do like it: Now he cannot afterwards disagree to it, to make void the Contract again, *18 Ed. 4. 15.*

If Tenant in *Precipe* agree not in the Countrey: This is not sufficient to bar the Freehold, *12 H. 4. 21. Br. Surrender 28. 11 H. 4. 62. 6 Ass. p. 2. Kelw. 116. b. 8. Rep. 61. 6 Encounter. 27 Ass. p. 27. Br. Surrender 28. 6 Ass. p. 2.*

If Lands be given to a Husband and Wife in Tail, or in Fee, and the Husband dieth, and the Wife doth afterwards disagree to the Estate by words in the Countrey, and saith she will not have it, or the like: This Verbal Wayver in the Countrey, will not divest the Franck Tenement out of her, but she may enter when she will after, notwithstanding, unless it be in case where she will demand Dower of by the Statute, *27 H. 8. 10. Co. 3. 26.*

If an Estate were made to a Man and his Wife, and he die, and the Lord supposing

the Husband to die sole-seized, assign the Wife her Dower by word; which she accepted, yet she hath the free-hold of the whole in her; and this agreement shall not prejudice her, *Co. 3. 26.*

Señ. 3.

If a Feoffment were made to four, and Livery is made to three, in the name of the rest, and the fourth when he seeth the Deed saith, That he will not agree to it, nor have any thing in the Land; yet this Disagreement will not divest the Freehold, for his Disagreement must be in a Court of Record. So if a Feoffment be made to the Lord, and a stranger by the Tenant, and the Lord by word disagree to it: This is no disagreement to divest the Estate, *Co. 3. 26. 10 Ed. 4. 12.*

5. Where and in what Case the Disagreement of any person is necessary for the divesting of any interest, or property.

If an Obligation be made to me, and delivered to my use, now if I will avoid it, I must disagree to it when I hear of it. So if a Deed of Gift be made to me of Goods, if I will avoid it, I must disagree to it; and by this the property will be divested: So if any Estate or an Obligation be made to a Feme Covert, if her Husband will avoid it, he must disagree to it, for it is in him till disagreement: So if any Estate be made to the Husband and Wife, during the Coverture, and she would avoid it after his death; she must disagree to it, then, for till then it shall be in her. If an Infant be married *Infra annos nobiles*, and he would avoid it after, it must be by Disagreement, *Co. 3. 26, 27. Dyer 167. & 49. Perk. 43. Co. 5. 119. 3 H. 6. 59. Broo. 6. Co. 6. 22. Perk. 438.*

If the Husband and Wife levy a Fine of the Land of the Wife, and the Husband alone declare the uses, if the Wife will avoid this or alter the limitation, she must disagree to that Declaration, and make her Disagreement to appear, *Co. 2. 57.*

6. Where and in what Case after Agreement, one may disagree, where other wife.

Regularly where a man hath once disagreed to the party himself, unto whom the Agreement or Disagreement is to be made; he can never after agree. But if persons married within age of consent do afterwards before that age, by word or writing under their hands, or before their Parents disagree or marry others; yet after their years of consent, they may agree again, and make the marriage good. But after Disagreement at age of consent, no new Agreement without a new marriage shall make it good, *27 H. 8. Robinsons Case. Curia, p. 7 Jac. Co. B. Co. super Litt. f. 79.*

Composition.

This is applied to a special kinde of Agreement, made either between Coparceners (which may be made without writing) as to present to a Benefice by Turn, or the like. But it cannot be between Tenants in Common without writing, for in a *2. Impedit*, the Composition must be shewed; but if once every one have had his Turn according to the Composition, then after the Composition need not be shewed: Or it may be heretofore between the Parson, and one of his Parish, to be discharged of paying Tyths for something agreed on, or between the Parson and Vicar, called sometimes an Indowment, *Dyer 29. 194. Co. 1. 38, 44, 46, 47. Co. 6. 6.*

7. How it shall be taken.

In the Composition between the Parson and Vicar, usage is much regarded; for though the Composition be, that the Vicar should have Garba, yet if he have never had but Hay, he shall have no more now. *Smiths Case*, adjudged. If the Composition be, that the Parson shall have all the Tyth-Corn, and the Vicar all other Tythes; and one sow his arable Land with Saffron, the Vicar shall have it. *Vicar de Farnhams Case, Tr. 1. Jac. Co. B.* It is commonly held, That if the Vicar be to have the Tyths of all the Crofts in such a place, that yet he shall not have the Tyths of the Crofts, parcel of the Parsonage; and if he be to have the Tyths of all the Dove-houses of the place, yet he shall not have the Tyths of the Dove-houses belonging to the Parsonage. If the Vicar by the Endowment, be to have the Tythe Hay of all the Meadows in such a place, yet he shall not hereby have any more but the Tyths of those that were Meadows at the time of the Endowment, and not of those grounds that were made Meadow since the Endowment.

By Baron *Drabam* a difference was taken, where an Endowment is local, as where the Vicar doth claim to have all the Tyths in such grounds, and he hath always had the Tythe of that place; and it hath never been sowed, and he have no Tyths, but the small Tyths of the rest of the Parish by the Endowment; yet if it be new sowed, he shall have the Tythe of the Corn: But if he be to have the small Tyths generally, and he hath always had Tyths in such a place, and it was never sowed, and now it is sowed to Corn; in this Case he shall not have the Corn. *8 Cap. & Sarum Assises.*

CHAP. IX.

Of Aid.



Aid is a Subsidy or yielding of help by one to another, unto whom he oweth it, and whose case calleth for it: And sometimes it is from an Inferior to a Superior, and sometimes from a Superior to an Inferior, and sometimes from one equal to another, *Terms Ley Aid.* Finch. 80.

Aid, what.

From the Inferior to the Superior. 1. From the Subjects to the Supreme Governor, when he hath need, and that Aid is called *Subsidy* or *Custom*, &c. (for which, see *Subsidy*.) 2. From the Tenant that holdeth in Socage to the Lord; and that for two purposes, First, To make his Son Knight, which he may do at fifteen years of age, and then he is to have this Aid. Secondly, To marry his Eldest Daughter, which he is to have when she is of the age of seven years (to wit) of him that holdeth Lands in Socage to the value of Twenty pound *per annum*, Twenty shillings & *sic pro rat*: Which if the Tenant will not pay, the Supreme Governor or other Lord, may at his Election, either distrain him for it, or have a Writ to recover it. But Aid annexed to a Tenure in *Capite*, or in Knights Service, is gone by the late Order. *Stat. 14 Ed. 3. 1. Co. super Lit. fol. 91. 162. 25 Ed. 3. 11. F.N.B. 82. Co. 11. 44.* See *Lord and Tenant, Chap.* *Sett.*

Sett. 1.
From an Inferior to a Superior.

Reasonable Aid shall be Twenty shillings for a whole Knights Fee, and as much for Twenty pound Land in Socage, and so after the Rate more or less: If the Father after the Aid levied, die before he marry his Daughter; the Executors of the Father shall be charged to the Daughter, for so much as he received, or his Heir, if the Executor have not Assets. The King also was to have this Aid according to this proportion by the Statute: But Tenant by Grand Sergeanty, or Petty Sergeanty, or Copiholders shall not pay this Aid. *Westm. 1. 35. 25 Ed. 3. 21 H. 4. 32.*

From a Superior to an Inferior. First, Where the Kings Tenant that held in *Capite*, was impleaded for the Land, or somewhat that doth issue out of the Land, as *Rebt*, &c. Or if any City or Burrough that had any Fee-Farm of the King, had been questioned for it; or, where the Kings Bailiff, Purveyor, or Collector, had been questioned: In these Cases they might have paid, and had Aid of the King. So where the King had warranted Land: For one cannot Vouch, but in that Case must have prayed in Aid of the King; but in the Kings Case, Aid was always to be prayed before Issue joyned, *Co. 8. 50. 4. 22. 5. 109. 1. 48. 9. 16. Stat. 4 Ed. 1. 3. Dyer 25.* Secondly, Where a Tenant for life, years, at will, by Statute, Elegit, or Copy, is impleaded for the Land or any Rent, &c. out of it; then he may pray help, and Aid of him in Reversion (which may sometimes be before Issue joyned, and sometimes after.) And then he may come in *gratis*, if he will, or if he will not, then shall issue forth the Writ called *Somons ad auxiliandum*, which is to compel him to come in, and to plead with his Tenant in the defence of the Land: And if he come not upon the second Writ, then the Tenant must go on without him; and if he do appear, and the Tenant and he do not agree, but differ in their Plea, then the Tenant shall be ousted of his Aid, and the Plea of the Tenant shall be taken alone, *Co. 4. 9. 20. 8. 50. 10. 31. 8. 75. 11. 80. Co. 9. 31. Dyer 256.* Thirdly, Where a Bailiff or Servant is questioned for what he did in his Masters service, he may pray; and shall have Aid of his Master, *14 H. 7. 6. 4 Ed. 3. 11.*

Sett. 2.
From a Superior to an Inferior.

Somons ad auxiliandum, what.

From one equal to another: As if one after Partition made, be impleaded, and lose all or part of her Land, by one that hath Title *Paragonus*, she shall have Aid of the rest, and shall recover according to the rate of the rest again, *Co. 4. 122.*

Between Equals.

It is where one bringeth an Action, and the Tenant in his answer, prayeth in Aid of another that hath a better estate then he; and the Demandant replieth, That he ought not to have Aid of him. This Plea is called a *Counterplea* to the Aid. *Terms Ley,*

Counterplea del Aide, what.

Ley. Sta. 25 Ed. 3. 7. See the old Statutes. *Stat. de Bigamis*, cap. 1, 2, 3. 14 Ed. 3: 14. Stat. 7.

CHAP. X.

Of Allegiance.

Allegiance,
what it is.

How many
kinds of it
there be.



It is a true and faithful Obedience of the Subject to his Sovereign. And this is incident to every Subject, that as soon as they be born, they do by Birth-right owe this Obedience to the Sovereign Magistrate: Hence the Subjects are called *Liege People*. Co. 7. 4, 6. 5.

And there are four kinds of Ligeances. The first is Natural, Absolute, Pure, and Indefinite: And this is that which is originally due by Nature and Birth-right, which is called *Alta Ligeantia*; and the Subject that oweth it is *Subditus natus*. See the excellent Learning of this matter, Co. 7. *Calvins Case*.

The second is Acquisition, which is not by Nature, but by Acquisition, as by Denization; and this is either absolute, as the common Denizations be to them and their Heirs, without any limitation or restraint. Secondly, Limited, as when the King had granted Letters of Denization to an Alien, and to the Heirs-Males of his body. Thirdly, It may be granted upon condition: And this may be effected three manner of ways, 1. By Parliament; 2. By Letters Patents which is the usual manner; 3. By Conquest.

The third is Local, which is made by the Law, and is when an Alien, which is in Amity, cometh into *England*; because as long as he is here, he is within the Supreme Magistrates Protection; therefore he oweth unto him a Local Obedience.

The fourth is a Legal Obedience, which is called *Legal*, because the Laws of the Realm have prescribed the order and form of it, which is the Oath of Allegiance, which is commonly to be taken in the *Tourn, Lies*, or by every man that is above the age of twelve years. Co. *super Litt.* 68. 8. 172. b.

The effect of
this Allegiance.

And by virtue hereof, they are bound to the Commandment of the Supreme Magistrate, to go any where within the Realm with him, for the defence thereof, without wages, but not out of the Realm without wages: For every Subject is bound hereby to defend him and his Realm, *F. N. B.* 8, *F. Protection* 100. 18 Ed. 3. 8. *Crompt. Jur.* f. 84.

Supremacy.

And that which is repugnant, and an enemy to this Allegiance, is the acknowledging and submitting to any Foreign usurped Authority, such as was the Popes sometimes here in *England*. All the Kings Liege people therefore, were to acknowledge and submit to the Kings Supremacy; and to oblige them hereunto, was the Oath of Supremacy Devised, which was as followeth.

Oath of Supre-
macy:

I. A. B. Do utterly testifie and declare in my Conscience, That the Queens Highness is the only Supreme Governor of this Realm, and of all other Her Highness Dominions and Countreys, as well in all Spiritual as Ecclesiastical things or causes, as Temporal. And that no Foreign Prince, Person, Prelate, State, or Potentate, hath or ought to have any Jurisdiction, Power, Superiority, Preheminence or Authority Ecclesiastical or Spiritual, within this Realm. And therefore I do utterly renounce and forsake all Foreign Jurisdiction, Powers, Superiorities, and Authorities; and do promise, That from henceforth I shall bear Faith and true Allegiance to the Queens Highness, Her Heirs and Lawful Successors; and to my power, shall assist and defend all Jurisdictions, Privileges, Preheminences, and Authorities, granted or belonging to the

the Queens Highness, Her Heirs, and Successors, or united and annexed to the Imperial Crown of this Realm: So help me God, and by the Contents of this Book, Stat. 1 Eliz. cap. 1.

But this Oath, and the Oath of Allegiance, as to a King, are now taken away, and not to be imposed upon any body, in any Case. See the *Act of Parliament*, 9 Febr. 1648.

CHAP. XI,

Of an Alien.



AN Alien is a Subject born out of the Legeance of our Supreme Magistrate, and within the Legeance of another King. And such a one is either *Amy*, i. one of such a Nation, as between whom and us there is no War, as now the *French* and *Dutch*; or else he is enemy, which is one of such a Nation, as between whom and us there is open War. And he also is either *perpetuus*; as all Infidels, betwixt whom and us Christians there is a perpetual War: Or *pro tempore*, as sometimes the *Spanish*, and sometimes the *French*, &c. Or *specialiter permissus*, as when an enemy is suffered by the Supreme Magistrates safe conduct to pass into the Country: And such an Alien-enemy may be, though he be born within this Country; as the Issues of enemies born here that hold a *Foite*, or of other Alien-enemies born here, *Terms Ley*, Co. 7: 17, 18.

Alien, what.

He shall be said an Alien that is within the definition aforesaid. But if an *Amy* come into *England* here, and have Issue; his Issue is no Alien. So if an Englishman go beyond Sea by License, and have Issue there; his issue is no Alien. So if one be born under our Dominions, in any other Country, as *Scotland*, or the like; he is no Alien; and therefore in these Cases, such Issues may inherit Land, and have all other benefits of any other Heir born in *England*. But if one be once an Alien, no continuance of him here in *England*, though it be from his Childhood, and though he be sworn in the Kings Leet will make him a Denizen, Co. 7. 6. Stat. 25 Ed. 3. Stat. 42 Ed. 3. 10. *Finches Ley*, f. 84.

Who shall be said an Alien born, or not.

An Alien that is *Amy*, whether he be an Infidel baptized, or any other, though he be not made Denizen, may by the Common Law, acquire, get, and have by Gift, Trade, or any other lawful ways or means, any Treasure or Personal Goods, as well as an Englishman. And if he be a Merchant he may take a Lease of a House, and it shall be good for that special purpose, but not to his Executors or Administrators; or being any other, he may take a House for his Habitation; and for these things he is capable of, he may have any Action, and the Plea of *Alienée* shall be no bar to him. But he is not capable of, neither can he have or enjoy any Estate of any Lands or Tenements, or any Chattels real, by descent, purchase, or otherwise; neither can he have a Benefice, if he be a Spiritual man, until he be made Denizen. And if he have any such Estate, the Lord Protector will have it by his Prerogative. Neither can he have any Action real, or mixt, or personal, concerning Land, but in every such Action, the Tenant or Defendant may plead that he was born in such a place, which is not within the Kings Ligeance, and demand Judgment, if he shall be answered: Neither can such Aliens serve in Juries here, Co. 7. 1. 16. *Plow*. 483. Co. 9. 141. *Dyer* 2. 283. Co. *super F. 1.* Stat. 7 R. 2. cap. 12. *Terms Ley*.

The capacity of an *Alienée* to purchase Lands, or gain Goods, or Chattels, and to bring Actions. And what thing he may take or enjoy to his own use or not. *Alien's Friend.*

But he that is an Alien-Enemy, so long as he remains so, is not capable of any such benefit that an *Alien-Amy* is capable of: For if he have any goods, any man may seise them, and the Lord Protector shall have all his Specialties, and any man may kill him by Martial law, Co. 7. 17. *Dyer* 2. 12 H. 8. 4. And if he do any offence here, he

Alien-Enemy.

he shall be executed by that Law, *Trin. 41 Eliz. Co. B.* And he is held to be an Alien-Enemy, that is subject to one between whom and us is open war; and not the subject of such a King as hath denied to traffique with us, or hath done to us some discourtesie. But Ambassadors of any King, friend or enemy, have a privilege to come here. See more for *Alien*, the Statutes of 1 H.6. cap 3.8. 14 & 15 H.8. cap. 2. 32 H.8. 16.

Denizen, what.

Naturalized or
Naturalization,
what.

A Denizen is one that hath been an Alien, and doth after become a Subject here; and this may be either by Act of Parliament, or by Letters-Patents: And by this he may be made Denizen in Fee-simple, Fee-tail, or for life; and it may be conditional, or absolute, as other things be granted; and then such a Denizen is capable of all other privileges and benefits for Estates of Lands and Chattels real, that a Natural born Subject is capable of, save only of Lands by descent, which no Alien can be capable of until he be Naturalized, (i.) endowed with all the privileges of a natural Subject, which cannot be but by Act of Parliament. But he may have Land by purchase; and if he die without heir, it shall go to the Lord, and not to the King by Escheat, *Co. 7.6.7. 3 H.6.55. Broo. 22 H.8.8. Co. super Lit. f.1.* See for *Alien-Merchants*, and other *Aliens*, the Statutes of 5 R. 2. 1. *An. Dom.* 1382. 6 R. 2. 10. 11 R. 2. 7. 1 H. 4. 16. 17. 6 H. 4. 4. 14 H. 6. 6. 1 R. 2. 9. 3 H. 7. 8. 21 H. 8. 16. 31 H. 6. 4. 1 R. 3. 9. 14 H. 8. 2. 22 H. 8. 13. 32 H. 8. 16.

CHAP. XII.

Of an Alienation, Alimony, Apparel, and Ambodexter.

Seff. 1.
Alienation,
what.



Alienation is nothing else but *Alienum facere*, to make a thing another mans, or to put a thing from one man to another: And if it be of Land, as it is most commonly understood, it is but the transmutation of the possession: Which may be either by Deed, as by Covenant, Fine, Feoffment, or Recovery; or by Law, as by Descent or Escheat, *Terms ley. Co. 6. 27. & super Lit. f. 118.* And in some cases a man hath power of himself so to do; and in some cases he cannot do it without the licence and assent of another: As one that had held of the King *in capite*, could not have aliened it without the Kings licence: So if any man will now alien Lands in Fee-simple to a House of Religion, or to a Body Incorporate, he must have the Lord Protectors, and the Lords licence of whom the Land is holden, first, or else he will forfeit the Land aliened. See *Mortmaine, Stat. 1. Ed. 3: cap. 12. 15 R. 2. cap. 5.*

Licence of Ali-
enation, when
it is required,
or not.

If the Lands that had been alienated from one man to another had been of the Kings *in capite*, or if any Honor *in capite* or in Serjeanty by Knights service, or Socage in chief; in these cases the Kings licence must first have been had, and a Fine paid to him before the Alienation had been made, whether it had been Lands Rent, Mesuagialty, Advowson, or a Reversion that had been so alienated, if there be any Estate of Freehold that is aliened, to the end that the King might still be sure of his Tenant; as in these cases following.

1. If there be three Joint-Tenants, and one release to one of his Companions; hereupon a Licence must be had, and a Fine paid.
2. If any Estate be made of such Land in Fee-simple, Tail, or for Life.
3. If a Partition had been in the Chancery by the Kings Tenants, and it had not been equal, and after they had altered it.
4. If a Fine or Recovery had been of Land to divers uses, and estates of Freehold had been created by this means, there must have been a Licence; and so must it have been, though the uses and estates had been with power of revocation or alteration; but in that case if the uses had been after revoked, there had not needed a new licence.

But

But the Tenure in *Capite* being now gone, no Licence is requisite upon such an Alienation. See *Broo.* 27. 18. 17. 33. 45 *Ed.* 3. 62. 3 *H.* 4. 8. *Br.* 4. 33 *H.* 6. 4. 11 *H.* 4. 33. 43 *Ed.* 3. 6. *Co.* 6. 27. Also when Lands are aliened in Mortmain, the Lord Protector's Licence must first be had, else the Lands are forfeit. But Licence for Alienation of *Capite* Land, is taken away, by Parliament, Order 24 of *Febr.* 1645.

But of the Lands held of the King in Burgage-tenure, or of any Honor of his, and not in *Capite*, there the Tenant might have aliened without any Licence. So also though the Lands be held of him in *Capite*, or otherwise as above, if it be in these cases following.

1. When by the Alienation no Freehold is made, but there is only a Lease for years made.
2. When there is in the sale but a bare Release of a Right by way of extinguishment, as when it is by a *Fine sur Release*, &c.
3. Where there be three Joint-Tenants, and one release to the other two.
4. Where there is only a Rent granted out of such Land by the Tenant.
5. When there is a new Declaration of Uses only, *Stamf. Pr.* fol 33. *Broo.* 296. *Co.* 6. 27.

These Licences so had from the King as before, must have been pursued, else the Licence would not help them that did alien: And therefore if the Licence had been to alien the third part, and he had aliened the whole, this Licence was void for all. So if the Licence be to alien the Manor of *Dale*, with all his Lands and Tenements in *Dale*; and he alien by Fine a certain number of acres (as he must in Fine) this Licence will not help him. So if the Licence be to alien the Manor of *Dale* rendring Five pounds rent, and he alien the Manor excepting twelve acres rendring Five pounds rent, this variance maketh the Licence insufficient for this Alienation. And then in all these cases it is an Alienation without Licence, 4 *Ed.* 6. 6. *Br.* 30. 23.

Sett. 2.
Licence pursued, or not.

But if the Licence be to alien to *I.S.* and *W.S.* and the Conveyance is made to them to divers uses, this is a good Licence, and the Licence need not mention the uses of a Deed, Fine, or Recovery. So if a Licence be to purchase Lands or Tenements, and he purchase an Advowson, this is a good Licence; for an Advowson is a Tenement, *Co.* 6. 27. *Br.* 35.

Upon this Licence had from the King, the party was to pay a Fine or sum of money to the King, viz. upon the Alienation of such Land as was held of him, or any Honor of his in *capite*, the third part of the yearly value; and for a Licence to alien in Mortmain, the value of three years profit, which is by composition to be paid presently before the Licence be granted, *Stamf. Pr.* cap. 27. 8 *Ed.* 4. 4. *Br.* 82. 205. *Co.* 6. 107. 2. 80. But if there had been an Alienation without Licence by the King's Tenant, where a Licence ought to have been had, there (though the alienation be made) yet the party must sue out his Pardon from the King, and the King must have recompence for this wrong done him, which was a Fine only, which is the value of the Land for the year; and for this the King might have seised the Land and kept it till he were satisfied for his wrong, and till he had sued out his pardon for it. But heretofore the Land it self was held to be forfeited, *Co. super Lis.* f. 43. 1 *Ed.* 3. 12. *Co.* 6. 27. But now all Fines, Licences, Seisures, and Pardons for Alienation and Charges incident thereunto, are taken away by Parliament Order. For restraint of Alienation, & Conditions repugnant.

Fine for Alienation, what.

Of Alimony:

FOR Alimony, which is maintenance for a Woman cast off by her Husband, this was recoverable by the Woman against her Husband in the Spiritual Court; but now there is no Court will believe her but the Chancery. See *Chancery*.

Alimony.

Of Apparel.

Apparel.

THE Statute that was made in 24 H. 3. against excess of Apparel is now repealed; so that there is now no Common or Statute-Law touching Apparel, but that every one may wear what he will, 21 Jac. 25.

Hats and Caps.

None may make or work any Felt or Hat of or with any foreign wooll or stuff, unless he have been first Apprentice or Covenant-servant to such myserie of Felt or Hat-making seven years at the least, *sub pena* of Five pounds a moneth, and the loss of all the Hats made while he doth so work, Stat. 8 Eliz. cap. 111 & 1 Jac. cap. 17.

None shall make or sell any Cap or other thing, or Felts, but only Hats, nor any Cap of any woollen cloth nor knit. None shall dye any Cap with Bark or Swarf, but only with Copperas and Gall, or with Wood and Madder.

None shall thick or full any Cap in any Mill, until the same be first well scoured and closed upon the back, and half thicked at the least in the Foot-stock.

No Hat-maker shall take above two Apprentices at a time, and them not under seven years. See for Hat-makers in *Norwich*, 33 H. 8. cap. 16. 1 Ed. 6. cap. 6. 5 Ed. 6. cap. 7.

Of Ambodexter.

AN Ambodexter is (by our Law) one that being a Juror taketh money to say his Verdict of the one side, and of the other. For this offence he is to be fined ten times so much as he takes, and imprisoned, and never to serve on a Jury again, 38 Ed. 3. 12. 5 Ed. 3. 10.

CHAP. XIII.

Of an Appeal.

Appeal, what.

His word bath two significations: For sometimes it doth intend an accusation or suit given to one for some wrong done to him, or his friend, against the wrong-doer: Of which read *Offences*. And sometimes it is used in our Law, as it is in the Civil Law, for the removing of a cause in any Ecclesiastical Court from an inferior Judge to a superior, when the Plaintiff or Defendant refuseth the Judge, and desireth to have his Cause tryed in the higher Court before the superior Judge; and then he is said to appeal, as *Paul* did from *Festus* to *Cesar* the Emperor: And he that doth so appeal, is called an Appealant, 24 H. 8. 12. 1 Eliz. 1. *Co super Lis*.

Appealant.

In what cases
Appeal may be
had or not, and
how and be-
fore whom.

In all causes Testamentary, causes of Matrimony and Divorces, Tythes, Oblations and Obventions, the party grieved that had cause to sue, provoke or procure any Appeal, might so do: But he must have it within this Realm, and not elsewhere; and in this manner, *viz.* First from the Archdeacon or his Official, if the matter be there begun, to the Bishop Diocesan of the same See; and if it be begun before the Bishop Diocesan or his Commissary, then from them within fifteen days after the sentence given, to the Archbishop of that Province, and there it must definitively have been ordered without any further Appeal. And that for lack of Justice at or in any of the Courts of the Archbishops, or in any of the Kings Dominions, the party grieved might have appealed to the King in Chancery, and there by special Commissioners called the Delegates appointed by the King, the matter should have been determined without further Appeal. And if any such cause or matter had in any wise touched or concerned the King, the party grieved might have Appeal from any of the said Courts

to the Upper-House of Convocation, there to be ended without further Appeal, 24 H. 8. 12. 25 H. 8. 19. 1 Eliz. 1. 32 H. 8. 6. But in no case may a man attempt or labor to have an Appeal to the Pope, or *Rome*, or any other person or place out of the Realm, without great danger: For which see *Premunire*, 24 H. 8. 12.

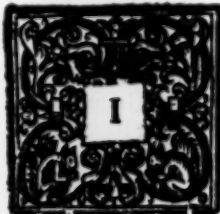
But in case of privation of a President of a College, or any such like matter which is a meer temporal thing, and as by Patron, no Appeal lieth upon these Statutes. As if the President of *Magdalen* College in *Oxford* had been deprived by the Bishop of *Winchester* the Visitor, he could not have had an Appeal to the Delegates; for this is out of the Statutes: But it may be he might have had an Assise, *Dyer* 209, P. 20.

— And in all cases, he that doth sue an Appeal, must pursue the order of these Statutes, or his Appeal shall be disallowed, and he shall have no benefit by it, *Dyer* 240. P. 46.

If a Suit begin before the Admiral touching any Civil or Marine matter, the party grieved may appeal from the sentence of the Admiral into the Chancery before the King, and he is to delegate Commissioners to end it without further Appeal, 8 Eliz. 5: 25 H. 8. 19.

CHAP. XIV.

Of Apportionment.



IT is the dividing into parts of some thing dividable (and not entire and whole) by reason of the division or alteration of some other things out of which that did come, or on which it hath dependance, or otherwise; as Rents, Commons, Conditions, Contracts, Obligations, Suits of Court, Debts, Covenants, Authorities, Damages: About which all the Questions touching Apportionment are moved, *Term's ley. Co. super Lit.* 147.

And these things divided or altered which cause this Apportionment, are so divided or altered sometimes by the act of God alone, and sometimes by the act of God and Law together, and sometimes by the act of Law alone, and sometimes by the act of the Law and the party together, and sometimes by the act of the party alone: And by these means such Rents Commons, &c. that did issue out of them, or depend upon them, be sometimes extinct, and sometimes suspended, and sometimes apportioned, and sometimes continue entire and unaltered, as in the Examples following, *Co.* 10. 128.

Rents and Services severable, Commons, Conditions annexed for Estates, may be apportioned. But Conditions of Obligations, Contracts, Suit of Court, and Services entire are not apportionable. So Assumpsits, *March* 101. pl. 172. 57 pl. 61.

A Rent-charge shall be apportioned by act of Law, and by act of Law when it is mixed with the act of the party, but not by the act of the party, *Co. super Lit.* 49. & 150.

If I let a flock of Sheep, Horses, or Land to one for years rendring Rent, and part of the Sheep be killed, Houses burnt, or Land drowned by the act of God, if so be it be without any negligence or default in the Lessee; here the Rent shall be apportioned with respect to so much as is gone, *Dyer* 56.

If a Lessee for life make a Lease for years rendring Rent at *Easter*, and before the Feast part of the Land be evicted, and the Lessor live till after *Easter*, and then die; here the Rent shall be apportioned, and so much abated as is of the Land evicted, *Co.* 10. 126.

If I let Lands or Goods for years rendring Rent, and during the Term a stranger recover

1. The act of God and Law together.

2. The act of the Law alone.

3. The act of the Law and party together.

4. The act of the party alone.

2. What things are apportionable, and what not.

3. Where and in what case Apportionment may be on Rent or other Services.

recover part of the Lands or Goods by a good Title; in this Case the Rent shall be abated and apportioned, having respect to what is recovered: As if I be seized of two Acres of Land, one in Fee, and the other in Tail: And I make a gift in Tail, Lease for life or years of both, rendring Rent, and after my death the Issue in Tail avoideth the Gift or Lease for the one Acre, here the Rent shall be apportioned. *Co. 10. 128. Dyer 81. 67. 212. 38. 56. 7 H. 7. 4. Co. super Lit. 148.*

If I be seized of two Acres of Land, the one in Borough-English, the other in Gavel-kinde, for years, rendring Rent, and have Issue two sons and die, and the Land go betwixt them (as it must) in this Case the Rent shall be divided between them, *Dyer 46.*

If a Lessee for years or life do surrender part of his Land, or do commit Wast, or make a Feoffment of part of his Land, and the Lessor recover the place wasted, or enter on the Land aliened for a Forfeiture (as he may) or if he enter upon part upon the breach of a Condition: In this Case the Rent shall be apportioned, and he shall pay but *pro rata*. of the Land is left in his hands, *Dyer 45. Co. super Lit. 148. 214.*

If my Father purchase part of the Land, out of which I have a Rent-charge, and dye, and that part of the Land descend upon me; in this Case the Rent shall be apportioned, and I shall recover a part of the Rent still, according to the value of the Land: And so it is if the Tenant of the Land make a Gift in tail of part of the Land to my Father, and this descend to me; and so it is also if my Father be Grantee of a Rent in Fee, and I purchase part of the Land charged, and my Father dieth, and the Rent descend to me; and so it is also if the Grantee grant the Rent to the Tenant of the Land and a stranger, the Rent shall be apportioned, and is extinct but for a Moyety, and the Grantee shall have a part of it of the stranger still. And in all Cases where any part of the Land descend to him that hath the Rent-charge, the Rent shall be apportioned. See *Co. super Litt. 149. f. Lit. Sect. 224. 34 H. 6. 41. Plow. 419. Co. super Lit. 149.*

If a man have Issue two Daughters, and grant a Rent-charge out of his Land to one of them, and dieth, the Rent shall be apportioned: And so if the Grantee in this Case enfeoffe another of her part of the Land, yet the one half of the Rent remaineth out of her Sisters part, and after partition shall be revived: So if one have a Son and Daughter, by one Venter, and a Daughter by another, and grant a Rent-charge to his Son in Fee, and he die, and the Rent come to his Sister, and after the Land come between them, *Co. super Lit. 225. 7 H. 6. 3. 34 Aff. p. 15.*

If one seised in Fee of Land, take a Wife, and make a Feoffment, and the Feoffee grant a Rent-charge to the Husband and Wife, and after the Husband die, and the Wife is endowed of part of the Land, out of which the Rent doth go: Now two parts of the Rent shall continue and be apportioned, and the third part extinct, *Co. 9. 135. 20 Aff. p. 10.*

One having a Rent-charge of Twenty shillings, grants Ten shillings, part thereof, to a stranger; this is a good Grant, and thereby the Rent is apportioned, *9 H. 6. B. 13. A.*

One having a Rent-charge of Twenty pounds, releaseth to the Ter-tenant five pounds parcel thereof; this is good. *Old Tenures 10 B.*

A. doth lease to B. for life, rendring a Rent, and doth after release part of the Rent; this is good. *9 Ed. 3. 8. Br. Release 83.*

Rent-seck which was once Rent-service, is apportionable.

If two Daughters, and Heirs be, and one is full age, and the other not, the Services shall be apportioned, and the Lord shall have the Moyety still, *7 H. 6. 3. Br. Entering 17.*

If one have a Rent-service of Money, or Corn, or Pepper, &c. Issuing out of Land and purchase part of it in Fee, the whole Rent is not extinct, but shall be apportioned *juxta valorem terra*; and so also it is of other Services if they be dividable, but if they be entire and they be valuable as a horse, or the like, then they be gone and extinct: But if it be Homage or Fealty, that doth continue: And if parcel of the Land held by such entire Service come to the Lord by descent; if the Service be

be Suit-service that are annual, that they are extinct also; and if they be yearly and valuable as a Horse, or the like, that they shall be multiplied, and not apportioned in neither Case: So if the Service be *pro bono publico*, yet they shall not be apportioned, but continue entire still. *Co. super Litt.* 143. 149. *Co.* 9. 135. *Co. super Litt.* 149.

If one Lease three Acres, rendring three Shillings Rent, and a stranger buy the Fee of one of them, or the Lessor Devise by Will the Fee of one of them, now the Rent shall be divided, and the Purchaser shall have seven pence of the Rent. So if the Tenant make a Feoffment of parcel of the Land, out of which Rent is to go to a stranger: So if the Lessee or his Assignee grant or surrender one Acre to the Lessor; in this Case the Rent shall be divided, and the Lessee shall pay less Rent by so much. And this is true, though it be in Case of the King, that the Reversion is his, *Co. super Litt. f.* 149. 148. 147. *Dyer f.* 4. & 5.

If there be Lessee for years, rendring Rent, and he assign his Term to the Wife of the Lessor, and a stranger, the Rent shall be apportioned, and the stranger shall pay half during the life of the Wife, *Plow.* 10.

If one make a Lease of two Acres, rendring Rent two Shillings, on condition, that if he do such an Act, he shall have the Fee; now if the Contingent happen, and that he have the Fee of one, then the Rent shall be apportioned, *Co. super Litt.* 148.

If the Gardein in Chivalry entreth into the Land of his Ward within age, now is the Seigniorie suspended: But if the Wife of the Tenant be endowed of a third part of the Tenancy; in this Case the Rent shall be apportioned, and she shall pay to the Lord a third part of the Rent. *Fitz. Dower* 138. *Co. super Litt.* 148.

If the Tenant give a part of the Tenancy to the Father of the Lord in Tail, the Father dieth, and this descends to the Lord; in this Case the Rent or Service shall be apportioned, and so is the Law of a Rent-charge, *Co. super Litt.* 148.

If two Joynt-tenants or Co-parceners be of a Seigniorie, and one of them Disseise the Tenant of the Land, the Service shall be divided, and the other Joynt tenant or Co-parcener shall distrain for his or her Moyety, *Co. super Litt.* 148.

Where Land to which a Condition is annexed, is divided by Act in Law, as where part is recovered by an elder title, or part doth descend, there the Condition shall be apportioned, and shall remain to the residue, *Dyer* 309. *Co.* 5. 59.

If one be seised of two Acres of Land of several natures (i. e.) the one in Fee-simple, the other of the Custom of Burrough-English, and make an Estate of them both together on condition, and die, and one Acre descend to one Heir, and another to another Heir; in this Case the Condition shall be apportioned, and both the Heirs shall take advantage of it, *Co.* 4. 120. *Dyer* 309.

If a Lease be made on Condition, and the Lessee do Alien part of the Land leased in Fee, or commit waste, and so commit a Forfeiture, and the Lessor enter, or recover it from him; in this Case the Condition shall be apportioned; and remains with the residue: For a Condition may be apportioned by Act of Law, but not by the act of the party, *Co.* 4. 120.

If one purchase part of the Land out of which another hath Common Appendant; in this Case the Common shall be apportioned, *Co.* 8. 79. 4. 37. *Dyer* 319.

If one have Common Appendant on Appurtenant to Land, and he sell away part of it; in this Case the Purchaser shall have Common *pro rata*, and there shall be an Apportionment, *Co.* 8. 79. 4. 37.

If he out of whose Land the Common is taken, do purchase part of the Land, to which the Common is appendant, yet the Commoner shall have an Apportionment for the residue, *Co.* 4. 37. 38.

If one have Common in certain in twenty Acres of Land, and ten of those descend to the Commoner; in this Case the Common shall be apportioned, and he shall have Common in the residue: But if he have Common *ad mensuram*, then he shall have Common so still, *Co. super Litt.* 149.

Two

See, a.

Condition:

4. How and in what a Condition may be apportioned:

Of a Common.

Apportionment in Common Appendant and Appurtenant.

Of Warranty,
how it may be
apportioned
by Act of the
Law.

Two Joynt-tenants with warranty, the one makes a Feoffment the warranty is not divideable, 29 *Ed. 3.* 70.

If two Joynt-tenants with warranty make partition by writ, the warranty remains by force of the Statute, 31 *H. 8.* For a warranty may be apportioned by Act of Law, but not by act of the party, 38 *Ed. 3.* 20. 48 *Ed. 3.* 17. 6 *Rep. 12. b.*

Of Execution.

If Execution be sued of Lands upon a Statute, and after the Inheritance of part of those Lands descend to the Conusee, all the Execution is avoided, and there shall be no Apportionment; but if the descent had been before Execution, *Contra. Co. super Litt. f. 150.*

Of an Annuity.

A. grants an annuity of ten pounds a year to *B.* *B.* grants to *C.* five pounds parcel of the said annuity of ten pounds, *A.* shall be liable to pay five pounds to *C.* *F. N. B. 152.*

§. How Apportionment shall be made. Where and in what Case not.

Rent shall be apportioned to the value of the Land purchased, and not according to the quantity, 18 *Ed. 2.* *Avowry 218.* Adjudged.

If one grant to another a Pension of twenty pounds yearly, while he doth keep him company, to be paid such a day, and before the day the Grantor die; in this Case there shall be no Apportionment, but the whole Rent is gone, *Co. 10. 128.*

Of Rent.

If I have a Rent-charge issuing out of Land, and purchase part of the Land, the whole Rent is extinct, and shall not be apportioned, but by Agreement of the parties it may be received again: So if I enter upon part of the Land, the Rent shall be suspended, and not apportioned, *Co. super Litt. fol. 147. Doff. lib. 2. cap. 16. 7 H. 6. 26. Bro. 3.*

If there be Lord and Tenant of Twenty Acres of Land by fealty, and twenty shillings Rent; If the Tenant make a gift in Tail, a Lease for life or years, of parcel thereof to the Lord, in this Case the Rent shall not be apportioned but is all suspended: But if the Lord purchase part in Fee of the Tenant, the Rent shall be apportioned, *Co. super Litt. 148.*

See. 3:

If the Lessor enter upon part of the Land of his Lessee for life or years, and Disfeise or out him, the Rent is suspended for the whole, and shall not be apportioned for any part, 4 *H. 7. 6. Co. super Litt. 148.*

If one have a Rent-charge out of Twelve Acres, and release the Rent out of one of the Acres, the Rent shall not be apportioned and be chargeable upon the rest, 34 *Aff. p. 15.*

If a Tenant Infeoff his Lord, and another in Fee, the Rent shall not be apportioned, but is all extinct, 7 *H. 6. 3.*

If one hold his Land of his Lord by the Service, to render to the Lord yearly at such a Feast, a Horse, a Golden Spur, a Clove, a Gilliflower; If in this Case the Lord purchase parcel of the Land, the whole Service is gone, and there shall be no Apportionment; and so also is the Law, where parcel of the Land held by such entire Service come to the Lord by Descent, there shall be no Apportionment; for in some cases the Service doth remain entire, and in some cases it is extinct, *Co. super Litt. f. 149. Co. 8. 105.*

If Tenants in Tail, or for life Lease part of the Land to others for years, there shall be no Apportionment, but the Tenant in Tail, or Lessee for life shall be still charged with the whole Rent, 22 *Aff. p. 52.*

If one make a Lease for years rendering Rent, and after the Lessee assign over part of the thing leased, it seems here shall be no Apportionment of the Rent, *Dyer fol. 4. 5.*

If one grant a Rent-charge out of two Acres, and after the Grantee recovereth one of the Acres by title Paramount, against the Grantor; in this Case there shall be no Apportionment of the Rent: For if it were true, the whole Rent shall issue out of the other Acre; if otherwise that it were fained, it is all extinct, *Doff. & Stur. l. 2. c. 17. Co. super Litt. 148.*

If *A.* Enfeoff *B.* of one Acre in Fee on Condition, and *B.* being seised of another Acre in Fee, grant a Rent out of both to the Feoffor, and *A.* re-enter for the Condition broken; here shall be no Apportionment, *Co. super Litt. f. 148.*

If

If one make a Lease for years or life, rendring Rent at *Michaelmas*, or twelve days after; and before the last day of payment of the Rent, the Land is evicted from the Lessee; in this case shall be no Apportionment, for Rent shall never be apportioned in respect of time. And so it seems if a Lease be for the life of the Lessee, on condition he shall pay Twenty pounds a year at *Michaelmas*, and he die before *Michaelmas*, that the whole Rent shall not be apportioned. And so if a Tenant for life make a Lease for years, rendring Rent at *Michaelmas*, and the Tenant for life dieth, here Rent shall not be apportioned, but is all lost, *Co. 10. 128: Opinio Bridgman Just. Co. 10. 128.*

If I let a flock of Sheep, or Houses, or Land to one for years rendring Rent, and part of the Flock, Houses, or Land be spoiled by the act of God, and default or negligence of the Lessee together, here shall be no apportionment, but the whole Rent shall continue still, *Dyer 56.*

If three Joint-tenants hold by an entire yearly Rent, as of a Horse, or of a grain of Wheat, and the Tenant cease by two years, and the Lord recover two parts of the land against two of them, and the third do save his part by tendring his Rent, and giving surety, &c. In this case the Rent shall not be apportioned, but is all extinct, *F. N. B. 209. Co. super Lis. 149.*

If a Lease be made on Condition that the Lessee shall not alien the land or any part of it without the licence of the Lessor, and he licence him to alien part; now the Condition is gone of the whole, and shall not be apportioned, and he may after alien the rest without licence, *Co. 4. 120. Co. 8. 79: Co. super Lis. 215.* Of a Condition.

If one lease three Acres for years or life, rendring Rent upon a Condition, and after sell the Reversion of one of these Acres; now in this case there shall be no Apportionment of the Condition, but it is destroyed in all. So also if the Lessee let or surrender part of the land to the Lessor. So if the Lessor enter upon part of the land wrongfully, the Condition is not to be apportioned, but is suspended in all, *Co. 4. 120: Co. 5. 54. Dyer 308.* St. B. 4.

If two Joint-tenants be with Warranty, and they make partition without Writ, the Warranty is destroyed, *Co. 6. 12.* Of a Warranty.

If I have Common appurtenant to Land, and purchase part of the Land, the Common shall not be apportioned, but is all gone and extinct, *Co. 4. 38. 8. 79.* Of a Common.

If A. hath Common of Pasture *sans number* in twenty Acres of Land, and ten of those Acres descend to A. the Common shall not be apportioned, but doth remain entire: And so it is of Common of Estovers, of Turbary, of Piscary, &c. *Co. super Lis. 149.*

If Lands be held by suit of Court, and it descend to Daughters, the service shall not be divided, but the eldest shall do all, and the rest shall contribute; and if the Lord purchase part of the Land, the whole is extinct, *40 Ed. 3. Br. 2.* Of Suit of Court.

If a Lease for years be made, rendring Rent at four days in the year; this Rent is not so entire, but it may be divided, and after the first day is past, the Lessor may bring an action of Debt for that Quarters Rent. So also if one be to pay money by the Condition of an Obligation or Recognizance, or by a Covenant at several days; after a Failer the first day, the Obligation, Recognizance, or Covenant may be sued. But upon a single Obligation, or a Contract or promise to pay money at several days, there no Action can be brought for the Debt, until all the days be incurred, and the Debt shall not be apportioned, *Co. 10. 128. Lis. f. 117. F. N. B. 267. Dyer 103.* 6. Where a Debt upon a Specialty or Contract shall be divided, and where not. Contract, how taken.

If the Condition of an Obligation be to pay Four pounds at a day, and at the day the Obligor pay Three pounds, now the Condition shall not be divided, but the Obligation is all forfeit as if he had paid no part of it, *20 H. 6. 23. Br. 1.*

If one promise me Three shillings a week for his Diet and Lodging, and I find him Diet, but not Lodging; this Debt shall not be divided, neither can I bring an action of Debt for the Diet, by or upon this Contract, *9 Ed. 4. 1. Br. 2.*

If one promise to serve me a year for Ten pounds, and before the year be expired he

he depart out of my service or die, or I discharge him, and he agree to it; now in this case the money shall not be divided, and therefore he hath no remedy for any part of his money: But if the money were to be paid quarterly, and he overlive the quarter, then he shall have the Quarteridge.

If I have land in the right of my Wife, and I sell twenty Trees upon that land for twenty pounds, and the Vendee cut some of them, and my Wife die before the rest be cut; now in this case the debt shall not be divided, neither can I sue for any part of the twenty pounds, but am without remedy, 10 Ed. 4. 18. 10 H. 6. 25. 3 Ed. 4. 6. Br. 25.

If a Lessee covenant to pay the Rent, and after surrender part of the Land, or be evicted out of part by title Paramount; it seems the Rent shall not be appportioned, and that the whole must be paid still, Hil. 7 Jac. B. Regis. See more in Contract, in Extinguishment.

7. Contribution.

Equality.

It is where a burthen or charge is to be laid, or somewhat had from divers, and one ought to bear it as well as another: But if it is wholly laid upon one, in this case the Law (that delighteth in equality) will give him relief against the rest, Co. 2. 25. 11 H. 7. 12.

If one bind him and his heirs by a Specialty, and die, and his Land descend to divers heirs, here they shall be equally charged. So likewise upon a Warranty where his Land doth after go to divers persons as heirs, they must all be vouched, Co. super Lit. 143.

So if one have entered into a Statute, and sold his Land after to divers, and the Statute is extended upon one, he shall have Contribution against the rest: *Ipsa etenim leges capiunt ut jure reguntur.*

If one hold three Manors by Knights service of divers Lords all of equal value, he cannot devise two Manors, and leave the third to descend; but he must leave a third part of each Manor to descend for the benefit of every Lord, Co. 2. 25.

If a Lord of a Mannor would approve Common, he cannot take it all out of one Village, and leave it in another, according to the Statute, but he must leave it in the same, Co. 2. 25.

Sect. 5.

In these and such like cases therefore the Law willeth, that there shall be a Contribution: And to give relief in some of these Causes, are the Writs of *Contributione facienda*, & *de onerando pro rata portione*; which Writs are of great affinity, the one seeming to be the Genus of the other. (See more for Appportionment, in Contract, Sect. 7. Rent, Sect. 5. Common, Sect. 5. Condition, numb. 15. Services, Sect. 6. Debt.)

Contributione facienda.

De onerando pro rata portione.

Where the first lieth or not, and where Contribution shall be made or not.

The first being defined to be, *A Writ that lieth in case where more are bound to one thing, and one is put to the whole burden.* And the last, *A Writ that lieth where one is distrained for a Rent that ought to be paid by others proportionally with him.* So that it seems the first doth lie in most or all cases where the latter doth lie, but not *à contra*. *Terms of the Law, F. N. B. 134.*

If Tenants in common or Joint-tenants hold a Mill (*pro indiviso*) and equally take the profits thereof, the Mill falling to decay, and one or more of them refusing to contribute towards the reparation thereof, the rest shall have this Writ to compel them, *F. N. B. 61. Manth. cap. 3.*

If there be three Coparceners of land that have suit to the Lords Court, and the eldest perform the whole, then may she have this Writ to compel the other two to a Contribution of the Charge, or to one of them, if one only refuse, *Writs, 2. 143.*

Where one only suith required for land, and that land being sold to divers, suit is required of them all or some of them by distress, as intirely as if all were still in one; here he may have remedy against the rest, *Old N. B. 143.*

If many are infeoffed of any land, for which suit ought to be done, &c. Now if they agree among themselves, that one of them shall make the suit, and the rest shall hold him liable, and the one doth the service, and the rest do refuse to contribute; in this case he may have this Writ, and therein he must make mention of the agreement; and if there be no agreement, and one be charged for the rest with all the service, he may have this remedy, *Writs, 2. 143.*

If a Charge come upon a Hundred or Tything, and it be laid upon one alone, it seems he may have his remedy by this Writ, *Fitz. Avarie* 191. *New Terms of the Law*, 99. b.

If Dower of the Tenant voucheth the Heir in Ward to three several Lords, each of them shall be equally charged, *Co. 3. 14. a.*

If two, four, or more men be severally seised of Land, and they all joyn in a Recognisance, in this Case. If the Conusee extend the Land of any of the Conusers alone, he may have Contribution; for all ought to be equally charged, and not one alone without the rest, *Idem Co. 3. 14. a.*

If Judgment be given against two Disseisors in Assise for the Land and damages, and one Disseisor dieth, the Execution shall not lie onely on the surviving Disseisor, but the Heir and the Disseisor shall be equally charged, and Execution ought not to be Awarded against the surviving Disseisor, *Idem Co. 3. 13. b.*

See more of this in Statute, *Numb.* Where the Land of one is charged by a Statute, he shall have Contribution against the rest. But if two be bound in an Obligation, and one of them be charged with the whole, the other shall not have Contribution, unless it be by special custom as in *London, Old Book of Entries*, fol. 261. 126.

If a man hold ten Plough-Land, and by Fealty, and twenty shillings Rent of the King, and the Tenant let one Plough-Land to one man, another to another in Fee, and so the residue to others, and the Kings Officers distrain one of them for all therein, now he may have this remedy against all the rest. So if the Kings Tenant have aliened to divers, and hath some of the Land in his own hands, and he be distrained for all; if he did alien by the Kings License, he shall have remedy against the rest, *F. N. B. 235. a.*

And if a man that holdeth one hundred Acres of Land ought to repair a Bridge, by reason of his Tenure of these one hundred Acres, now if he alien in Fee twenty of these Acres to one, and twenty to another man, and after one of them alone is distrained to repair this Bridge, upon a Presentment made of it; in this Case he may have a special Writ, directed to the Kings Officers, that they shall not distrain him, but according to the rate of the Land he hath, *Fitz. N. B. 235. B.* See more in *Taxes and Rates.*

CHAP. XV.

Of Arbitrement.



Tis an Award, Determination, or Judgment, which one or more doth make at the request or agreement of two or more, for and upon some Debt, Trespas, or Controversie between them; for the ending and deciding of which, the parties have chosen and authorized them as Judg or Judges. It is a Judgment given by such as are elected by the parties unto the Controversie, for the ending and pacifying of the said Controversie according to the *Compromise* and *Submission*, and agreeable to Reason and Conscience.

Arbitrement.

And therefore they are called *Arbitrators*, Judges indifferently chosen by the parties that have power to give a definitive sentence in the matters of difference; and this Award or Sentence is called a Judgment.

Arbitrators.

This doth differ from an *Accord* herein onely, that this is made by the parties themselves, and that by the mediation of Friends.

The difference and agreement between Arbitrement and an Accord.

2. This is no Plea to an Action upon the things accorded, if the thing awarded be not done, for there be means to compel the doing of it; but that is a good Plea to any Action brought upon any thing put in *Arbitrement*, though the thing awarded

be not done; if there be means to compel him to it, that was awarded to do it, 19 H.6. 37. *Plow.* 11. *Kelw.* 121. *Dyer* 75.

Umpire, what.

An *Umpire* is the same in effect with an *Arbitrator*: *Judex honorarius, non à lege datus, sed ab iis qui litigant electum qui totius rei habet potestatem ad arbitrandum non ex lege & stricto jure, sed prout ipse æquum esse existimet.* And he is by the parties to order the matter, if the Arbitrators cannot agree, or do not make the Award by the time set.

Submission or Compromise, what.

A Submission or Compromise, *Compromissum est simultanea illa partium promissio, qua sua sponte ad alicujus boni viri arbitrium suam remittunt Controversiam*: And this is sometimes in writing (which also may be made by the parties reciprocally, or to the Arbitrator) as by Obligation, Recognizance, Covenant, &c. or by word only, and both these are sometimes absolute, and sometimes conditional, as if the Award be made by a day, &c. and sometimes general of all matters, and sometimes particular of some one or more matters. And this is also express, or implied: For in an Obligation or Assumpsit to abide an Award is an implied submission, and upon a bare submission, an Action may be brought if the Award be not performed. If it be to pay money, &c. *Co.* 10. 131. 5. 78. 20 H.6. 18. *Brown and Dennigers Case.* *Trin.* 18 Jac. *Cyprian Salters Case*, p. 9.

**Sett. 1:
1. The fruit
and effect of
Arbitrement.**

The fruit and effect of an Arbitrement is this; That if it be a good and binding Arbitrement, and any thing be given or awarded for any wrong done in recompence, and it be either paid or performed; or if it be such a thing for which the party to whom it is awarded, hath means to come by it, or some thing in attendance for not performance of it, as where there is an Obligation or Assumpsit to perform it, it is an Extinguishment of the wrong and controverſie thereabout; so that the causes of Suit before, *Transcunt in rem judicatam*, inſomuch, That if the party sue again for any of those matters, whereupon the Award hath been made; that Award being pleaded to it, will be a bar to him in his Suit: As if he say, That they submitted to the Award of 7. 3. for that matter alone, or that with others; and that 7. 3. awarded him to pay 10 much money such a day, and that the day of payment is not yet come, (for an Arbitrement that one of the parties shall pay money, doth give an Action for the money:) Or if it be past, then that he paid, or at least tendered the money at the day (for so he must say.) But if the party pay not the money, then is the other party restored to his first Action; yet so as it is at his election, to have an Action upon the Award, or to sue upon the first causes; but if payment be made, the first wrong is altogether determined by the Award. And if the Submission be by Obligation, and the Award be that one shall pay the other money, the party may have an Action upon the Obligation, or upon the Award at his choice, 21 *Ed.* 4. 41. 33 H.6. But if there were a Submission, and no Award, or an Award that is not good in Law, which is all one with no Award, or there be onely a bare Submission without Bond or Assumpsit, and the Award be to do such a thing as for which the party to whom it should be done hath no remedy, being a collateral thing as to make a Feoffment, &c. or any thing else but payment of money: In these Cases the party shall not be barred in any Suit upon the matters put into Compromise; neither will any Action lie for the not performance of such an Award. *Ex nuda submissione non oritur actio*: But if the Submission be by Obligation, or an Assumpsit, and a Collateral Act be awarded to be done, and it be not done, the Obligation is forfeit, or the money promised to be paid by Assumpsit, if it were not performed, may be recovered, 6 H.7. 1. 11. *Plow.* 5. 49 *Ed.* 3. 3. 20 H.6. 41. 9 *Ed.* 4. 51. 6 H.7. 11. 8 H.6. 25. *Dyer* 75. *Co.* 5. 78. 5 *Ed.* 4. 7. 16 *Ed.* 4. 9. 9 *Ed.* 4. 51. 20 H.6. 12. 40. 5 *Ed.* 4. 7. 8 H.6. 25. 16 *Ed.* 4. 8. 49 *Ed.* 3. 3. 33 H.6. 2. 4 H.6. 1. 21 H.7. 28. 9 *Ed.* 4. 44. *Plow.* 6. 5 *Ed.* 4. 47. 19 H.6. 38. 19 H.6. 38. 20 H.6. 9. 5 *Ed.* 4. 7. 9 *Ed.* 4. 44. *Co.* 5. *Samons Case*.

But some hold that an Action lieth in some Cases for non-performance of an Award upon meer Submission, although it be to perform a Collateral Act as to make a release, and he shall declare upon a mutual promise to perform the Award, 20 H.6. 20. *A.* 10. *Rep.* 131. *A.* *Trin.* 18 Jac. *B.* *B.* *le Roy*, *Brooms and Doring.* *Co.* 8. 98.

The

The Award of a Personal Chattel, as if an Award be that *7. S.* one of the parties shall have a Horse in question between them, doth alter the property, and give it to *7. S.* so that *7. S.* may have an Action of Detinue for it: And so also it seems it doth of a Chattel real; but in real matters which concern Free-hold, an Arbitrement can neither give a Title, nor binde a Right, *Dyer* 183. 21 *H. 7.* 29. 14 *H. 4.* 19.

An Arbitrement can give no Title concerning Free-hold, nor bind a Right.

But if the Award that is made be faulty in any of the particulars following, or there be never any Award made, then for not performing such a part of the Award, as is not good; no Action will lie upon the Obligation or Assumpsit to perform it, neither doth the Award in that Case where it is defective produce any effect; for no Action will lie upon it, *Co.* 10. 131. *Hains versus Honeywood, M.* 4 *7 ac.*

The Husband may submit himself to an Award for himself and his Wife, for the Goods and Chattels he hath in the Right, and by reason of his Wife; and this will binde the Wife, 21 *H. 7.* 29. 13 *H. 4.* 12. 10 *H. 6.* 14.

What persons may submit to an Award, and what shall be said to be good Submission in Law, and what not.

If an Infant binde himself to perform an Award by Bond, the Bond is void. So if a stranger binde himself, that an Infant shall perform an Award: the Bond is void, *March.* 111: *pl.* 189. & 141. *pl.* 215. For an Infant cannot submit to an Award, nor any body for him, *March.* 111. *pl.* 189.

If divers have done a wrong to one, and one of these, and he to whom the wrong is done may submit to the Award, and if an Award be made, the others that were no parties to the Submission, may take advantage of it to extinguish the wrong. 7 *H. 4.* 31. 20 *H. 6.* 12.

A Submission to an Award by a Deputy, as if the one party himself, and a Deputy for, and in the name of the other submit to an Award; this is a good Submission, and the Award that shall be made upon it will be good, *Dyer* 270.

If divers be parties to the Submission, and one submit at one time, and another at another time, it seems this is not a good Submission; but they must submit all at one time, 4 *Just. Bridg.*

Styl. 3.

If the Submission be of all Actions, Causes of Action are not contained within this, *Co. super Lisl.* 285.

But if the Submission be of one thing, within it may be included any thing incident to that thing; and of it an Arbitrement may be made within this Submission, 8 *H. 6.* 18. 19 *Ed. 4.* 1. 5 *H. 7.* 22.

How a Submission shall be expounded.

If the Submission be by Obligation with Condition to perform the Award, so as it be delivered *utrique eorum* before a day: Now by this it must be delivered to each of the parties, else it is not sufficient, *Br. Condition,* 46.

Though a Submission be by word or writing, and be naked, or cloathed and joyned with an undertaking by Obligation or Assumpsit, yet before the Award be made, it may be countermanded, and the Arbitrators discharged of the work, but with these differences.

Countermand of a Submission, where it may be, and where it shall be good, and where not.

1. That where there is a naked Submission by word, that may be revoked by word; but if it be in writing, the countermand must be by writing, for it must be *eodem modo*, as the Submission is.

2. If the Submission be naked, and either of the parties countermand it, and discharge the Arbitrators, the other hath no remedy against him: But if he undertake by Especialty, or Assumpsit to abide the Award of *7. S.* and do countermand, and revoke it; though the Revocation be good, yet he is subject to Suit on the Especialty or Promise, for he hath broken his promise.

3. In both, and all these Cases, where the party will have his Submission revoked, he must give notice of his minde therein to the Arbitrators. But if there be two or more of the one side that do submit to the Award, one of them cannot revoke the Submission without the rest, especially if it be by Deed, *Co.* 8. 81. *Fitz. Arbitr.* 21. *Co.* 5. 78. 21 *H. 6.* 30. 3 *Ed. 4.* 3. 8 *Ed. 4.* 10. 8 *Ed. 4.* 11. 10. 28 *H. 6.* 6. 21 *H. 6.* 30.

5. The duty of Arbitrators, and how they ought to demean themselves.

When the parties have submitted themselves, the Arbitrators may either refuse to meddle with it, or accept the burthen of it: And if they will accept it, the parties are to notifie their Controversies to them, or else they are not to take any notice of it

(but they cannot enjoy any oath to Witnesses, and yet may take any evidence that any man will voluntarily by oath confirm) after they have understood the cause, and heard the parties and matters fully, they must make their Award *Secundum allegata & probata*, and they must do this themselves; for they cannot transfer their power to another, or make Deputies, (for an Award so made will not be good) because they are Judges of the matter by consent. After they have made the Award, if by the Submission it be provided for, that it shall be published or notified, then it must be done, and so done as the Submission is; as if the condition be, that it shall be by writing them so: If to all the parties, then so it must be, and till then it is no good Award. But if it be left to the discretion of the Arbitrators, and no order be taken by the Submission for the publication of it, the Arbitrators are not bound (but in honesty) to notify it, and the parties are bound to take notice of it; but if one be to do a thing that depends upon another thing first to be done by the other party, he must have notice of this, 8 Edw. 4. 10. 47 Edw. 3. 21. Co. 5. *Samons Case*, 8. 98. 8 Ed. 4. 11. 8 Ed. 4. 21. 1 H. 7. 5. *Plow.* 218. Co. 4. 82. 5. 103. 8. 82. 8 Ed. 4. 21. 20 Ed. 4. 8.

If the Submission be, that the Award shall be delivered to the party, &c. before a day if he desire it, if he desire it not, he must take notice of it at his peril, 8 Ed. 4. 18, 21.

If divers of the one side, and divers of the other, submit themselves to the Award of divers, the Arbitrators may make an Award for matters between them jointly, and for matters between them severally; and they may make an Award between some of the one part, and some of the other, and not meddle with the rest, unless the Submission be so, as they must meddle with all or none: For an Arbitrator may protest against meddling with some parcel, and make an Award of the rest, if the Submission will warrant it, and an Award made of that parcel which is within the Submission, is good, 2 R. 3. 18. 21 H. 7. 29. *Plow.* 289. 22 Ed. 4. 22. 19 H. 6. 6.

6. What Matters are Arbitrable, and what not.

Self. 3:

The most proper matters for Arbitrements, are personal wrongs, and uncertain duties, as Trespasses, and the like: But most things may be referred to Arbitrement, as differences about Land, and Estates therein: Chattels real or personal, choses in Action, Reckonings, Accompts, and the like. *Dyer* 183. Co. 5. 78.

But Arbitrators cannot dispose of Land by their Judgment (as the Chancery and a Judgment at the Common Law can do) yet they may Award, that one party shall enjoy it, and the other not disturb him; or, that the one shall give the other a Bond for quiet enjoying, or the like. And if there be any Especialty or Assumpsit, to perform the Award, and he do not; he may sue upon it. Freehold is not arbitrable, 9 H. 6. 60. *B. Kelm.* 99. b. 21 Ed. 3. 26. 14 H. 4. 18, 19, 24. *Br. Abridgement*, 5. 30. 8. *Rep.* 137. a. 3 Ed. 3. *Waste* 5. Contrary to *Dyer* 242. b. 14 H. 4. 19. a. *per Skren*, 8 R. 2. *Annuity* 55. 12 *Aff.* pl. 25. 12 Ed. 3. p. 24. And for Chattels they may dispose them, and give the property or interest to one or another as they please.

1. Debts due for expence about business are arbitrable. 2. So also it seems is a Debt on a Contract or damage certain, being joyned with Trespass, or other things uncertain; and all these are arbitrable, before any suit begin or after. A debt on a Contract alone seems also to be arbitrable. See Co. 8. *Baspolis Case*, f. 97. (1) *Adjudge Sower versus Bradford*, 37 *Eliz. Co. B.* (2) *Finches Ley* 181.

And therefore if a man demand five pound for divers businesses that he hath done for another; this is a matter arbitrable, adjudged. *Trin.* 37 *Eliz. B. R. inter Sower & Bradfield.*

Some Books say in some of these Cases, the Submission must be in writing, or else the Matters are not Arbitrable. Quere, how and what is meant by that.

But Debts certain due by Bond, or Bill, or Covenant, or on a simple Contract alone which is certain, are not arbitrable: Nor Debts upon arrearages of account before Auditors; nor things that are not in *Reum natura*, at the time of the Submission, though they after happen; nor Freeholds, Annuities, Waste, Detainment of Charters, or the like; yet so as before on Penalties or Assumpsits, to perform such Awards they be bound, or else must pay the money, 4 Ed. 3. 16. *Dyer* 51. 6 H. 4. 6. 4 H. 6. 17. 10 H. 7. 4. 9 H. 6. 60. 14 H. 4. 18. Co. 5. *Samons Case*.

But

But matters of Commonwealth, or of Marriage, it seems are not arbitrable at all, *West. Symb. f. 146.*

In every Arbitrement these five things are requisite as incidents, *Dyer 217. 19 Ed. 4. 1. Ca. 10. 137. 10 H. 7. 4.*

1. Matter of Controversie, and that must be Arbitrable.
2. A good Submission of the parties to the Award.
3. Parties to the Submission.
4. Arbitrators.
5. An Award; and if either of these be wanting, it can be no good Award.

Observe therefore, for the defects and faults of Arbitrements whereby they lose their force and become void; some of them are in something going before the Award it self, and some of them in the Award it self, and some of them in something coming after the Award it self, or *ex post facto*.

Before: As where either the persons are not able to submit, as Feme-Coverts, or the like; or have not submitted, as when the Award concerneth strangers, not privities nor parties, or the things referred, are not things that lie in Arbitrement, and there is no collateral security to bind the parties to perform it; or the submission be not legal; or being legal, it is determined by revocation before the Award made, *Co. 4. 1. Kelm. 99. Co. 5. 78. 8. 98. 10. 131. 17 Ed. 4. 5. 12 H. 7. 5. 19 H. 6. 36. 13 H. 4. 12. 8 Ed. 4. 10. 10 Ed. 4. 8.*

In the Award it self: As when either the Arbitrators pursue not the Authority given, by the submission; or they award somewhat to be done to, or by a stranger; or the Award is uncertain, or there is an apparent wrong, and they give no shew of satisfaction; or the Award is made all for one side, and nothing for the other, and it imply some wrong to him done also; or they award a thing the party hath no means to come by; or the Award is not final and definitive; or the Award is of a thing impossible or unlawful, or of a thing apparently unreasonable, or it is imperfect or insensible.

The common faults of Arbitrements.

After: When some due circumstance is not observed after; as publication or notice of the Award, according to the submission, or the like. For all or any of these causes, an Award may become void. As for examples:

If one sue for a Debt upon a Record or Specialty, and this be put to Arbitrement; and an Award is, that he shall pay all or some part of it: This is no good Award, for the matter is not arbitrable. See the Answer of this Question, in the four first Questions before: *What persons may submit. Countermand. The duty of Arbitrators. Matters Arbitrable, 10 H. 7. 4.*

Before the Arbitrement.

If there be divers Trespasses referred to Arbitrement, and the Award is, that the one shall make the other amends, and say not what; this is a void Award, *8 Ed. 4. 1. 39 H. 6. 9.*

In the Arbitrement it self for uncertainty.

If an Award be, that one of the parties shall enter into an Obligation with Condition to do any thing, and say not of what sum the Obligation shall be, or that one shall give a Release to the other, and say not what Release, *Co. 5. Samons Case. See March 18. pl. 42.*

If the Husband only do submit, and the Award be, that he and his Wife shall do, have or take any thing; the Award as to the Wife is void, and so is it if it were of a stranger, any other besides his Wife. As an Award, that one of the parties and the Arbitrator, or any stranger shall do an act, is void as to the Arbitrator: So an Award, that the party and his wife shall enjoy the Land in question, or that either party shall make a Feoffment, or pay money to a stranger, is so void as to the stranger, that for not doing these things by or to the stranger, no Action will lie. An Arbitrement, that one of the parties shall do a thing wherein the Assistants of others that are strangers, and whom he hath no means to compel thereunto, is not good for so much as concerneth such stranger. An Award, that each party shall pay Five shillings for writing the Award to the Clerk; and it was agreed void, *Brownl. 2 par. 100. Co. 10. 131. Kelm. 45. 18 Ed. 4. 28. Co. 5. 78. 19 Ed. 4. 1. 28 H. 6. 13. Trin. 9 Jac. Tydderlies Case, Banco Regis. 17 Ed. 4. 15. 5. 18 Ed. 4. 23. 19 Ed. 4. 1.*

Self. 4.

For want of privity in such, by whom or to whom to be performed.

When a stranger is by the Award to do something, this is void for this cause also, because

For that which is not contained in the Submission, or in pursuance of the authority.

because it is out of the Submission. See the last Division. 19 Ed. 4. 1.

The Arbitrement that is made of a thing that is not contained within the Submission, is void: As if the Submission be for all Actions personal, and the Award be made of and about Actions real; & sic è contra. So if the Submission be on a Condition (which is usual) as when the Condition is to stand to an Award, so as it is to be made by a day certain, or be in writing, or under Seal, and delivered by a day, and the Arbitrators make it after the day, or do it not so as before, this Award is void. So if the Submission be for all matters between them until the tenth of May, and they award that a Release shall be given of all Actions until the twentieth of May, this is a void Award. So if A. on the one side, and three others of the other side submit to Arbitrement for all actions and demands between them, and the Award be made of some matters between them three of the one side only, this is not good. (2.) So if the Submission be of all causes depending between them *ab initio mundi*, &c. and the Award be of all causes *à principio*, omitting *depending*, this is void. So if a Submission be to four, and three of them make the Award. But if the Condition of an Obligation to stand to Award, be to stand to the Award of four, so as the Award of the said Arbitrators or any three of them be made &c. In this case an Award made by any three of them is good. So if the Submission be of divers particulars, with a Condition: For as an Award be made of the premisses, &c. if all the differences, or some be made known, and they do not make an Award of as much as is notified. But if the Condition were for all matters, or between divers persons; and some matters only, or all between some of the persons only are notified, an Award of them alone is good. And if the Submission be of divers things in particular, without any such conditional restraint or conclusion, an Arbitrement upon any of them is good. *Vide plus supra & infra*, 7 H. 6. 40. 19 H. 6. 36. 36 H. 6. 11. Pl. 306. 9 Ed. 4. 44. 8 H. 6. 18. p. 9 Jac. B. Regis, Scots Case, Dyer 242. Co. 8. 92. Co. 10. 132. v. Iels: Sule Marg. 2 R. 3. 18. 36 H. 6. 8: (2) Adj. Hayns, Perkins, Armisteed. Adj. vers. Cale, B. Regis. Co. 8. 58. Dyer 216. Cyprian Sallows Case, P. 9 Jac. B. Regis.

If the Submission be by Deed, and a time set, and the Arbitrators meet and pro-
rogue it to a time after the day, and then do it, this is not good; but if it were without Deed, it seems otherwise. And if they make an Award one day, and after before the time make another; or make part one day, and part another, before the time set; or part before the day, or part after: In these cases, without a new Submission, these Awards are not good. But if they meet and agree only, and at another day within the time make the Award, this is good, 49 Ed. 3. 9. 22 H. 6. 52: 33 H. 6. 28: 39 H. 6. 12. 8 Ed. 4. 10. 19 Ed. 4. 1.

If the Submission be of all Suits and Controversies then depending, and the Award is made of a Controversie not in suit, this is good. *Per Curiam*, B. R. M. 10 Car.

See §. 4.
For that it is
not satisfac-
tory.

If the Arbitrement do not import satisfaction of the wrong that is put in Com-
promise, it is not good. As for Examples:

If the differences be about arrearages of Account, and this be referred, and the Award is, that the party in arrearages shall account: So if the Award be, that be-
cause one of the parties had the goods of the other, that he shall redeliver them. But if by that redelivery, the party to whom may have some special benefit, then the Award is good enough. So an Arbitrement, that one party shall have one part of the thing in question, and the other the other part, (c) if it be Debt in question, and the Award be, he shall pay part of the debt. (7) So if an Award be, that one that is supposed to have done a trespass, shall do his Law, and then be quit and discharged. (8) So if the Award be, that in recompence of the wrong, the parties shall enter-
marry. (9) So if the Award be, that one of the parties shall do such an act such a day, and the day be past before the Award finished, *Fitz.* (2) *Arbit.* 27. (3) 12 H. 7. 15. 45 Ed. 3. 16. (4) 2 H. 5. 2. 14 H. 4. 14. (5) *Fitz. Arbit.* 19. (6) 15 Ed. 3. 16. (7) 46 Ed. 3. 17. (8) 9 Ed. 4. 44. (9) 3 Ed. 4. 11. 8 Ed. 4. 22.

For that it is
made of one
part only.

So if a Suit be put in Arbitrement, and the Award be, that the Plaintiff shall not proceed, or shall be Non-suited, or the like; it seems these are not good Awards,
19 H. 6.

19 Hen. 6. 36. Plow. 11. 5 Hen. 7. 2. 21 Hen. 7. 28. 36 Hen. 6. 15. Co. 8. 98.
7 Hen. 6. 40.

An Arbitrement, that one shall pay money to the other, and then the other shall release all Actions, is good.

If between the Garnisher and the Plaintiff in a Detinue, the Award be that the Garnisher shall go quit of all quarrels and suits, had by the Plaintiff against him; and nothing be said for the quarrels of the Garnisher, had against the Plaintiff. So if all matters be referred between two, and the Award be, that the one party shall go quit of all Actions, that the other hath against him, and say nothing of the Actions he hath against the other; these are not good Awards. And yet if a man demand five pound of B. for busshesses he hath done for him, and this be referred to Arbitrement, and the Arbitrator Award that B. shall pay to A. four pound in full satisfaction of the same debt, and no more; this is a good Award. *Sower versus Bradfield*, adjudged. Trin. 37 Eliz. B. R. Co. 8. 98. 7 H. 6. 40.

If an Award be that one party shall pay ten pound to the other, and doth not say for what, or that the other shall go quit for the like; this is not good, and no Averment per Just. Berkley. R. R. 11 Car.

A. was indebted to B. and they both died. The Heir of A. for good consideration assumed to the Administrator of B. that he would pay to the Administrator the debt; and for not payment according to the Assumpsit, the Administrator brought an Action, and then they submitted to the Award of C. and became bound; and to the other, to stand to the Award accordingly; so that the Arbitrator make his Award of all matters, and controversies between them, before such a day. C. the Arbitrator before the day recited the Assumpsit, debt, as aforesaid, and ordered, That the Heir should pay the Administrator so much money, and published; and an Action of the Case was brought upon this Award, and Judgment, given for the Plaintiff. *Brownl. 2. part. Co. 8. 98.*

For want of means to obtain the thing.

If the Award be, that one of the parties shall have Land out of anothers hands, this is void; for this order doth not give the Frank-Tenement: But yet *secundum quid*, onely, for if there be any Bond or Assumpsit to perform the Award, and it be not performed; yet one may sue upon the Bond or Assumpsit, Plow. 11. 20 H. 6. 52. 5 Ed. 4. 7. 19 H. 6. 36.

An Arbitrement, that the parties or either of them shall do something by the advice of the Arbitrators, or one of them, is not good, 19 Ed. 4. 1.

Not definitive or final, or by words.

An Award, that if one of them will wage his Law, he is not guilty of the Trespas, that then he shall go quite, and the other shall release to him, is not good: So if the Award be, that the parties shall abide the Award of others, or of the Arbitrators themselves at another time, or shall do as another shall set down, or the like: So also if an Award be, that the Plaintiff shall be Non-suit, it seems this is not good, for he may then begin again, 46 Ed. 3. 17. Co. 5. 78. 47 Ed. 3. 20. Plow. 11. 19 H. 6. 36.

If a Submission were to Arbitrators; and after to an Umpire, and the Arbitrators make an Award of parcel, and the Umpire of the rest; this is not good, unless the Submission were so made; that the Umpire might make an Award of any part of it, 39 H. 6. 10.

An Award cannot be made part at one time, and part at another, 39 H. 6. 11. d. 8 Ed. 4. 10. b. 19 Ed. 4. 1. d.

If the Arbitrators make an Award between the parties one day, they cannot make another Award between the parties another day, 22 H. 6. b. 52. d.

So if the Award be made, but of part of that which is referred; as if the Reference be of nine Articles, and the Award be made but of six of them; this is void, *Goldsb. 1. 5. pl. 14.*

For that it is not made of all that is referred.

If a Debt of Twenty pound be in question, and the Award is, the party shall pay more then the debt, is not good, 9 Hen. 7. 16. *Keble.*

Unreasonable.

So if it be that one shall release the Surety of the peace to W. S. and in truth there be no such matter, 21 Ed. 4. 40. 9 Ed. 4. 44. 39.

An Award, that either of the parties shall release to the other all Actions till the day

Sec. 6.

Impossible.

Against the Law.

Incertain, or imperfect.

After the Award, or by Matter, *ex post facto*.

Where not. Before the Award.

Privy.

Self. 7. Being contained in the Submission or Pur-
suaunce of the Authority.

day of the Award, is unreasonable and void ; for then the Obligation or Assumpfit will be released also, that was made to perform the Award : So divers before for their unreasonableness in other particulars, are void, *H. 6. 10. 21 H. 7. 28.*

An Award that the one shall release to the other such a Suit he hath against him, when as in truth he hath no such Suit in being, *20 Ed. 4. 38.*

An Award that one shall rob another, or disseise him of his Free-hold, or the like, are void.

If a Submission be of all the Lands descended, and the Award is of White-acre and Black-acre, an Averment may be, that this is all the Land descended ; and by this the Award may be good. *per Just. Berkley, 11 Car. R. B.*

If the Submission be made with Condition, so that the same Award be notified to the parties, or some of them by a day, and the Arbitrement be well made ; but it is not after published or delivered according to the tenor of the Condition, then is the Arbitrement void, and the Publication must be as the Condition is : If by such a time, or under Seal, &c. then it will not be good, unless it be so done : But if the Condition were so, that it be delivered to the parties before a day *petentibus hoc*, here they are not bound to deliver it till it be desired : If the Submission be by divers of both sides, Provisor it be delivered to the parties, or one of them : If he deliver it not to some, or one of them, the Award is void ; but if he deliver it to any, or either of the one, or the other side, it is a good Award. So if the Submission be by two, so that the Award be delivered to either, or *utrique eorum* before Michaelmas, and it be delivered but to one, it is not good. See this question before above in the Negative question. *8 Ed. 4. 21. 11. 1 H. 7. 5. Dyer 218. 37 H. 8. Br. Cond. 46.*

An Award that a thing shall be done by the advice of a stranger that is not party, or privy to the Award, is good enough, *8 Ed. 4. 11. 14 Ed. 4. 1.*

An Arbitrement that the party shall do a Judicial act, is good, though it cannot be done without the help of strangers, *19 H. 6. 38. 19 Ed. 4. 5 5 H. 7. 22.*

If the Submission be of things personal, and the Award is, that one of the parties shall do an act, that is, of a thing real in satisfaction of the personal wrong, & *se è contra* : So if the Submission be of one thing, and the Arbitrement of any thing incident to, or depending necessarily upon that thing, it is good. So if the Submission be of all Actions real and personal, and the Award be onely of matters personal, or of the matters real, it is a good Award ; for so much especially, if no other matters were notified to them. But in that case, if the words or manner of the Submission be Conditional, that the Award must be of all matters or none, there it may be otherwise : So if the Submission were of the Right, Title, and possession of Land, and the Award be made of the possession onely, and nothing said of the Right ; yet it is good for so much. So if *A.* on their side, and three others on the other side, do submit to the Award of *W.* and he do Award some matters that are between the three and *A.* jointly ; or matters that are between any of the three and *A.* this is a good Award : So if a Submission be of all Suits, and the Award be, that the one shall release to the other all Suits, Debt, &c. except one Obligation in particular ; this is a good Award : So if there be divers Suits and Controversies about Tythe, and other matters between two, and they submit these to Arbitrement, and he Award that all Controversies between them shall cease, and the one shall pay to the other twenty pounds in recompence of all wrongs ; this is a good Award for the Tythe, adjudged. *Ingram versus Web, Trin. 18 Jac. B. R.* And if the difference is between a thing severable, and a thing entire, as the making of a Release in the Case *Supra* ; for there if the Award exceed the Submission, it is void for all : So if *A.* and *B.* 1 *Maii* submit themselves to *J. S.* for all matters from the beginning of the world unto the date of the Submission ; and in *June* following they make an Award, that *A.* shall pay to *B.* ten pounds, &c. and that *B.* shall make him a general Release, and that this shall be an end of all matters between them from the beginning of the world, until the date of the Award ; this is a good Award, adjudged ; but if other matters be shewed in pleading to be between the parties, between the date of the Submission, and the date of the Award, *Contra. 9 Ed. 4. 44. 8 H. 6. 18. 9 H. 7. 15. 7 H. 6. 40. 36 H. 6. 11. Co. 8. 98. Dyer 216. 19 H. 6. 6. Br. 2 R. 3. 18.*

36 H. 6. 8. Br. p. 97 ac. *Sallows Case. Lee versus Pain, Hill. 14 Jac. Co B.*
43 Eliz. Co. B. *Barns Case.*

If an Award be, that he that hath done the wrong, shall give the other a Quart of *Safflower* Wine, or ever so little recompence for the satisfaction of the wrong; it is good enough: So where divers of the one party, and the other submit, and the Award is, that one of the one side, shall pay to another of the other party so much, and give nothing to, or from any of the rest; this is good enough: So an Award, for that the wrongs are equal from either party to the other, therefore either of them shall go quit against the other; so if it be that either of them shall release to the other; so if it be, that either party shall go quit against the other; and the one shall pay the other so much, because his wrongs he did were more; so if two have suits each against other, and they be referred, and the Award is, that they shall each of them be Nonfuit, or discontinue their suits, and not sue again for those matters, or enter a Retrait, are good, 43 Edw. 3. 33. 9 Edw. 4. 44. 22 Edw. 4. 25. 19 Hen. 7. 37. Fitz. Arb. 9. 9 Edw. 4. 44. 10 Hen. 6. 4. 20 Hen. 6. 19. 5 Hen. 7. 22. Fitz. Arb. 9.

An Arbitrement, that one shall release to the other all his right in the Land in question, is good; if it appear by the Award, that he to whom the Release was made, were in possession of the Land, 9 Ed. 4. 44. 21 Ed. 4. 40.

If the Controversie referred, be about a debt of ten pounds due by a Contract, and the Award is, that he shall pay forty shillings costs, it is good; for hereby he is discharged of the debt that doth pay it. So if divers Trespasses done by one of the parties be referred, and the Award be, that he that hath done the Trespass, shall pay ten pounds for the Trespasses, and say nothing of the other, this is good; for hereby the other is discharged of any Action for those Trespasses: So if the Award be, that whereas one of them hath received twenty shillings of the other, and hath done him divers Trespasses, as also the other hath done to him divers Trespasses, that the one therefore shall pay to the other his twenty shillings, and that they shall go quit one against another: So where divers matters be of both sides, when the Award is, that they shall be friends, and all Controversies and Matters shall cease, and the one shall pay the other twelve pence: So if there be divers of both sides, and the Award is, that one, or some onely shall pay to one, or some onely of the other side, Co. 8. 98. 22 Ed. 4. 25. 20 H. 6. 19, 12. *Gales Case*, 7 H. 4. 31. M. 8 Jac. 20 H. 6. 18. 10 H. 6. 4. 19 H. 6. 6.

If an Award be, that one shall levy a Fine, make a Feoffment, enter a Retrait by Nonfuit, or discontinue his Action, or make defaults in a *precipe quod reddat*: In all these Cases, though the concurrence of the Acts of others be necessary, yet it seems the Awards be good, 5 H. 7. 22.

If a stranger had drawn an Award before, and the Award be, that the parties shall perform that Award, it is good. 8 Ed. 4. 10. 39 H. 6. 10.

If the Arbitrators meet, and commune one day of the Award, and make it after another day at a new meeting, within the time given them, this is good; but they cannot meet, and make a part of the Award one day, and meet after, and make the other part another day; it seems this is not good, 39 H. 6. 12. 8 Ed. 4. 10. 19 Ed. 4. 1. 3 H. 4. 1.

Award that the parties shall be bound, or shall make assurance by advice of Council, or that an Action shall be sued between the parties by advice of A. is good. 18 Ed. 4. 22, 23. 8 E. 4. 1, 4.

If the Arbitrement be, that the party that hath done the wrong shall pay a greater sum in value then the wrong is that he hath done; this Award is good. 8 Ed. 4. 21.

An Arbitrement, that one shall give the other a thing he hath not, is good, if it be to be had, and he must provide it. 19 Ed. 4. 1. 9 H. 7. 16.

An Arbitrement, that one of them shall give security for the performance of a thing to be done, is reasonable and good, 8 H. 6. 18. 19 H. 4. 1.

An Award that the one party shall pay to the other ten pounds, and release to him all Trespasses, and that the other shall release to him again is good, yet he cannot compel him to release; but he may sue him or the Bond, or Assumpsit, 20 H. 6. 18.

After the A-
ward, or for
Matter, ex post
facto.

If one be bound to stand to the Award of four of all Actions, &c. So that the same be made in writing, and delivered such a day by the Arbitrators, or any three or two of them: If any two of them deliver it, it is good enough, *Sallars Case*.

If the Submission be with Condition, so that the Award be delivered before such a day, and the Arbitrators deliver it by word of mouth, it is a good Award; but if the Condition had been, that it should have been delivered in writings, *Contra*. And if in this Case the Award be made in one County, and delivered in another, yet it is good enough, *Dyer* 218. 5 H. 7. 7.

If the Submission be by divers on both sides, with Condition that the Award be delivered to the parties, or one of them. If the Arbitrators deliver it to both, or all of one side, or to one of either side, it is good enough, *Dyer* 218.

If the Submission be with Condition, that the Award be delivered before *Michaelmas*; if it be delivered the last day before after Sun-set, it is good enough, adjudged. *Parkers Case*. M. 37, 38 Eliz. Co. B.

8. The Expo-
sition of an A-
ward, and how
it shall be
taken.

Though an Arbitrement be a Judgment, yet it is not like to other Judgments that are taken more strictly; for this shall be taken according to the intent of the Arbitrators; if the intent will stand with Law, else the parties shall perform it according to these words; in such sense as they will agree with Law, 17 Ed. 4. 3. 21 Ed. 4. 39. 19 H. 6. 36.

If an Award be, that one shall pay to the other twenty pound at *Michaelmas* next coming, provided, that for security the Extents and Leases shall remain in force: And if he pay not the twenty pounds at the day, nor put in security such as the Plaintiff shall like of, then the Leases and Extents shall remain in force. This is an absolute Award for the money, and the words (nor put in security) shall refer onely to the saving of the Leases, adjudged. *Dightons Case*. M. 2 Jac. B. Regis.

How an Award
shall be per-
formed.

The parties are bound to do all that they can to perform their Award, and it must not be done in part onely, but part may be at one, and part at another time, 21 Ed. 4. 39. 8 Ed. 4. 10. 6 H. 7.

If the Award be, that the one shall pay to the other ten pound for all wrongs, and then that the other shall release all Actions, &c. Now in this case the other shall not be bound to release, till the other pay him the money; and so in all like cases, when another is to do an act before the party is to do his act; if the other do it not, he is excused. But if the Arbitrement be, that one shall pay money, and that the other shall release without any such reference of time, then or the like; either must perform his part at his peril, 21 Hen. 7. 28. 10, 36 Hen. 6. 15. 5 Edw. 4. 7. 21 H. 7. 28.

If no time be set by the Award for the doing of a thing, the party shall have a reasonable time to do it, 20 Ed. 4. 8. 21 Ed. 4. 41.

If a thing be ordered to be done, which may be done two ways, in one whereof the concurrence of a stranger is necessary, in the other it may be done by the party himself; it shall be done that way in which the party may do it himself, 21 Edw. 4. 40.

If an Award be that one shall make and seal a Bond or Release, &c. He that is to do it, must get it made, and must seal it at his peril, *Brown and Donugors Case*, Trin. 18 Jac. B. R. Co. 5. 77. In Margent.

Request.

The Defendant was to pay to the Plaintiff upon Award eight pounds or three pounds, and costs of Suit expended in such an Action, between the Plaintiff and Defendant, as should appear by a note under the Attorneys hand of the Plaintiff, &c. In this Case the Plaintiff is not bound to cause his Attorney to give notice thereof, or make tender of the note to the Defendant, but he ought to seek the Attorney, and request it, *March*, 108. pl. 186. & 156. pl. 225.

If Arbitrators Award one party to pay to the other money, and say not what day, he must pay it without demand at his peril, *Goldsb.* 63.

9. Where an
Arbitrement is
a good plea,
and where not.

Arbitrement is a good plea in all Actions personal, though the Submission be not by Deed; so also to all Actions that are grounded on an Especialty, when no certain duty doth accrue by the Deed *tempore confectiois*; but a wrong and a default subsequent, together with the Deed, gives Action to recover damages, as upon a Covenant

to repair; or that he hath power to Lease a Term, and such like. *Co. 6. 44. 14 Ed. 4. 18. Co. 9. 60.*

It is a good plea also, in an Action of Debt on a Lease for years, or on a Contract; also in an Account of a Receipt *per auter mayne*; also in a *Farger de faux faits*; also in a Ravishment *de gard*; also in mixt Actions, if the Submission be by Deed: And in all such Actions, wherein an Accord with satisfaction is a good plea; also it is said an Arbitrement is a good plea in an Action upon the Statute of Laborers; also in a Writ of Annuity, if the Submission be by Deed, *Broo. Arbitr. Dyer 75. 26. 19 H. 6. 36. 14 H. 4. 34. 6 H. 4. 6. Fitz. Arb.*

But in Debt upon an Especialty, or Arrearages of Account before Auditors, or in a Controversie grounded on matter of Record: In all real and mixt Actions, Arbitrement is no good plea, *Co. b. 44. B. R.*

He that pleadeth an Arbitrement, must shew that he hath performed his part, and how, and wherein; or that he tendred, and the other refused, for this will excuse, or say he is ready to perform it: And if divers things be to be done on the one part, in some of which the Award is void, and thereupon other things are to be done by the other side; if he shew he hath performed the Award, so far forth as it is good, the other must perform his part; and he that will sue upon an Award, must say he hath done all that is to be done on his part, and wherein in particular the other hath broken the Award, *Co. 10. 131. 7 H. 4. 31.*

It is sometimes taken for an agreement between two or more, that intend the levying of a fine of Lands one to another, how and what manner the Lands shall be passed (for which see *Fine*.) But here it is taken for an Agreement between two or more, to satisfy and make amends to another for some offence done to him; which being performed accordingly, though he give not the tenth part of the damage, it is a Bar in any Action brought for the same offence: And this is either Absolute and Executed, or Executory. That which is executed, is such an Accord as is performed according to the Agreement. Executory is that which is not yet done, but agreed onely to be done, *Plow. 5. 6. Dyer 356. 39.*

To the making of a good Accord that may be a Bar in an Action for any wrong done, these things must concur.

1 The thing given and received, must be valuable, and satisfactory, a charge to the giver, and a benefit to the receiver.

2 It must be perfectly and compleatly finished and executed, and satisfaction made according to the Agreement before any Action brought.

3 It must be in the life time of him that did the wrong.

4 The party to whom the wrong is done, must accept the Amends according to the Agreement; for it seems notwithstanding the Accord, he may refuse it, and Tender of Amends without an Acceptance thereof is no plea in any Action, but being accepted is: For as wrongs and injuries cause discord and variance, and beget Suits; so by an Accord between the parties, this may be recompenced, and this recompence begetteth peace. *Dyer 356. 6 H. 7. 11. Fitz. Accord. 4. Dyer 75. 17 Ed. 4. 2. Co. 9. 79. 5 Ed. 4. 7. Old Books of Entries, f. 6. Dyer 356.*

In a forger of false Deeds, If the Defendant give to the Plaintiff a Pottle of Wine in satisfaction of the Trespass, and he agree to it; this is a good Accord, and a Bar in the Action, *19 H. 6. 29. Fitz. Bar. 26.*

If divers do a Trespass, and one make a good Accord, this will discharge, and be a Bar to all the rest, *Co. 9. 79.*

If a stranger, as one of the Parents or Friends of the Trespasor, give the Amends in recompence: It seems this is as good, as if the party himself did give it, *Barre 166.*

In Detinue for a Chest and Charters therein, by the delivery of the Plaintiff: The Defendant pleads an Accord, that he should keep the Chest until the Plaintiff come to *Bristol*, and there it shall be opened: And if any Deeds be there that do concern a house, of which the Plaintiff had Enfeoffed the Defendant, that he shall keep it still, and saith, That he never came to *Bristol*, and it was awarded a good Concord. But *Querr. Fitz. Accord. 2. 7 Ed. 4. 23.*

Sec. 9.

How an Arbitrement may be pleaded.

10. Accord and Concord: What Agreement shall be an Accord, and what shall be a sufficient Accord and good Bar in Action.

The Qualities of a good Accord.

If one be amerced for a private Nufans or Trespass done to the Lord in his Leet, and he receive the Amercement, though it be Extortion, and he could not have recovered it; yet it seems, if he after bring an Action for this Nufans, this acceptance of the Amercement may be pleaded in bar, *Fitz. Bar.* 187. 222. *Br. Trespass.* 195. 61, 66.

Self. 10.
What not,
For default of
the value.

If one plead, that whereas there were divers Trespasses committed by each of them, one upon another, and by mediation of Friends, they agreed one should go quite against the other; this is no Plea, neither will it bar in the Suit: So in an Entry on the Statute of *Richard* That the Plaintiff shall re-enter, and have his Land in peace, and that he shall deliver him the writings that he hath, that do concern the Land, *Dyer* 356. 16 *Ed. 4.* 8. 9 *Ed. 4.* 19. *Fitz. Accord.* 3.

So if it be in Trespass for Goods taking, and the Defendant plead an Accord made, that he should have his Goods again, 9 *Ed. 4.* 19. 30 *H. 4.*

So if it be, that the Defendant should do his endeavor to make the Plaintiff, and another who was at odds with him, agreed; or (as it seems) to shew that he did make an Accord between him and the stranger, unless he shew wical, that he was at some charge to do it, *Fitz. Accord.*

For default of
Execution.

If the Defendant plead an Accord, that he must make Windows, and pay ten pounds at a day to come; and he set forth, that he hath made the Windows, but he doth not set forth that he hath paid the ten pounds; this is no bar, 6 *Hen 7.* 10.

In Trespass, the Defendant pleaded an Accord to pay six pence to the Plaintiff, and to give him counsel when he shall require it; this is no good plea, 17 *Ed. 4.* 2.

Tender of money without payment, is no good plea in bar of any Action, *Old N. B.* f. 122.

If the Accord be between the parties, and be executed by the Heir or Executor of the Trespassor; this is no bar where any Action may lie against the Executor, *Dyer* 356.

For other
cause.

In a Writ of false Imprisonment, the Defendant saith. That it was agreed between the Plaintiff and him. that he should bring the Defendant to such a place, which is the same imprisonment and it seems this was no good plea, *Fitz. Bar.* 14.

11. In what
Actions Ac-
cord shall be a
good plea.

In all Actions wherein an Arbitrement is a good plea in Bar, an Accord executed is a good Bar: As in all personal Actions founded on a wrong, wherein damages only are to be recovered; as in Actions of Trespass, and upon the Case, *Sur Assumpsit*, or otherwise, Attaints, Appeal of Maytime, Covenants to repay, or the like: Maintenance, Conspiracy, Waste in the Tenet, Forger of Fairs, Ravishment of Gard, Debt upon a Contract: In all Actions also wherein Chattels real or personal are to be recovered, as *Ejectione Firmæ*, *Quare ejecit infra terminum*. Waste against a Lessee for year, Detinue of Goods or Charters, which concern Freehold; and in all Actions wherein the wrong is supposed to be *Vi et armis*, and wherein *Capias* & *Exigent* doth lie at Common Law, *Co. 6.* 44. *Dyer* 76. *Old Book of Entries*, fol. 6. 19 *H. 6.* 52. *per Curiam*, *Trin.* 7 *Jac. B. Regu.* *Co. 4.* 1. 13 *H. 7.* 20. *Co. 9.* 78. 6. 44. 40 *Ed. 3.* 25. 35 *H. 6.* 6. *Brownl. 2. part.* 128.

In all Actions real for any Freehold or Inheritance, or mixt, as Assise or Waste in the Tenet; this is no Bar (but in some Cases where certain Statutes make it a Bar, as in a Joyncture) and therefore an Accord with satisfaction, is no plea in those Actions: So likewise in all Actions founded on a Record, or a Specialty, as an Obligation, or Debt on a Lease for years, or in an Account before Auditors, but where it is founded partly on a Record or Specialty, and partly on a Deed; there it will lie as in Attaint, and some of the Cases above, *Co. 9.* 79. 4. 16. 44. 13 *H. 7.* 29. 10 *H. 7.* 4. 13 *Ed. 4.* 5. See *Liver. Condition* 181. *Debt.* 122.

Where an Ac-
cord or Agree-
ment, to take
one thing for
another, shall
binde, where
not.

If one be bound in a Statute or an Obligation to do a Collateral Act, as to make a Feoffment, Account, or the like; here an Accord with Execution for any other thing as money, or the like, is no plea to save the Forfeiture of the Obligation: But if the Condition of the Deed, by the Original Contract of the parties, be to pay money, there by agreement between the parties, any other thing may be given in satisfaction of it, whether the money in the Condition be a Collateral sum, or parcel of the Obligation, *Dyer* 1. *Co. 9.* 79. 12 *H. 4.* 23. 9 *H. 7.* 4. See *Agreement, Acceptance.* If

If one be bound in two hundred quarters of Corn, in condition to pay twenty pounds, the Obligor may by agreement between them pay him a Horte for it: But if the condition were to pay fifty quarters of Corn, he cannot give money, or any other thing in satisfaction of it by an Accord to save the Obligation, Co. 7. 9.

CHAP. XVI.

Of Artificers, Tradesmen, and Arrow-heads.

Hese are such, whose Calling and Employment is, and doth consist especially or chiefly of their bodily labor. As the Calling of Tanners, Shoo-makers, Girdlers, Sadlers, Cord-wainers, Laborers, Burchers, Brewers, Bakers, Glasiers, Lime-burners, Brick-makers, Tile-make, Mummers, and such like, which are called Crafts, Feats, Trades, Mysteries; or Occupations, which are opposed to those Employments, wherein the minde is chiefly occupied; as the Employment of a Divine, Lawyer, Physician, and the like, which are called Professions, Stat. 2. 3 Ed. 6. 15.

No Butchers, Brewers, Bakers, Cooks, Poulterers, Colstermongers, or Fruiterers, shall conspire, promise, or swear, that they shall not sell their Victuals but at certain prices, Stat. 2. 3 Ed. 6. 15.

Conspiracy de Artificers.

No Artificers, Workmen, or Laborers, shall so conspire, promise, or swear, not to do any work but at certain prices; nor to do that another hath begun or not to do more then so much work by the day, or not to work but at certain hours, Stat. 2. 3 Ed. 6. 15.

He that transgresseth either of these Branches, shall suffer for the first offence ten pounds; or if he pay not that within six days after conviction, twenty days imprisonment, to be kept with Bread and Water: For the second offence twenty pound, if he pay it within six days after conviction, or else the punishment of the Pillory. And for the third offence forty pound if he pay it within six days after conviction, or else the punishment of the Pillory, and the loss of one of his Ears and to be ever after taken infamous, for his sayings or depositions. And if it be the Company or society of Victualers that offend herein, and the greater part of them be present at, or do consent to the conspiracy, their Corporation shall thereby be dissolved.

The punishment of this.

All Justices of Assize, and Peace, Majors Bailiffs, and rewards of Leets, may hear, and upon proof, by witness or confession, punish these offences, *Idem*.

Who may punish this.

Such as have been Apprentices, and may exercise their Trades in one place, may work in any place, unless the Orders and Ordinances of the place (as in divers Corporations they do) hinder them. And if those extend onely, and will restrain (as it seems) to such as are dwelling within the Corporation and not strangers; for strangers cannot be let to work there, if any man will retain and hire them. See the Statutes of the 2. 3 Ed. 6. & 3. 4 Ed. 6. 10.

Where Tradesmen may work, or not.

Of Arrow-heads.

All Heads for Arrows, and Quarrels, must be well boiled or brazed, and hardened at the points with Steel, in pain to forfeit them, be imprisoned and be fined at the Kings pleasure.

These Arrow-heads must be marked with the proper mark of the Maker:

Justices may punish defects herein, Stat. 7 H. 4. 7.

CHAP. XVII.

Of Assets.

Sett. 1.
Assets, what.



Assets is in two kinds, either Intermaines, which is where one dieth indebted, and maketh his Executors: Or dieth *intestate*, and the Executors or Administrators have sufficient in Goods or Chattels, or other profit, to pay his debts, or some part thereof. These Goods or Chattels are called *Assets Intermaines*, (*i. e.*) Enough in their hands; and they shall be chargeable for so much as they have come to their hands by any Creditor, or Legatee: And if they waste it, or lose it; or pay Debts or Legacies, in any other order then the Law

doth set down, they must answer it out of their own Estate, *Terms Ley, Co. 6. 46. Dyer 271.* Or it is by Descent, and that is also in two kinds, 1. Where a man bindeth himself and his Heirs, by some especialty or writing to do something, and die leaving Land in Fee-simple, to descend to his Heir: In this case he shall be charged for his Land, to perform this as far as the Land will extend upon a Suit. And if he take not care in his pleading, he may be charged for his own Land, that he hath by any other means. 2. It is where a Man hath Land in Tail, or in the Right of his Wife, and alieneth the same with Warranty, leaving as much other Land in Fee-simple to descend to his Heir. Now this will be a Bar to the Issue in a *Formedon*, or a *Sar cui in vita*, whereby else they would have recovered the same Land. *Broo. 199. 42 Ed. 3. 10. Co. 5. 34. 8. 52.* In both these cases, this is said *Assets per Descent* in the Heir, *Quod tantundem valet.*

Sett. 2.
Quosimplex.

Where and
what shall be
said Assets to
an Heir, to bar
him in an
Action, or
not.

Assets therefore is either Intermaines, or by Descent. Intermaines also is in *facti. i. e.* When one hath enough indeed in his hands; or in *Law, i. e.* When though he hath it not indeed, yet the Law doth charge him as if he had it. By Descent is either to charge him on a Deed, or to Bar him in an Action, *Stat. 33 H. 8. 19.*

That Assets that must make a Lineal Warranty, a Bar must have six qualities:

1. It must be Assets, *i. e.* of equal value or more at the time of the Descent.
2. It must be by Descent, and not by purchase or gift.
3. It must be Assets in Fee-simple, and not in Tail, or for another mans life.
4. It must Descend to him as Heir from the same Ancestor that made the Warranty.

5. It must be of other Lands or Tenements, Rents or Services valuable, or other profits issuing out of Lands or Tenements, and not Personal Inheritances, as Annuities, or the Reversion of the same Land, or the like.

6. It must be in Estate or Interest, and not in use or right of Actions, or right of Entries; for they are not Assets, until they be brought into possession; and when it hath all these qualities, it is a Bar, though the Issue have done the same away by Alienation: But then the Issue of the Issue shall not be barred. But if the first Issue were barred in a *Formedon*, and then after alien the Assets, then the Issue of the Issue is bound also, *Co. super Littl. 374. 4 Ed. 3. Gard. 63. Fitz. Assets 4. 43 Ed. 3. 9. 7 H. 6. 3. 11 H. 4. 20. 24 Ed. 3. 47. Co. super Littl. 384. Perk. Sett. 270. Dyer 139. Plow. 110. Co. 3. 78. 10. 38.*

If a Rent in Fee-simple issuing out of the Land of the Heir, descend to him whereby it is extinct; yet this is Assets. And for this purpose, in Judgment of Law, hath continuance. And therefore, if the Father be Tenant in Tail, and seized of a Rent-charge, issuing out of the Lands of the Son in Fee, and discontinue the Land tailed with a Warranty; this Rent descending shall be said Assets, *Fitz. Assets 5. Co. 3. 31. Fitz Recovery in value 17. Co. super Littl. 374. Perk. Sett. 270.*

A Seignior in *Free-Almoigne* is no Assets, because it is not valuable; and so also of a Seignior of Homage and Fealty. *Fitz. Mesne 7. Register 293. Co. idem.*

An Advowson is Assets, and it shall be recovered after the rate of twelve pence for every pound or mark the Church is worth, *Co. super Littl.* 374.

If the Tenant in Tail maketh a Lease for life, or gift in Tail rendering Rent, and the Reversion descend; this is no Assets to bar. *Non potest adduci exceptio ejusdem rei, cuius petitur dissolutio, Fitz. Gar. 35. Co. super Littl.* 384. 20 *Ed* 3. 221.

All the Lands, Tenements, and Hereditaments, that do descend to the Heir immediately from his Ancestor, that made the Specialty in possession, or in Reversion after any Estate for life or years, shall be Assets in the hands of the Heir; but no Execution shall be of the Reversion, till the Tenant for life be dead: Also Rents and Services that are valuable, and Tyths and an Advowson are Assets, *Dyer* 373. *Perk.* 348. *Co. super Littl.* 374. *D. & St.* 111. 4. *Trin.* 42. *Q. C. B.*

If a Manor descend to the Heir, and after a Tenancy Escheat; this Tenancy shall be Assets, because it comes in lieu of the Services, 6 *H.* 4. 1.

If the Heir enter into Land for a Condition broken, this Land shall be Assets in his hands. And if one seized of Land in Fee, make a Lease for years on Condition, That if his Heirs pay ten pound, the Lease shall be void, and the Heir do after pay the ten pound; it seems, that not onely the Reversion after the Lease, but the whole Estate of the Land shall be Assets in the Heirs hands, *Broo. Assets* 8. *Opinio Bridgman Just.* *Co. super Littl.* 159.

If one and the same man have an Estate Tail in Land, and the Reversion after; this Reversion in his Heir by descent, shall be Assets. So if an Estate be made to *A.* for life the Remainder to *B.* in Tail the Remainder to the right Heirs of *A.* this is a Fee-simple in *A.* and therefore will be Assets in the Heir of *A.* *Co.* 6. 42. *Co. super Littl.* fol. 54. *Finches Ley* 73.

But a Copihold of Inheritance of Land, or a Freehold descendable, shall not be Assets to charge an Heir in Debt, upon a Bond made by the Ancestor, *Co.* 4. 42. 10. 98.

Personal Inheritances, as Annuities, and the like, or such as are not valuable, as Services in Frank-Almoigne, or of Homage and Fealty, though they do descend in Fee-simple, are not Assets in the Heir. So neither is a Reversion of Land after an Estate Tail in another person, any Assets in the Heir, *Co. super Littl.* 374. *Broo. Assets* 26. *D. & St.* 76. *Co.* 6. 42.

An Estate Tail that comes to the Heir by descent, is no Assets to charge him upon any Especialty of any of his Ancestors, *Dyer* 124.

The Lands and Tenements in Fee-simple descended are not Assets neither, if they be *bona fide*, aliened and fold away before the Writ purchased against the Heir, upon the Especialty, though the Heir do after repurchase them again before the Writ brought, *Dyer* 124. *Broo.* 27.

What shall be Assets in the hands of Executors or Administrators. See *Executors.* And see more of this here in *Heyre Devastavit, Extinguishment and Warranty.*

Where and
whan shall be
said Assets to
an Heir, to
charge him in
an Especialty,
or not.

CHAP. XVIII.

Of Assignees, Assise of Bread, &c.
Attachment and Attaint.Assignee, what
the kindes.

He word Assignee, doth sometimes signifie the person to whom a thing given or granted, shall be afterwards granted or conveyed by him that bath the thing. And sometimes the person to whom a thing is to be done, that is not done at the first. And in both these senses, they are either in Fait or Deed, which are those Assignees that are indeed appointed to receive the thing; or in Law, which are such as are named by Law, to have or do the thing as Executors, For the knowledge whereof take these Cases.

1. If one Covenant to do a thing to *J. S.* or his Assignees, or to *J. S.* and his Assignees by a day, and before the day *J. S.* die; in this Case it must be done to his Assigns, if he before the day name any Assignee, otherwise it must be done to his Executor or Administrator, which is an Assignee in Law, 27 *H. 8.* 2.

2. If one make a Lease for years, and grant that the Lessee and his Assignees, shall have twenty load of Wood yearly; in this Case he to whom the Lease is assigned is Assignee. So if one make a Feoffment of Land to *J. S.* and warrant the Land to him, his Heirs, and Assigns, and he assign over the Land; in this Case the Assignee may take the benefit of it, and vouch upon the Warranty. So if I sell a Horse on condition, that if I pay forty shillings to the Vendee, or his Assigns; in this Case his Assignee is he to whom he shall sell the Horse.

3. Where I am bound with condition to make a Feoffment to one and his Assigns; in this Case the Assigns are such as he shall name to me, and to them must I make this Feoffment. See for these things, *Plow.* 287, 288. *Co.* upon *Listl.* 210. *Perk. Self.* 100.

4. Grantees of Reversions shall have like advantage against Farmers and Lessees (by Action onely) for any Covenant in the Deed, as the Lessors their Heirs or Successors might. What Assignees shall take advantage by this, see *Covenant. Numb.* 8.

5. What Assignees may take advantage of a Warranty, is to be seen in Warranty. *Numb.* 12.

6. The Remedy of Entry, in case a man be put out of his Land, taken in Exchange, doth not go to an Assignee. See for this in *Exchange, Numb.* 2.

7. A Feme sole conveys a Term in Trust, and marries, and then the Husband assigns it away; in this Case, the Trust doth pass, but not the Estate. *Marsh.* 88. *pl.* 141.

of the Assise of Bread, and other things.

Assise of things,
what.

Assise, this word hath many significations in our Law; but in this place it signifieth nothing, but the setting down and regulating of the price, and quantity of Bread, and Beer, and other things to be sold.

For the Assise of Bread and Beer, see *Stat.* 5 *H. 3.* Ordinance of Brewers, cap. 2. 5, 6. Two Statutes, *Incerti temporis, Crumpr.* *jur.* 225. 12 *Ed.* cap. 6. 3 *H. 8.* 8. See *Clerk of the Market.*

And for the Assise of Fuel, 43 *Eliz.* 14. 7 *Ed.* 6. 7. See *Quantity.* For Paper, Parchment, Tile, Timber, Leather, Lead, Hops, Beef, Cheese and Butter, Herrings, Salmons, Eels, Wool, Hemp, Sugar, Spice, Iron, Glass, Linnen-cloth, how it shall be measured and accounted, see *Dalt. Just. of Peace,* 185. See cap. 29.

Of an Attachment.

TO attach, in our Law, is to take hold by commandment or Writ of a mans person or goods: If it be applied to the person, it doth not differ at all from an Arrest. So an Attachment is sometimes to take the person of a man, and sometimes to take his goods, and sometimes to take both together. In the one sense it is said, a man may attach a Cow, or that a man may be attached by a Cow, or by an hundred Sheep.

Attachment and Attain, what.

There is an Attachment of Privilege; and it is in two cases: Either to give power to arrest a man in a place privileged; Or it is to arrest a man by virtue of his Office and Privilege to come into that Court to which he himself belongeth, and in respect of which he is privileged. And there is an Attachment to arrest a mans person for some Contempt to a Court, or other misdemeanor. For which see *Contempt*.

Attachment of privileged, what.

There is a Process also called a Foreign Attachment, which is used to attach the goods of Foreigners found within any Liberty, for a Debt due to another man. Also there is an Attachment used in the Forrest-Courts; and there is a Reattachment, which is a second Attachment of him that was formerly attached, and dismissed the Court without day.

Foreign Attachment, what.

Reattachment, what.

Of an Attaint.

IT is a Writ that is given to relieve a man that is hurt by a false Verdict. As if in a Civil cause, after another be pleaded to Issue, a Jury of twelve men, thereupon impanelled, give a Verdict against their Evidence given unto them therein, shew themselves to be partial, and thereupon Judgment is given; then the party that is hurt and grieved by the Judgment, may have this Writ against the other party, (whether he be Plaintiff or Defendant in the first suit) and against the Jurors or such of them as be then living; and then it shall be tried by twenty four sufficient Gentlemen of the Countrey, whereof twelve at the least must be of the Hundred where the Land lieth, whether the Verdict be true or false, after the same Evidence was given which was given to the Petit Jury, (for no more, nor no other Evidence may be given to this last Jury then was given to the first;) and if it be well done, or so much as is well, shall be affirmed. But howsoever, if the grand Jury newly chosen do affirm it, though it be false, the party hath no remedy. And if the twelve Jurors be found guilty, then Judgment shall be given that the first Judgment shall be reversed, and the party restored to what was given from him thereby; That the party for whom the first Verdict was given, shall be fined and imprisoned; That the Jurors for the first Verdict shall forfeit each of them twenty pounds apiece, if the matter were above forty pounds; if under, then one pound: And then are they called Attainted, and accounted as perjured and defamed, and they for ever disabled to serve in any Jury, or give in Evidence in any Cause in any Court of Record again. But if the Petty Jury be acquitted by the Grand-Jury, and they do adjudg as the first, then shall the Plaintiff in the Attaint not only lose the Land, and be fined, imprisoned and ransomed at the Kings pleasure, but also pay damages to the parties molested; and although the matter be never so false, yet is there no remedy after this in Chancery nor elsewhere, *Crompt. Jur.* 49. And if it be the Plaintiff in the first Action that brings the Attaint, and he have Restitution, then he hath his Title and Action as before. *Fortescue, cap. 26. Broo. 242. 18 Ed. 4. 9 Broo. Attaint in toto. Dyer 202. Old N.B. 11. Fitz. N.B. Attaint. Stat. 2. H. 8. 3. 15 H 6 8. A.D. 14 36. 5 Ed 3. 6. 28 Ed 3. 8. 3 H. 5. 11. 11 H 6 4. 12. B. 2. cap. 14. Kelm. 130. Det. 5. f. 37. Dyer 53. 173 235. 301. 212. Co. super Lit 294.*

Attaint:

The trial and proceedings therein.

These Writs are seldom put in ure: For, Gentlemen will hardly be drawn to appear to this end; and when they do, unless the corruption be very apparent, they will not attaint them; and if they do, the Judge is not willing to give sentence but deferreth; and then if the parties agree, or die, the Attaint ceaseth.

This word hath also another signification; for when a Judgment is given against any

R

any man in Treason or Felony, then he is said to be attaint or attainted. For which see *Attainder*.

What persons
may have an
Attaint, and
where not, and
against whom.

Any one that is hurt by the false Verdict, whether he be party to the first Suit, or not, may have this Writ; and if the Verdict were about a matter of Land, then this remedy runneth commonly with the Land, so that any party or privy shall have it; as an Heir or Executor, or he in Reversion on a Recovery against the Tenant for life or years, *Dyer* 1. *Co.* 11. 5. 18. *Kelw.* 119. *Co.* 3. 4. *Stat.* 91 R. 2. 3. *Co. super Lit.* 294.

If a Trespass be done by divers, and one have pleaded to Issue upon a Declaration against him, and the Jury upon the Trial have assessed unreasonable Costs; the other Trespasgers may bring an Attaint, for they be bound by those Damages, *Co.* 11. 5. *F. N. B.* 10. *Co.* 10. 119.

If Trespas be against two, and Damages excessive, they may join in Attaint, *Co.* 11. 43.

But such a one as is neither party nor privy to the Suit, may not have this Writ; neither can the King, or an Informer have this Writ, *Kelw.* 119. *Plow.* 439. *Broo* 479.

Whereit lieth,
and where
not.

And this Writ lieth against parties or privies, Heirs, Executors, and any other for the most part that hath the thing that was recovered by the first Judgment, *Dyer* 201.

It lieth in all real, personal, and mixt Actions, in case where any material falshood is found, though there be some truth found with it. As in real Actions, where in a Writ of Entry the demand is of twenty acres, when he should have but ten, and the question be about the quantity, and they find he disseised him of twenty acres: If they find a man guilty of many Trespasges, when he is guilty but of one; or give excessive Damages in a Trespass, or the like. But it lieth not on a false Verdict given upon an Enquest of Office; nor for any falshood found, when the thing found is out of their charge and impertinent to the issue; nor upon any falshood in a Writ of Right; nor upon any thing found in a *Quare impedit de plenitudine ex cuius presentatione, si tempus semestre transierit*, and about the value of the Church by the year, *Co.* 644. *Westm.* 1. 37. 1 *Ed.* 3. 6. 28 *Ed.* 3. 8. *Dyer* 30. *Co.* 11. 6. 10. 119. 11. 13. *Dyer* 134. *Kelw.* 119.

Attaint lieth after the death of many of the Petty-Jury, 2 *H.* 4. 18. a. 16 *Ed.* 3. *Judgment* 109.

Attaint lieth not where Judges increase Damages for the same, 3 *H.* 4. 4. a.

Attaint lieth not upon an Enquest awarded to enquire of Waste, 7 *H.* 6. 38.

Pleas in At-
taint.

There be divers Pleas may be pleaded to this Writ, as a Release, Arbitrement, Accord, and the like; also, That all the Jurors be dead but one. But one cannot plead another Attaint depending, Joint-tenancie, or that the Plaintiff is a Feme-Covert; *Non-tenure* is no plea for the first Tenant; but if he enfeof a stranger, the stranger may plead it, *Co.* 6. 44. *Dyer* 5. 75. *Broo* 8. 11. See the Statutes hereof, *Westm.* 1. cap. 37. *Stat. de Attinilis.* 1 *Ed.* 3. 6. 5 *Ed.* 3. 6. 7. 28 *Ed.* 3. 8. 34 *Ed.* 3. 7. 9 R. 2. 3. 13 R. 2. 18. 11 *H.* 6. 4. 15 *H.* 6. 5. 11 *H.* 7. 21. 23 *H.* 8. 3. 37 *H.* 8. 5.

CHAP. XIX.

Of Attorney.



N Attorney is a substitute or servant that is set or appointed in the turn, stead, or place of another, to do any business for him. And he is of two sorts. 1. Publique and by Record, as are the constant and general Attornies at Law, in the Courts of Record. *Qui vicem gerit Clientis apud Judicem*, whose Warrant from his Master is, *Ponit loco suo talem Attornalium suum*. He also is general, or

Attorney.

special. And the other is an Attorney that is private or by Deed, is such a one as is made and appointed now and then for any particular business, and upon any special occasion, who are so then only at that time, and in that thing. And in both these cases, when any thing is done by another as an Attorney, it is as if he did it by himself: *Qui per alterum facit, per seipsum facit. Co super Lit. f. 51, 52. Stat. 7 R. 2. cap. 14. 7 H. 4. 13. See for such Attornies, Stat. 4 H. 4. 19. 18 Westm. 2. 10. 33 H. 6. 7. 3 Jac. 7.*

Warrant of a publique Attorney.

The private Attorney is commonly made and appointed by Letters, or a Deed of Attorney, which is usually called a Warrant of Attorney, which is a Writing or Instrument, authorizing the Attorney to do that for him that doth make him his Attorney, that he would have him to do. And their duty then is to pursue their Authority; from which if they vary, they make all they do void and of no effect. For which see

Self. 1. The making and office of a private Attorney.

Authority, & infra.

The publique Attorney is to be made, appointed, and sworn by the Judges of the Courts wherein they be Attornies, and they ought to choose and appoint none but men of Learning and Virtue, and such as have been brought up in the same Court, or otherwise well practised in soliciting Causes, and have approved themselves able and honest therein; and for misdemeanors, they may remove, or otherwise punish them by their discretion. And then he is chosen by the Client, who makes his choice amongst the Attornies made by the Court, of which he will, and he may make his Attorney in general, for all matters to do and receive for him; or special, in one or some particular matters or things. *Stat. 4 H. 4. cap. 18. 3 Jac. 7. 7 R. 2. 14. 7 H. 4. 13.*

Warrant of a private Attorney.

By the Common-Law, all that were commanded to appear by the Kings Writ, were to appear in person, and then after appearance the Judges were used to allow them an Attorney: But if the Judges and Court were not such as did not hold plea by Writ, they could not allow him without a Writ of *Attornato faciendo*; and the Justices in Courts of Record and else, would not suffer any to appear by Attorney, whether he were Plaintiff or Defendant, *Co. 8. 56. F. N. B. 26, 27. Stat. 10. H. 3. 10.*

Where and in what cases one may have and retain a publique Attorney, and where not without a Writ out of the Chancery, or other allowance.

But at this day in most cases where one doth sue, or is sued, he may make his Attorney without Writ of Allowance from the King; as in Debt, Trespass, Formedon, Account, Appeal of Murther, or Death, in Suits in a Hundred, Tything, County, Wapentake, or Court of the Lord; in a Plea to the return of a Rescous by the Sheriff, *Dyer 361. 5 H. 4. 8. Glou. cap. 3. Merton capio, West. 2. cap. 10. 3 H. 7. 1. Dyer 212.*

In an Information or Suit upon a Penal Statute, the Defendant being a Denizen may appear by Attorney of the Court, and shall not be compelled to put in Bail, *Dyer 346. 9. 29 Eliz. 5.*

In a Writ of Affise, Attaints, & *juvis utrum*, after the Tenants have once appeared, he may make his Attorney to sue for him if he will, *3 Ed. 1. 41.*

If any person be outlawed or waved, and is so impotent as he is not able to come in person to reverse it; this being examined and found by the Judges, they may in

their discretion allow him an Attorney; but not in the case of a Writ of *Capias ad satisfaciendum*, 7 H. 4. 13.

In Pleas of Trespals in the County-Court, where an Appeal lieth not, the Defendant may make an Attorney, 6 Ed. 1. 8.

Any of the Petit-Jury, Defendants in Attaint, may appear and answer by Attorney, 23 H. 8. 3.

But in a *Pramunire*, the party may not appear by Attorney, without a special Writ, notwithstanding he be a Lord of the Parliament, Stat. 14 H. 4. cap. 14. 9 Ed. 4. 2.

It seems that by this Writ which is called *Attornato faciendo*, the King may command the Justices to allow an Attorney to the party, Plaintiff or Defendant, in any Action or Cause; and the Justices must allow him, as in a *Quid juris clamat*, against a woman great with child, or any impotent person; or in prison, the Defendants may have a Writ to allow of an Attorney directed to the Judge, F.N.B. 25. l. Dyer 175. Dyer 135. p. 15.

By a Writ out of the Chancery, or other allowance.

They which shall depart the Realm with the Kings licence, upon request to the Chancellor, he with advice of the Justices may grant to them to make their General Attornies to make answer, do and receive for them in any case or matter, Stat. 7. R. 2. cap. 14.

Every Free-man which oweth Suit to the County, Tythings, Hundred, and Wapentage, or to the Court of his Lord, may freely make his Attorney to do those Suits for him: And this must be allowed him upon a Writ of *Attornato faciendo*, 20 H. 3. 10. Fitz. Attorn. 106. F.N.B. 156.

St.B. 2.

But in Writs of Entry and Right, the Justices will not admit of any Attorney on the Tenants side unless he come in and acknowledg him before some Justice, or have a Writ out of the Chancery to testify it, F.N.B. 26.

And a *Retraxis* cannot be entred in a Court by an Attorney, but the party must appear in person and do it, Co. 8. c. 8.

Where and what things may be done by Attorney.

Most things that a man may do by himself, he may do by another: as, make a Feoffment or Lease, or the like; make Livery of Seisin, Entry, Claim, Demand of Rent, or the like, or pay money: One may receive money, take Livery of Seisin, take a Deed, take a Copihold-estate by an Attorney; also one may revoke an Administration, surrender a Copihold-estate, sue for Debts, and such like by Attorney, Co. 9. 75. Dyer 283. Br. 89. Co. super Lit. & Lit. sect. 153. 14 H. 4. 1.

What by a naked authority cannot be done by an Attorney.

But if one have a naked authority only, coupled with a confidence, as Executors that have power to sell Land have, he cannot do this by Deputy or Attorney. So if one have only a particular power and authority in respect of some special interest; as if there be Tenant for life, the Remainder in tail, and the Tenant for life hath power to make a Lease for one and twenty years, this cannot be done by Attorney: So if there be a special custom in a Manor, that the Tenants may surrender to any two of the Tenants out of Court, this cannot be done by Attorney, unless the Custom will warrant it, Co. 9. 75, 76.

What personal things cannot be done by Attorney.

Also there be some personal things that cannot be done by Attorney, but must be done by ones self; as the doing of Homage, Fealty, Suit of Court, or the like, 7 H. 4. 19. Co. super Lit. Co. 9. 75.

None but such as are honest and skilful, and have been accustomed to sollicite, or have been trained up in the practice of the Courts where they are to be Attornies, ought to be admitted by the Judges into that Office; and any one of those Attornies that are allowed by the Court, may be Attorney for his Client, whom the Client will choose, 4 H. 4. 18. 3 Jac. 7.

No Steward, Bailiff, or Minister of Lords of Franchises which have Retorns of Writs, shall be Attorney within the Franchise or Bailiwick in any Plea, whereof he is or shall be Officer or Minister, 4 H. 4. 19.

Private.

Any person almost may be a private Attorney, or do a thing for another, yea, such as might not do such a thing for themselves; as an Infant, Feme-Covert, person Attaint, Excommunicate, Outlawed, a Vilain, an Alien. A Feme-Covert may be an Attorney to deliver Seison to her Husband, & sic à contra: And he in Remainder

mainder may be an Attorney to deliver Seison to the Lessee for life, *Co. super Lit. fol. 52.*

They must demean themselves honestly and justly according to their Office and Oath, not moving nor exciting men to Suits, especially forein and untrue ones, for small trespasses and little offences, and small Debts, whose Actions are triable in Courts-Baron, *4 H. 4. 18. 3 Jac. 7. 39 H. 6. 7.*

The duty and office of an Attorney.

If he have given any Fee to any Serjeant or Counsellor at Law, or any sum of money to Clerk or Officer, in any Court of Record at *Westminster* for Copies, he must have a Ticket subscribed with the hand and name of the same Serjeant, Counsellor, Clerk or Officer, witnessing how much he hath received, and at what time; and he must give a true Bill to his Client, or some for him, of all other charges concerning the Suits, which they have for them subscribed with his own hand and name, before such time as he shall charge his Client with any of these same Fees or Charges, *3 Jac. 7.*

Publique.

He must enter his Warrant of Attorney on Record, the same Term the *Exigent* is awarded, under pain of Forty shillings for every time: And the same Term he pleads to issue being for the Debt, or before, or else he is to forfeit ten pounds, and be further punished by the discretion of the Judges of the Court, *Stat. 18 H. 6. 9. 31 H. 8. 30: 18 Eliz. 13.*

And they must not make any suit in a forein County, nor willingly begin untrue and forein suits, *39 H. 6. cap. ult.*

They must not willingly delay their Clients suits for gains, nor demand in their Bills any other sums of money or allowance on his Accounts of any money which he hath not laid out or disbursed; and if he do, his Client may have an Action against him, and shall recover treble damages, and the Attorney shall be put out of his Office for ever, *3 Jac. 7.*

They must not admit any other to follow any Suit in their name: If they do, each of them, the Attorney and Solicitor, forfeit twenty pounds apeece, and the Attorney is to be put out of his Office for ever, *Stat. 3 Jac. 7.*

Sec. 3.

They must not be Under-Sheriffs, Sheriffs Clerks, nor Receivers, nor Sheriffs Bailiffs whilst they be Attornies; and therefore if they take upon them any such Office, they must cease that while and discontinue the practice of an Attorney, *Stat. 1 H. 5. 4.*

If a private Attorney do anything, he must do it in the name of his Master for whom he doth it, and not in his own name: As if he have power to make Leases for years, it must be done in his name from whom he hath his power, unless there be some necessity to the contrary; as where an Executor hath power to sell Lands, they must do it in their own names; or it be in some special case, as where the Authority is so given, that he may do it by himself or a Deputy: But if the Authority be indefinite, and he do the thing in his own name, all is void that he doth, *Co. 9. 76. Curia, Underhills Case, M. 7 Jac. B. Regis.*

Private.

Also such Attornies must take care to pursue the Authority given them, expressed by the Dreed and implied by the Law, *Co. lib. Instit. 1 par. fol. 52.* See for this, *Feoffment.*

The power and authority.

He may bring an Action of Debt for the Charges expended, and his Fees against his Client; or if he be dead, against his Executor or Administrator: But he must then first give a Note of the Charges to his Client, in manner as is above set forth, *Stat. 3 Jac. 7.*

Publique.

They may not meddle in the Sheriffs office, and execute the office, or practise as Attornies at one time, *Stat. 1 H. 5. 4.*

Such an Attorney cannot do more then his Master: *Derivativa potestas non potest esse major primitiva.* And therefore the Attorney of one that is disseised cannot make a Claim of from the Land, if the Disseisee himself durst to have gone to the Land. The Bailiff of a Disseisor shall not say, that the Plaintiff never had any thing in the Land, for the Master himself might not say so, *34 Ass. p. 4. 2 Ed. 4. 16.*

Private.

The

Warrant of
Attorny.
Publique.

The Warrant for the publique Attorny is, *Ponit loco suo talem Attornatum suum*: And this ought to be entred carefully by the Attorny. See the Statutes *supra* el *stat.* 18 H.6.9. el 32 H.8.30.

The Husband may make an Attorny for his Wife, and she cannot disavow him, 33 H.6.43.

Private.

The Warrant of the private Attorny is made by an Instrument or Writing, *ut supra*.

The Principal in an Obligation may give a Warrant of Attorny for the rest for appearance; and this is as good as if the rest did give Warrant for themselves, *Dyer* 361.

CHAP. XX.

Of an Attornment.

1. What.



AN Attornment is the agreement of the Tenant to the grant of the Seignior, or of a Rent, or the agreement of the Donee in tail, or Tenant for life or years, to a grant of a Reversion, or of a Remainder made to another. As where the Lord, or one that hath a Rent out of Land, doth grant over his Seignior or his Rent to another; or one that hath a Reversion or a Remainder after an estate for life or years, doth sell or give the same away to another: In these cases the Tenant of the Land must have notice of this sale or gift, and of the alteration of the party to whom he must attend in his services, and he must give his consent to the same gift or grant, or else generally the same is not good. And this yielding of consent is called an Attornment; and it is either actual, or verbal, or actual and verbal both. *Co. super Lit.* 309. *Terms of the Law.* Plow. 25. *Lit. sect.* 551.

2. The kinds.

That which is actual, is either implied and in Law, or expressed and in Fact. Of all which there are divers Examples hereafter following.

3. The effect of it.

The end, effect or fruit of this Agreement, is to perfect a Grant, and to make a good Conveyance of an Estate: For where this is needful, no Rent nor Reversion will pass without it; neither can the Grantee of the Seignior, Rent or Reversion, bring any action of Waste for waste done in the Land, nor distrain for any Rent or Service upon the Land before this is done. But this is but a bare assent, and therefore it shall not nor will enure or work to pass any Interest, to make a bad Grant good, to enfranchise a Villain, nor to give a man a Tenancie by disseisin, intrusion, or abatement, neither shall it work by the way Estoppel. And therefore if a man gain a Rent issuing out of Land by Cohersion of Distress or otherwise, and the Tenant of the Land attorn to him, this will not amend his estate. But otherwise a Grant and the Attornment of the Tenant do as effectually pass the Freehold and Inheritance of the Reversion of Land, as a Feoffment and Livery of Seisin of Land doth pass the Possession of Land. *Lit. sect.* 551. *Co. super Lit.* 302. *Lit. Bro. sect.* 267. 129. 379. 39 H.6.24. *Co. super Lit.* 323. 315. *Lit. sect.* 6:8.

4. Where and in what cases the Attornment of the Tenant is necessary, or not; and how, and to what intents.

In most cases where the Grantee hath means to compel the Tenant to attorn, there the attornment of the Tenant is at least to some purposes needful. For howsoever it be true, that if a Seignior, Rent, Services, Reversion, or Remainder be granted by Fine, in this case the Rent, Seignior, &c. doth pass, so as the Grantee may enter for a Forfeiture upon the alienation of the Tenant being Tenant for life, years, by Statute or *Elegit*, or upon an Escheat of the Tenant; or seize a Ward or Heriot, if it happen before any Attornment be made. And if the Reversion of a Lease for years be granted by Fine, and the Lessee be ousted, and the Lessor disseised, the Conusee may have an Assise; and therefore as to all these purposes the Attornment

ment of the Tenant is not needful. But the Grantee, his Heir, or Assignee cannot distrain the Tenant for Rent, or bring any Action that doth lie in privity between him and the Tenant, as Waste upon a waste done by the Tenant, Writ of Entry *ad communem legem*, or *in casu proviso*, or *in consimili casu* upon the alienation of the Tenant, Escheat upon the dying of the Tenant without Heirs, or Ward upon the death of the Tenant his Heir within age, or Writ of Customs and Services, until he have the attornment of the Tenant; and therefore as to all these purposes the attornment of the Tenant is necessary. And hence it is that the Conusee of a Fine hath means appointed him by the Law to compel the Tenant to attorn; for in case where the Lord doth grant his Seigniorie to another, and the Tenant will not attorn, the Conusee, before the Fine be ingrossed, may have a Writ called a *Per qua servitia*, and thereby compel him to attorn. And in case where a man doth grant a Rent to another, and the Tenant of the Land out of which the Rent doth issue will not attorn, the Conusee of the Rent may have a Writ called *Quem redditum reddit*, and thereby compel him to attorn. And in case where a man doth grant a Reversion or a Remainder of his Tenant for life to another, and the Tenant will not attorn, the Conusee of the Reversion or Remainder may have a Writ called a *Quid juris clamat*, and thereby compel the Tenant for life to attorn. And if the Conusee of the Fine die in these cases before he have the attornment of the Tenant, his Heir, albeit he come to the thing descended by act of Law, yet shall be in no better case then his ancestor was. And if the Conusee of a Fine, by which he hath a Reversion granted to him, before he hath gotten the attornment of the Tenant, bargain and sell the Reversion by Deed indented and inrolled, the Bargainee shall be in no better case then the Bargainor was. And if a Reversion be granted by Fine, and the Conusee before attornment enter and make a Feoffment, and the Lessee reenter; in this case the Feoffee cannot distrain for the Rent. And yet if there be Lord Mesne and Tenant, and the Mesne grant the Services of his Tenant by Fine to another in Fee, and after the Grantee die without Heir, and by this means the Services of the Mesne escheat; in this case the Lord may distrain for them without any attornment of the Tenant, *Lit. sect.* 579, 580, 581. *Co. 6. 68. Co. super Lit.* 309, 314, 320. *Old. N. B.* 170. *Co. super Lit.* 252. *Idem. Idem. Co. super Lit.* 310. *Co. super Lit.* 321. *Co. 6. 68. Lit. sect.* 584, 583.

Per qua servitia.

Quem redditum reddit.

Quid juris clamat.

In these following cases, Attornment in Law or in Deed is absolutely and to all intents necessary, *viz.* Where one doth make a Lease for life or years to one, and after doth grant the Reversion or Remainder after the same Lease ended to another by Deed in Fee-simple, Fee-tail, for life or years; in this case the Lessee for life or years must attorn. So where the Lord doth grant his Seigniorie, or the Services of his Tenant by Deed in Fee-simple, or otherwise in Fee tail for life or years to a stranger; in this case the Tenant must attorn. So where the Lord of a Manor doth make a Feoffment of his Manor; in this case the Services of the Tenants will not pass without their attornment. So if another man have a Rent-service, Rent-charge, or Rent-seck issuing out of my Land, and he doth grant this Rent to a stranger; in this case I must attorn to this grant to the stranger. And if in these cases the Tenant do not attorn, the grant of the Reversion &c. is meerly void. *Co. 2. 66. Lit. sect.* 551, 567, 571. *Co. super Lit.* 316. *Lit. sect.* 551. *Co. super Lit.* 315. *Perk. sect.* 636. *Co. 6. 68. Doct. & Stu.* 55. *Lit. sect.* 553. *Co. super Lit.* 312. *Lit. sect.* 572.

If a Reversion be granted after an Estate of a Tenant by Statute-Merchant, Staple, or Elegit, or after an Estate that any one hath until debts be paid, or the like; in these cases these Tenants must attorn, or this grant will not be good, *Co. super Lit.* 315.

If one make a Lease for years of Land rendring Rent, and after he doth grant the Reversion to another for years, to begin after the death of the Grantor; in this case it is needful that the Lessee for years in possession do attorn to make this grant good: But if one make a Lease of his Land to one for Ten years, and after make a Lease of it to another, To have and to hold from the end of the said term of Ten years, for the term of Twenty years; in this case it seems it is not needful that the first Lessee do attorn, but that the grant is good enough without it, *Co. 2. 35. Lit. Br. sect.* 98. *Dyer* 307. *Co. super Lit.* 312. *Lit. Br. sect.* 151, 379. *Br. Attor.* 59. *Dyer* 26. *Lit. Br.* 349.

If one make a Lease to another for twenty years, and he make a Lease over to a third for ten years rendring a Rent, and then doth grant the Reversion to a stranger; in this case it is needful that the Lessee for ten years do attorn: But if the Lease for ten years be made without any reservation of Rent, *contra*. For it is a rule, That where there is no Tenure, Attendance, Remainder, Rent or Service to be paid or done, there Attornment is not necessary. And hence it is, that where one doth grant Common of Pasture appendant or appurtenant, or Estovers out of Land, that there needs no Attornment of the Tenant to make this Grant good. And if a Rent or Common be granted to one for life, and after the Reversion of it be granted to another; that in this case there need no Attornment to make this second Grant good. And if one make a Lease to one for ten years, and then make a Lease to another for twenty years; in this case the second Lease is good for the ten years to come after the first ten years ended, without any Attornment of the first Lessee. And so it was agreed in *M. 37, 38 Eliz. B.R.*

If a Lord exchange the services of his Tenant with another for Land; in this case the Attornment of the Tenant by whom the Service is to be done, is necessary to perfect this Exchange, *Perk. sect. 249, 259.*

If there be Lord and Tenant in Fee-simple, and the Tenant doth make a Lease to another man of the Tenancie for life, and the Lord doth grant the Seigniorie to the Tenant for life in fee; in this case the Tenant in Reversion must attorn to the Tenant for life upon this Grant of the Reversion, or the Grant is not good, *Lit. sect. 562.*

If I be seised of a Reversion after an Estate for years, and I grant it to the use of my self for life, and after to the use of another and his heirs in Fee, and after I grant my Reversion for life to another; in this case it is needful that the Tenant for years attorn to this Grant, *Hil. 8. Jac.*

If a Lease be made to *I.S.* for his life, and afterwards another Lease is made of the same Land to *I.D.* for his life; in this case it seems that *I.S.* must attorn to this second Grant, or that the Grant will not be good, *Dyer 118.*

An Estate of a Seigniorie cannot be gained by a Disseisin, Abatement, or Intrusion without an Attornment. And therefore if one disseise another of a Manor which is part in Demesne, and part in Services, the Services are not gained until the Tenant attorn, *Lit. sect. 587.*

In all cases for the most part where there is no means provided by Law to compel the Tenant to attorn, there their Attornment in Law or in Deed is not necessary unless there be some special default in the Grantee. *Quod remedio destituitur, ipsa non valet si culpa absit, Co. 6. 68. Lit. sect. 580, 583, 586. Co. super Lit. 321. 314.*

And therefore an Attornment is not necessary in these cases following, *viz.* Where one doth grant a Rent, Reversion, Remainder, Service, or Seigniorie to another by way of Devise by a last Will and Testament, or by Letters-Patents from the King, or where such things are granted by matter of Record from a Subject to the King, *F.N.B. 121. m.*

So when the thing granted doth pass by way of use, and doth vest by force of the Statute of Uses: As if one that is seised of Land in Fee, doth make a Lease of it for life or years to *I.S.* and after levieth a Fine, or doth covenant to stand seised of the Reversion of this Land, (or of the Land it self, which is all one) to the use of another, or doth bargain and sell the Reversion in Fee, or for years; in these cases the Tenant need not to attorn, *Co. 6. 68. super Lit. 321. 2. 35.*

But if *A.* grant a Reversion to *B.* to the use of *C.* and the Deed is not inrolled, or the use arise not upon consideration of blood, &c. in this case if the Tenant do not attorn, the Reversion will not pass. *Agreed in the Court of Wards, Hil. 18 Jac.*

If one by a Common Recovery suffered, grant a Reversion to the use of himself, his wife, or children; in this case there needs no attornment of the Tenant by the Statute of 7 H. 8. 4. *Calvins Case, Pasch. 7 Jac. B.R.*

So where one doth come to any such thing by title or Seigniorie paramount, as by Escheat, Surrender, or Forfeiture, or by Descent; in all these cases, and the rest before

before, the Attornment of the Tenant is to no purpose, neither to pass the thing as to the Estate, nor to make a privity to distrain or bring action of Debt. And therefore if there be Lord, Mesne and Tenant, and the Mesne grant the services of his Tenant by Fine to another in Fee, and after the Grantee dieth without heir; in this case the services of the Mesnalty shall come to the Lord paramount, and he may distrain for them, or bring any Action that lieth in privity for them without any Attornment. So if Lessee for life of a Manor surrender his Estate to the Lessor, there needs no Attornment of the Tenants of the Manor to make this Estate to pass. So if the Reversion of a Tenant for life be granted to another in Fee, and the Grantee die without heir, so that the Reversion escheat; in this case the Lord may distrain or bring any action of Waste, &c. without any attornment. So if a Reversion descend to an heir from his ancestor; in this case it will vest in the heir without attornment; and attornment in this case is not necessary. So if the Conusee of a Statute Merchant extend a Seignior or Rent for debt, the Seignior or Rent shall be vested in him without any attornment of the Tenant, *Litt. sect. 583. 5 H. 7. 18, 19. Co. super Litt. 321.*

So in all cases when the thing doth move by act of Law: As if a Lease for years rendering Rent, be assigned for Dower, or granted by *Elegit* for the moyetie upon the Execution, *Brownl. Rep. 1 par. 33. 2 par. 291.* And so also it is where a Manor or Reversion of Copiholds is granted, the attornment of the Copiholder is not necessary, *Brownl. 1 par. 179.*

If a Copiholder in Fee make a Lease for years by licence of the Lord rendering Rent, and after surrender the Reversion to the use of *I. S.* in this case it seems an attornment of the Tenant is not needful, but *I. S.* shall have the Rent without any attornment, *Per tres Just. Trin. 4 Jac. B.R.*

If one grant the Reversion of Copihold lands for life or years, or grant the Seignior of Copihold lands of inheritance; in these cases there needs no attornment of the Tenants to make the grants good. And so also is the Law for an Estate at will by the Common Law, *Curia M. 37, & 38 Eliz. B.R. Co. 2. 35. super Lit. 311.*

If a Lease be made to one for life, the Remainder to another in tail, the Remainder over to the right heirs of the Tenant for life, and the Tenant for life doth grant his Remainder in Fee; in this case there needs no Attornment of the Tenant in tail, but the Remainder will pass by the Deed presently without any Attornment at all, *Litt. sect. 578.*

If one lease for life the Remainder for life, and after the Lessor release all his right in the Land to him in Remainder for life; in this case there needs no Attornment of the Lessee for life to perfect this Release, *Litt. sect. 575.*

If two Joint-tenants or more make a Lease for life rendering Rent, and one of them doth release the Rent to the other; in this case there needs no Attornment to make the Rent to pass, *Litt. sect. 574.*

In all cases where the Grant is in the Personalty, there needs no Attornment. And therefore in Grants of Annuities which do charge the Person of the Grantor only, and not his Land, there needs no Attornment; and in all cases where there is an Attornment in Law, there needs no Attornment in Deed. Agreed in *Curnacks Case, M. 3 Jac. Co. B.*

Tenant for life must attorn upon a Fine levied by Tenant in tail, *Goldsb. 5. pl. 9.*

If there be Lord, Mesne, and Tenant, and the Lord grant the Fee of the Seignior; in this case the Mesne, and not the Tenant must attorn, *Litt. sect. 555.*

If one make a Lease for life, and then grant the Reversion for life, and the Lessee attorn, and after the Lord grant the Seignior; in this case it seems the Grantee, and not the first Lessee for life must attorn, *Co. super Lit. 319.*

If there be Lord and Tenant, and the Tenant make a Gift in tail, or Lease for life of the Land, and after the Lord grant the services to a stranger; in this case the Tenant for himself, and not the Tenant in tail or for life must attorn: For it is a Maxim in Law, That no man shall attorn to any Grant of any Seignior, Rent, Service, Reversion, or Remainder, but he that is immediately privity to the Grantor.

S

But

s. By whom an attornment may and must be made, or not.

But to the Grant of a Rent-sock or Rent-charge, issuing out of such Land as before, the Under-Tenant in Tail, or for life, and not immediate Tenant himself must attorn, *Littl. Sect. 554, 556. Co. super Littl. 311.*

If there be Tenant for life, the Remainder in Fee, and the Lord grant the Services to a stranger: In this Case the Tenant for life, and not him in Remainder, must attorn, *Littl. Sect. 556.*

If there be Tenant for life, the Remainder in Tail, and he in the Reversion after their Estates doth grant his Reversion to a stranger: In this Case, if either of them need to attorn, it must be the Tenant for life, *Idem.*

Husband and
Wife.

If a Woman that hath a Husband be to attorn, the Husband may and must do it for her, and the Attornment of the Husband for the Wife, whether it be expressed or implied, will binde the Wife, *Co. super Littl. 312. Littl. Sect. 558:*

If one make a Lease for years of Land, the Remainder for life, and after the Lessor doth grant the Reversion: In this Case, the Tenant for life or years, either of them may attorn, *Littl. Sect. 571. Co. super Littl. 316, 317.*

If a Rent-charge be issuing out of Land, and the Tenant be disseised of the Land; in this Case the Disseisor must attorn. But in case of the grant of a Rent-service, the Disseisee may attorn if he will; for the privity is between the Lord, and the Disseisee only, *Co. super Littl. 312.*

If a man make a Lease for life to *7. S.* of Land, and after grant a Rent-charge out of it to *7. D.* and after he grant over this Rent to another; in this Case the Lessor, and not *7. S.* must attorn, *Idem.*

The Tenant in Dower, after she hath assigned over her Estate, and not the Assignee must attorn to the grant of the Reversion; and yet some hold that the Assignee also may attorn. The same Law is also of the Tenant by the courtsey; but it is not so in other Cases; for if the Reversion of Lessee for life be granted, and Lessee for life assign over his Estate, the Assignee and not the Lessee must attorn, *Co. super Littl. 316. 8 Ed. 4. 10.*

If Lessee for life assign over his Estate upon Condition, and then the Reversion is granted; in this Case the Assignee, and not the Lessee for life, must attorn, *Co. super Littl. 316.*

If a Tenant in Fee simple, that ought to attorn to a grant of a Seignior, or Rent, die before he make an Attornment, his Heir must attorn, and an Attornment made by him is good. So if he grant away his Land before he make Attornment, his Grantee may attorn, and an Attornment made by him, will be good enough, *Co. super Littl. 315. Perk. Sect. 231.*

If a Lord of a Manor, make a Lease of his Manor for life or years, and the Free-holders and others do attorn to the Lessee, and after he grant away the Reversion of the Manor to a stranger; in this Case the Lessee for life or years must attorn, and this will binde all the Free-holders, *Co. super Littl. 311.*

If there be Lord and Tenant by Homage, Fealty, and Rent, and the Tenant is disseised, and then the Lord granteth the Rent to another; in this Case the Disseisor and not the Disseisee must attorn; but if he grant the whole Seignior, the Disseisee may attorn, *Idem.*

Infant.
Non compos
mentis.

A voluntary Attornment where it is needful, may be made by an Infant, or one that is deaf and dumb, (who may do it by signs.) But one that is *non compos mentis*, cannot make an Attornment, *Brownl. 2. part. 84. 1. part. 46. Co. super Littl. 315.*

6. To whom
an Attornment
may and must
be made; or
not,

The Attornment must always be made to the Grantee of the Reversion, Rent, &c. according to the Grant, whether the Attornment be express or implied. But if divers do take by the Grant, the Attornment may be made to one of them, and this shall avail the rest; as if a Reversion or a Rent be granted to two or more, and the Tenant attorn to one of them; this is good to vest and settle the thing granted in them, all according to the Grant. And if a Lease be made by Deed of a Reversion to *A.* for life, the Remainder in Fee to *B.* and the Tenant attorn to *A.*; this is a good Attornment to settle the Remainder in *B.* But if the Tenant attorn to *B.* during the life of *A.*, this is not good for *A.*; howbeit if the Tenant for life die before the

the Attornment be made; in this case the Attornment may be made, and this shall be sufficient to perfect the Grant of the Remainder to *B.* *Co. super Littl.* 310, 311. 20 *H. 6. 7.*

If I grant a Reversion to one man, and before the Attornment of the Tenant had to perfect the Grant, he doth sell this Reversion to a third man; in this case the Tenant may attorn to the second Grantee, and this will make the grant good to him. But if the Attornment be made to both the Grantees, it is void for Incertainty, *Co. 6.* 68. 11 *H. 7. 12.*

An Attornment may as well be made to *Cessuy que use* of a Reversion, as to the Grantee of the Reversion himself. And it seems it must be made to him, and not to the Grantee of the Reversion. For it was agreed in the Court of Wards, *Hil. 18 Jac.* That if a Reversion be granted to *B.* to the use of *C.* that the Attornment must be made to *C.* and not to *B.* who is but an Instrument, *Co. super Littl.* 310. *Hardings Case.*

In all Cases regularly where Attornment is necessary, it must be made in the life time of the parties Grantor and Grantee, or Exchangor or Exchangee, for if either of them die before the Attornment be made, the grant or exchange is void. And therefore if a Manor be granted, and Livery of Seisin be given upon the Demesns thereof, and one of the Tenants die before Attornment be made by him, his Tenement will not pass, and the Grant, as to that part, will be void; for in this case all the Tenants, but Tenants at will, must attorn. And albeit the Grant of the Reversion be to begin at a day to come, and after the death of either of the parties; yet must the Attornment be made in the life time of the parties, or otherwise the Grant will not be good. And yet an Attornment may be made after the death of the Tenant by his Heir, and after the Conveyance of the Tenant by his Assignee, *Co. 1.* 151. *super Littl.* 310. *Littl. Sess.* 551. *Perk. Sess.* 263. 231. *Co. super Lis.* 315. 2. 35.

7. When and at what time the Attornment must be made.

If a Lease be made of a Reversion, to begin at a day to come; in this case the Attornment may be made before or after the day, so it be made in the life time of the parties, *Co. 2.* 35.

If one grant his Reversion of White-acre or Black-acre, and the Tenant attorn to the Grant, before the Grantee have made his Election, which Acre he will have; this is a good Attornment, *Co. super Littl.* 310.

If a man grant his Reversion by Deed to one, and after and before the Tenant do attorn, he levy a fine or make a Feoffment of the Land to another; in this case it seems the Attornment after comes too late: But if the fine or Feoffment be but of part of the Land granted before in Reversion; in this case the first Grant after Attornment, shall be good for the residue. And if a Woman sole grant a Reversion, and after and before Attornment she marry with a stranger, and after the Tenant attorn; in this Case the Attornment comes too late, for the marriage is a Countermand of it. And if a Reversion of an Estate for life or years be granted, and the Grantor before Attornment doth confirm the estate of the Tenant for life or years, and so change the Estate, and after the Tenant attorn; in this case the Attornment comes too late, *Co. super Littl.* 309, 310. 8. 82. 4. 61. *Kelw.* 163.

To the making of a good Attornment, where it is needful divers things are required.

1. It must be made by the person that ought to make it.
2. It must be made to the person that ought to take it.
3. It must be made in time convenient.
4. If it be an express Attornment, the Tenant must first have notice of the Grant of the Reversion, Rent, &c. to which he must attorn; but otherwise it is of an Attornment in Law, for there notice in all cases is not necessary.
5. And it must be done in that manner the Law doth prescribe.

And for this it is to be known, that it may be made by words or by Deeds, and without any writing, or by Deed or Writing (and this is the safest way to do it.) And any words written or spoken by the Tenant, that do import an assent and

8. The manner of making an Attornment. And what shall be said a good Attornment; or not.

and Agreement to the Grant of the Reversion, Rent, &c. in such manner as the same is made after notice given to him of the Grant, whether it be in the presence or the absence of the Grantee of the Reversion, Rent, &c. will make a good Attornment in Deed. And therefore, if the Tenant after knowledge of the Grant, use these words following, or any others to the like effect, to the Grantee, viz. I do attorn, or turn Tenant to you according to the Grant; or, I become your Tenant; or, I agree to the Grant; or, I am well content with the Grant; or, God send you joy of it: These are good exprefs Attornments, *Co. super Littl.* 309, 310, 315. *Littl. Sett.* 551. *Plew.* 344.

And if the Tenant after knowledge of the Grant, pay, do, or deliver all, or any part of the Rent, or Service, before, or at the time when the same is due, to the Grantee, or give a peny or farthing, an Ox, or a Knife, or any such like thing, or any other valuable thing, in the name of Attornment, or in the name of Seisin of the Rent; this is a good exprefs Attornment, and that Attornment which is made by words and Deed, or sign both, is the best; for that doth leave a more deep impression in the minde of the Witnesses. But if one have a Rent-charge issuing out of my Land, and he grant it to a stranger, and I give him an Ox to put him in possession of the Rent; it seems this is no good Attornment. See *Brownl. 2. part. 51. Littl. Sett.* 563, 551. 513. *Co. super Littl.* 315. 49 *Ed* 3. 15.

If a man grant his Reversion of my living to *J. S.* and his Bailiff that doth use to gather his Rents, saith to me, That *J. S.* hath bought it, and I must hereafter pay my Rent to him, and I tell him I am glad of it; this is a good Attornment. And that albeit it be in the absence of *J. S.* *M. 2 Car. In the Court of Wards. Co. super Lit.* 310.

And it is not material whether the stranger know of the Grant or not, so the Tenant know of it. And an Attornment made to the Lords Steward in the Court in the absence of the Lord is a good Attornment. For it is sufficient if the Tenant have notice, that he attorn to the grant in the presence of any whomsoever. Tenant for life was, the Remainder in Tail, he in the Remainder granted his Remainder; the Tenant for life having notice of the Grant, saith to a stranger in his absence, That is the party, I am well pleased that the Grant is made to him; it was adjudged to be good. *Curia B. R. Hil. 11 Car. B. R. Hiltons Case.*

If a Reversion be granted to one for life, and after the same Reversion be granted to him for years, and the Tenant attorn to both the Grants at once; this Attornment is void for Incertainty. So if one grant his Seigniorie to *J. S.* Bishop of London, and his Heirs, by one Deed, and grant the same to *J. S.* Bishop of London, and his Successors by another Deed, and the Tenant attorn to both Grants at once; this Attornment is void for Incertainty. So if a Reversion be granted to two several persons, by several Deeds, and the Tenant attorn to both the Grants at one time; this Attornment is void for Incertainty, and neither of the Grants are perfected by the Attornment in these Cases. The implied attornment which also doth amount to an exprefs Attornment is made divers manner of ways. For if the Tenant after notice of the Grant of the Reversion pay his Rent to the Grantee, or surrender his Estate to the Grantee, or pray in aid of the Grantee, or accept a Grant of the Reversion or Remainder from him that hath it; this is a good Attornment in Law. But if the Tenant after the Grant of the Reversion, not having notice of the Grant, pay his Rent to the Grantee as a Receiver, Bailiff, &c. this is no good Attornment. And therefore if the Bailiff of a Manor shall purchase the Manor, or the Reversion of one of the Tenements and the Tenant not knowing of this purchase, pay his Rent to him as he was wont to do; this is no good Attornment in Law. So if a man seised of a Seigniorie levy a fine of it, and then taketh back an Estate in Fee, and the Tenant having no notice of all this, doth pay his Rent to the Conusor as he was wont to do; this is no good Attornment in Law, to perfect either of these Grants, *Co. super Littl.* 310. 11 *H* 7. 12. 14 *H* 8. 15. 34 *H* 6. 41. *Co. super Lit.* 312. *Calvins Case*, Adjudged. *Pasche*, 7 *Jac.* *B. R. Co. super Littl.* 309. *Co.* 2. 67. *Dyer* 302.

If there be Lord and Tenant, and the Tenant let the Land to a Woman for life, the

the Remainder in Fee, and the Woman doth take a Husband, after the Lord doth grant the Services to the Husband in Fee; in this case this Acceptance of the Deed by him that ought to attorn, is a good Attornment in Law. So if in this case the Tenant Lease to a man for life, the Remainder over, and the Lord grant the Services to the Tenant for life, and he accept thereof; this is a good Attornment in Law, *Littl. Sess. 558, 560, &c.*

If the Lord by Deed grant his Seigniorie to the Tenant of the Land, and to a stranger, and the Tenant doth accept of this Deed; this is a good Attornment in Law, to extinguish a moyety, and to vest the other moyety in the other Grantee. So if one make a Lease to *J. S.* for life, and after confirm his Estate, the Remainder over to *J. D.* and the Lessee for life, doth accept of the Deed of this Confirmation and Grant; this is a good Attornment in Law, and doth vest the Remainder in *J. D.* *Co. super Littl. 313. Co. super Littl. Sess. 573.*

If there be Lord and Tenant, and the Tenant take a Wife, and after the Lord doth grant the Services to the Wife, and her Heirs, and the Husband doth accept of the Deed of this Grant; this is a good Attornment in Law, *Littl. Sess. 559.*

If the Conusee of a Fine of Services sue a *Scire facias* to have Execution of the Services, and hath Judgment to recover; this is a good Attornment in Law, *Littl. Sess. 564.*

If a Woman grant a Reversion to a man in Fee, and after marry with the Grantee; this is a good Attornment in Law to perfect this Grant made to the Husband, *Co. super Lit. 310.*

If a Lord grant his Seigniorie, and there be twenty manner of Services, and the Tenant with what intent soever it be, pay or perform in Deed any parcel of the Services to the Grantee; this is a good Attornment in Law for all the Services, *Littl. Sess. 561.*

If I be seised of Land in Fee, and make a Lease for life or years of it, or it be extended by a Statute or Elegit, and then I make a Feoffment of this Land; and give Livery of Seisin upon it, and so put out the Tenant, and after the Tenant (or one of the Tenants, if there be many) re-enter; this is a good Attornment in Law. And so also it seems in the Law, if the Lessee for life recover in an Assise. But if a man make a Lease for life, and then the Lessor grant the Reversion for life, and the Lessee attorn, and after the Lessor enter and make a Feoffment in Fee, and so disseise the Lessee for life, and then the Lessee re-enter; this is no good Attornment in Law by the Grantee for life. And if the Conusee of a Reversion by fine disseise the Lessee for life, and make a Feoffment in Fee, and the Lessee re-enter; this is no good Attornment in Law to the Feoffee to enable him to distrain, &c. *Littl. Sess. 576, 577. Co. super Littl. 319. Dyer 212. Co. 6. 68. 5. 113.*

If one grant the Reversion of a Lease of a term of years, and before any Attornment made, the Lessee for years doth grant his term to the Grantee of the Reversion; in this case this is no good Attornment in Law to make the Reversion to pass, *Hil. 8 Jac.*

If one have Land, and a Rent issuing out of other Land, both in one County, and he grant both by Deed, and give Livery of Seisin of the Land, in the name both of the Land and of the Rent; this is no good Attornment in Law to make the Grant of the Rent good, *Perk. Sess. 231.*

If Lessee for life or yeers, subscribe his name as a witness to the sealing and delivery of the Grant of the Reversion made by the Lessor to a stranger; this is no good Attornment in Law, for he may do this, and not have notice: But if he have notice of the Grant, and then put his hand to it; this is an Attornment, *Curia. B. R. Hil. 11 Car. So was it held in Brokenbury and Martials Case. 5 Eliz.*

If a Reversion be granted of two Acres, or for forty years, or if Services be granted, and the Tenant doth attorn for one Acre, or for part of the forty years, or for part of the Services; this shall extend to all, and is a good Attornment for both the Acres, all the forty years, and all the Services. And that albeit the Tenant say expressly, it shall be good but for a part, and not for the whole; and so also it is of an Attornment in Law. And therefore if the Grantee by fine of Services sue a

Attornment to
part of the
Grant good
for the whole.

Scire

Scire facias, to have Execution of any part of the Services, and have Judgment to recover any part, or a Lessee of three Acres surrender one of them to the Grantee of the Reversion of all the three Acres; this is a good Attornment for the whole. But if one attorn for part of the Land, or for part of the Services in case of the Grant of a Reversion of Land, or the Grant of Services, and have no notice of the Grant of any more; this Attornment is not good for any part, but void for all, *Co. 2. 68. super Littl. 297. 314. 309. Littl. Selt. 564.*

Attornment to
one good to
others.

If a Seignior, Reversion, or the like, be granted to two or more, and the Tenant after notice thereof, doth attorn to one of them; this is a good Attornment to perfect the Grant to both or all of them. But if one die before Attornment, and the Tenant attorn to the Survivor or Survivors; this shall not avail the Heir of him that is dead, but it is good to perfect the Grant to the Survivor or Survivors, to whom it is made, *Co. super Littl. 297. 2. 68. 67.*

If a Reversion be granted to Husband and Wife, and the Tenant attorn to the Wife in the absence of the Husband; this is a good Attornment to perfect the Grant to them both. But if a Reversion be granted to two men, and the Tenant have notice onely of a Grant made to one of them, and he attorn to him onely; this Attornment is void, and not good to perfect the Grant to either of them, *Calvins Case. Pasche, 7 Jac. B. R. Co. 2. 68.*

Attornment by
one good for
others.

If two Joynt-tenants be for life, or years, and the Reversion of their Estate is granted to a stranger, and one of them attorn to the Grant of the Reversion; this is a good Attornment for both of them. The like Law is for Tenants in common; *Co. 2. 66. 67. Littl. Selt. 566.* But if *A, B, C* and *D*, be Lessees for years, and *C* and *D* be outlawed, so as they forfeit their parts to the King, and the King become Tenant in common with *A* and *B*, and after the Reversion is granted to a stranger, and *A, B, C* and *D* attorn; this is no good Attornment to perfect the Grant of the Reversion; for *C* and *D* cannot attorn, and the Attornment of *A* and *B* for the King and themselves, is not good, *6 Car. In the Lord Brook's Case in the Court of Wards.*

9. Who shall
be compelled
to attorn; or
not; and
where.

Attornment made by the Husband, is good for the Wife; whereof see before at *Numb. 5.*

In all Cases for the most part where Attornment is needful, the Tenant whether he be Tenant in Fee simple, for life, years, by Statute, Elegit, or as Executor until Debts be paid, shall be compelled to attorn. And albeit the Tenant be an Infant, and come to the Land by purchase or descent, yet may he be compelled to attorn, but then in this case his Attornment shall not prejudice him; for when he is of full age he may disclaim, or say he doth hold by less Services. *Co. 6. c8. 9 84. super Littl. 315.*

If there be Tenant in Tail of a Reversion, and he grant this over to a stranger; in this case the Tenant in possession may be compelled to attorn. But if the Reversion upon the Estate of the Tenant in Tail, or upon the Estate of the Tenant in Tail, after possibility of Issue extinct be granted, such a Tenant may not be compelled to attorn; and yet such a Tenant may attorn *gratis* if he will. And the Assignee of the Estate of such a Tenant in Tail after possibility, &c. is compellable to attorn. And if one make a gift in Tail, the Remainder in Fee, and the Seignior, or a Rent-charge issuing out of the Land, is granted in Fee by Fine; in this case the Tenant in Tail may be compelled to attorn, *Co. super Littl. 316, 318.*

In all cases, for the most part, where Attornment is not needful, there is no means to compel the Tenant to attorn. And therefore the Tenant cannot be compelled to attorn to him that comes to a Reversion or Remainder by Elcheat, Forfeiture, &c. *Co. 6. 68. super Littl. 318.*

If one grant his Reversion of Land in Mortmain without a Licence, the Tenant may not be compelled to attorn, until there be a Licence had from the King, *Co. super Littl. 318. 3. 86.*

Also it is a general rule, that when the Grant by Fine is defeasible, there the Tenant shall not be compelled to attorn. As if an Infant levy a Fine, this is defeasible by Writ of Error during his minority, and therefore the Tenant shall not be compelled

pelled to attorn. So if the Land be holden in ancient Demefn, and he in the Reversion levieth a Fine of the Reversion at the Common Law; the Tenant shall not be compelled to attorn, because the Estate that passeth is reverfable by a Writ of Deceit. *Co. super Littl.* 318. 3. 86.

If the Grant be absolute, and the Attornment be on condition; yet this shall enure according to the Grant. So if the Attornment be but to part of the things, or part of the time granted; this shall enure to perfect the Grant for all. So if the Attornment be made but to one of the Grantees, it shall enure to the rest. So if the Attornment be made to the particular Tenant, it shall enure to him in the Remainder to perfect his Estate also, *Co. super Littl.* 309, 310. 297. See before.

10. How an Attornment shall enure and be taken.

If the Estate of the Tenant be with a privilege annexed, as without impeachment of waste, or the like, and the Tenant attorn generally without any saving of his privilege, if the Attornment be *gratis* and voluntary, whether it be an Attornment in Law, or in Deed; this shall not enure to extinguish his privilege: But if the Attornment be made by the Compulsion of a Writ in this manner, and without this saving, he hath lost his privilege for ever. *Co. super Littl.* 320.

If a Reversion, &c. be granted to two several men one after another, and he that hath the latter Grant, get the Attornment of the Tenant to his Grant, before the other; in this case this shall enure to perfect the latter, and the first Grant now cannot be made good, *Co. super Littl.* 310.

If a Reversion be granted to a Man and Woman unmarried, and before Attornment made they entermary, and then the Tenant attorn; in this case they shall have the Estate by Moyeties, *Idem.*

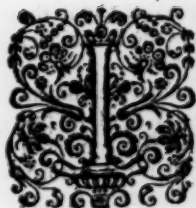
An Attornment as to the Parry-Grantor shall have relation to the time of the Grant, to make the thing to pass out of the Grantor *ab initio*, albeit it be made many years after the Grant; and therefore all acts done by him, after the time of the Grant, and before the Attornment to the prejudice of his own Grant, as granting of Rents, entering into Statutes, or the like, are void, as to the Land to charge it: And hence it is, that if a Reversion be granted to an Alien, and before the Attornment of the Tenant, he is made Denizen; in this case the King upon Office found, shall have the Land; and yet it shall not so relate as to make the Tenants chargable to the Grantee for any mean Arrearages, or for any waste in the Lands, from the time of the Grant to the time of the Attornment. But in respect of a stranger it shall not relate at all. And therefore if two Deeds be of a Reversion at several times, and he whose Deed was made last, gets Attornment first, the Reversion doth pass to him; and though the other get Attornment afterwards, yet this will not help him by relation; and albeit the former grant of the Reversion be in Fee, and the latter for life onely, yet the Law will be all one in both cases. *Idem.*

11. How an Attornment shall relate.

CHAP. XXI.

Of Audita Querela.

Audita Querela.



T is a Writ lying where one is bound in a Statute-Merchant, Staple, or Recognizance, or where Judgment is given only for Debt or Damages, or the party in Execution, and he hath a Release or some other sufficient Discharge for all or part of the duty, but hath no day in Court to plead it, nor means to make use of it, then he may have this Writ to relieve himself, *Co. super Lit.* 290. *Dyer* 56: *Finches Case*, 14 *Fitz.* 23.

And this sometimes is to be brought against the Prosecutor himself, and sometimes against him and others that ought to

bear part of the burthen with him. *Kelw.* 25. *Br.* 38.

The Process
herein.

If it be brought before Execution by the party or his Heir or Executor, the party may have a *Superfedeas* to stay Execution upon a Surmise of good cause for the *Audita Querela*, and upon Bail given to prosecute and stand to the Judgment of the Court: But when the party is in prison, it seems there is no Bail put in till the Comisee answer in the *Audita Querela*: But after Execution done, it seems no *Superfedeas* lieth. And the Process besides are before Execution, a *Venire facias* with an *Alias*; and then if he come not in, it seems that the party that is in prison, upon motion may be discharged: And a *Distingas*; and upon a default after appearance and a Plea pleaded, a *Distingas ad audiendum Judicium*; for by such default Judgment shall be given against him: And after Execution, the Process is a *Scire facias*, when the party is in prison on a *Cap. sat.* But when he cometh in *gratis, contra.* *Dyer* 339: 22 *H.* 6. 56. 2 *H.* 7. 12. 25 *H.* 6. 34. 43 *Ed.* 3. 28. 12 *H.* 4. 6. 15. 15 *Ed.* 4. 5. *Fitz.* 5. 6, 7.

It seems also that a stranger, as he that is a Purchaser of Land of a Cognizor of a Statute, shall not have a *Superfedeas*. See *Fitz.* 8. 9.

And if one Purchaser sue to have Contribution of another, and that other have a Discharge by Release, a *Scire facias* shall go against the Cognizor that made the Release, to try that Deed, *Fitz.* 19.

And in case where a man puts in Bail, he shall not be discharged of his Bail, but must continue it, until the Suit by the *Audita Querela* be determined; for though the Plaintiff present not after the appearance of the Debt, yet the party must continue in prison or stand upon Bail, *Fitz. Aud. Qu.* 2.

If a man be Nonsuit in one *Audita Querela*, yet he may have another; but he shall have no *Superfedeas* to stay Execution in the second, as he may in the first, *Fitz.* 11.

Against whom
it lieth.

This Writ lieth against the Ter-tenant, without naming him Party or Privy, *F.N.B.* 104. c. 12 *H.* 4. 16.

If an Obligee have Judgment against an Heir of the Obligor, and his Land in extent, and the Obligee assign his Estate to a stranger, and after the Heir get a Release from the Obligee of this Judgment, he may have this Writ against the Assignee, *Adjudg. Flower and Elgars Case, Pasch. 7. Car. B.R. Co: 4. 430. 3. 44.*

In what case
this Writ lieth
to avoid a
Judgment or
Execution.

In all Cases where this remedy is given, there are these three Incidents in the Case.

1. There is a charge and burthen come, or coming upon him that is to have it;
2. It is such as by Law he ought to be discharged of in all or in part.
3. It is in such a case where he hath no other remedy to relieve himself. As in all these Examples following:

St. B. 1.

(a) If a Judgment be against me, or Judgment and Execution, and the Plaintiff make me a Release in Fact, and I be released in Law, so as the same or any part of it is released, and yet he sueth Execution. (b) So if a Widow of a Copiholder in Fee,

Fee, that claimeth Dower by the Custom of a Manor, recover the same in the Lords Court, and Fifty pounds in damages, where in truth there is no such custum, and the recovery is erroneous; the party grieved may have this remedy to prevent Execution, and to be restored to his damages if they be taken, (a) 36 H.6 24. *Plow.* 72. *Dyer* 286. 20 H.7.30. *Co.* 8.153. *Dyer* 50. (b) *Co.* 4.30.

So if Executors have sued and recovered by Judgment, after the Testament is revoked and annulled, in this case the party against whom the Judgment is, may get it certified by the Bishop, and then have an *Audita Querela* against the Executors, *Co.* 8.144. *Dyer* 203. p.73.

So if one be in Execution, and the Sheriff or the Plaintiff deliver him out and set him at liberty, and after take and imprison him again, he may have this remedy; for by this the Debt is discharged, *Co.* 8.21.

So if one have a Judgment against a Sheriff upon an Escape, and after the first Judgment, from the Execution whereof the Escape was, is reversed for Error, the Sheriff may have relief by this Writ; but till it be reversed, though there be Action, he cannot. So if the party be taken after the Judgment reversed, *Co.* 8.142.

So if in a *Detinue* for a Statute, the Defendant prays Garnishment, and the Plaintiff recover against the Garnishee by an Erroneous Judgment, and thereupon the Defendant deliver the Statute to the Plaintiff, and he hath Execution after the Garnishee reverse the Judgment; it seems though Execution cannot be avoided, yet the party may have this Writ, *Co.* 5.90.

So if one have a Judgment against two Joint-trespasors, and one is taken, and he is satisfied by him, and after sue to have Execution of the other, he may be relieved by this Writ, *Trin.* 3 Jac. B. Regis.

So if one have Judgment against two, and one is taken in Execution, and released or discharged by the party, the other shall have the advantage thereof, *Monk* against *Brown*, P. 40 Q. Com. B.

If he that is in Execution purchase a Manor, to which the Plaintiff is a Vilain regardant, wherein there is a Discharge in Law, he may have this Writ, *Fitz.* 19.

If an Obligee have a Judgment and Land extended of the Heir, and assign it over, and after the Assignment release to the Heir; in this case he may have this remedy against the Assignee, *Flowers* Case, P. 7 Car. B. R. Adjudg. M. 36. & 37 Ed. 2: *Co.* B.

If the Conusee of a Statute or Recognizance purchase part of the Land the Conusor had at the time or after, and another another part, and the Conusee sue the Execution on the other Purchasor, he shall have this Writ to discharge him altogether; for in this case he shall not have Contribution, or any part of him, *Charnock* vers. *Sir Tho. Gerrard*.

If after the *Scire facias* sued upon the Statute, the Conusor get a Release from the Conusee of all or part of the Debt, and yet he go on to sue Execution; the Conusor may have this remedy: For if it be before the *Scire facias* sued that he had the Release, he might have pleaded it, *Finch* 114. *Dyer* 50. p. 6:

To avoid a Statute or Recognizance:

If one enter into a Statute that hath some defect in him, and is not good, and yet the Conusee sue Execution, the Conusor hath this remedy.

Or the same be voidable by some Law, as if the same were made upon an Usurious Contract, or the like.

Or there were a Defeasance upon it, which have been kept, and he notwithstanding hath sued Execution upon it.

Or the Statute were delivered up (which is a Release in Law) and the Conusee happen to come by him again, and sue upon him, *Dyer* 35. *Corles* vers. *Sir Rowland Lacy*, P. 7 Jac. B. Regis. *Dyer* 297. *Br. Co.* 31. 43 Aff. p. 18. *Br.* 29. 22 Aff. p. 44.

If the Conusor after Execution tender the money due upon the Statute to the

T

Conusee,

Conusee, and he refuse it; or part were paid at the day, and he tender the rest in Court, *Fitz. 4. & in 1010.*

Stil. 2.

If a Conusee or a Statute after Execution of Body and Land, purchase parcel of the Land of the Cognizor, or part of it descend to him, he may have this Writ to discharge his Body of Execution, *Plow. 72.*

If the Statute were delivered to a stranger to keep till certain condition, and he deliver him the Conusee, or he recover him by Covin from him, before the Conditions performed, he may have this Writ, *Fitz. 15, 16.*

If the Statute were entred in *per dures*, it seems by this it may be avoided by an *Andita Querela*, *Fitz. 927.*

To prevent a Judgment.

If one binde himself and his Heirs by an Especialty, and the party Obligee sue the Heirs, and recover of them, and then after sue the Executors for the same cause; or *E converso* after he hath recovered against the Executors, sue the Heirs; the Heir or Executor may have this Remedy, for he cannot plead it in Bar. So if, a Lessee Covenant for him and his Assigns to repair the Houses, or otherwise; and after he hath assigned away his Estate, he remains liable to an Action of Covenant still; so as the Lessor may sue either: If he sue and recover against one, and then sue the other, he may have this Remedy, *Plow. 439. Dyer Broo. 74.*

If divers be bound by an Obligation or other Especialty, *Conjunctim & divisim*, and the Obligee hath Judgment and Execution, and is satisfied the debt of one, and yet after sue another: Now this other in this case may be relieved by this means, *Co. 5. 87.*

So if in the interim between the Verdict and Judgment, the parties have put themselves into Arbitrement for the Suit, or the Defendant hath gotten a Release from the Plaintiff, and yet the Plaintiff sueth Execution notwithstanding, for after the Verdict he cannot plead it; but there it seems Judgment must be given before the Writ brought, *21 H. 7. 33. 11 H. 7. 10. Fitz. 7. 13.*

So if one have had once Judgment and Execution for a thing, and then sue for the same cause, and recover again, *Br. 25. 9 Ed. 4. 50.*

So if one take any Goods from me by any delivery, and another take them from him; if one of us sue him, and recover for them (as we may both) and then the other sue, he shall be relieved by this, *5 H. 7. 15. Dyer 232.*

For Nonage.

If an Infant have entred into a Statute, he may avoid it whiles he is in his minority by this means, but after he cannot: And the course to avoid it, is, when he is in prison, for some of his Friends to have this Writ to the Justices, and thereupon a Writ to the Sheriff to bring the Infant into the Court to be seen by the Judges; and then if they adjudge him within age, he shall be discharged out of prison, after Proces sent to warn the Conusee to come into the Court, *Fitz. 26.*

To have Contributions.

If one alone be charged, or about to be charged upon a Judgment, Statute, or Recognizance, and others ought to contribute, or bear part of the burthen, he may have relief by this Writ. As if one enter into a Statute, and after sell his Land to divers Purchasers: Or a Judgment be had against a man, who doth leave his Land to divers Heirs; or one binde him and his Heirs by an Especialty, and leave his Land to descend to divers Heirs: If one of the Purchasers in the first case, or one of the Heirs in the last cases be charged alone, he may have this Writ against the rest. And if any one of them have a Release, or other good discharge, this (as it seems) will discharge all the rest. See more in *Contribution and Statute. 48 Ed. 3. 5. Fitz. 38. Co. 3. 44. 12. Co. 6. 13. Fitz. 3. An. Querela.*

Where not.

If one have such a Release of the Judgment, or Duty, as by Law is not sufficient to bar the Execution; in this case he shall have no benefit by this Writ. The same Law is if it be to discharge a Statute, *Broo. 37.*

To avoid a Judgment or Execution.

If one have good matter of discharge, and have a day and time to plead it in Bar, and do not, as when a *Scire Facias* is sued out upon a Judgment, and the party have then a Release, or other matter of discharge, and do not plead it; now he shall not afterwards have any relief by this Writ: But if he had no warning of the *Scire facias*, then he may have this Writ, as when the Sheriff returns him *Nihil. Finch 314. Fitz. 25.*

If

If a Prisoner escape against the will of the Sheriff and party, and the Sheriff take him again, he cannot have this Writ, for the taking is lawful, Co. 3. 44. 8. 141.

If one have a Judgment against a Sheriff upon an Escape, and there be Error in the Proceeding of the Suit wherein the Judgment is, but the Judgment is not reversed, yet the party can have no remedy by this Writ, until the Judgment be reversed for Error, Co. 8. 142.

Seal. 3.

If one be outlawed after Judgment, and imprisonment upon a *Capias Utlagatum*, and the Sheriff doth let him go at liberty, and the Plaintiff taketh out another *Capias Utlagat* against him, upon which the Sheriff doth return *Non est inventus*, and the Defendant finds Error in the *Exigent*, upon which by sentence of the Court it is annulled: After the Plaintiff takes Execution of the first Judgment, in this case the party cannot have this Writ; but if the *Exigent* had been well awarded, *contra*. Co. 8. 142.

If an Administration be granted to one, and he sueth a Debtor, and hath Judgment, and after another covenously sueth out an Administration to him and the first Administrator, and he alone releaseth to the Debtor, yet he shall not discharge himself by this Writ, for the Release was not good, *Dyer* 339. Co. 6. 19.

If a Conusee purchase part of the Land of the Conusor before Execution, and after sue Execution, the Conusor shall have no remedy by this Writ, for the Statute is not hereby discharged, *Plow.* 72. To avoid a Statute.

If the Sheriff in Execution of a Statute deliver the Lands of a stranger in Execution, as some of the Lands which were in the hands of the Cognizor the time the Statute was made, or after; Now he shall not have relief by this Writ, but by an Assise, *Fitz. Aud. Qu.* 6.

If a Conusor of a Statute surmise, or that the Conusee and he have agreed, and that the Conusee hath delivered him the Statute for an Acquittance, and because he hath him not to shew cancell'd, the Conusee or the *Corporalis* hath counterfeited the Statute, and so doth sue Execution; this is no good cause to maintain the suit: But if he had the Statute to shew cancelled, then it seems this suit were maintainable, *Fitz.* 9: 10. 22.

If one that is sued by the King get a Charter of Pardon, or any Release in the mean betwixt the Verdict and the Judgment, and after the Judgment is had, he cannot have relief by this Writ, but he may plead it after Judgment, 11 *H.* 7. 10. To prevent a Judgment.

After a suit is begun, and so far gone, as there is no time to plead, it seems no *Audita Querela* lieth until the Judgment be given, *Fitz.* 13.

If an Infant have entred into a Statute, and be sued upon it after he is of full age, he shall not then have any remedy by this Writ, *Dyer* 231. For Nonage.

If one after he hath entred into a Statute or a Recognisance, do convey away some of his Land to divers persons, but keep some in his hands, and the Conusee sue Execution only upon the Land that he hath in his hands against him, or his Heir after his death; in this case neither he nor his Heir shall have this Writ to have Contribution of the Purchasors: But if Execution had been sued upon one of the Purchasors, he might have had him against the rest. See more in *Statute*, Co. 2. 91. *Dyer* 322. To have Contribution.

CHAP. XXII.

Of an Averment.

Averment,
what it is.

Se^{ct}. 1.
In what case
an Averment
may be had,
and how, or
not, upon or
against a Deed.



Averment in this place is taken for an affirmation or denial of something that doth not appear, which one doth offer to prove, and being allowed to him shall be put to Trial, *Terms of the Law*.

For answer to this Question, these things are to be known.

1. That any Averment may be had upon a Deed in writing, to alter, qualifie, or abridg the operation of it, if there be any apt words in the Deed whereupon to ground it. As if a Deed be to *A*. the son of *B*. and he hath two sons of that name, or a Grant be of the Manor of *S*. and he have two Manors of that name; in these cases an Averment will lie; which Son, or which Manor was intended by the Deed. But no such Averment can be against the words of a Deed. And therefore if the Estate limited by Deed were to *J. S.* and his heirs, you shall not be admitted to say the meaning of it was, that it should be to him and the heirs of his body. So one may not aver upon a general Release, that it was intended it should reach only to some particular: And yet if the first words be general, and joined to particular words, and restrained all to a particular, *contra*. So when a Deed is said to be delivered in one place, you may not be admitted to say it was delivered in another place: And when a Deed doth express a Consideration, you may not aver that there was no Consideration given. (a) So if a Lease be made without impeachment of waste, you may not aver that it was intended or agreed that he should not do waste, *Co. 8. 155. 5. 68. Clark's Case, 155. Plow. 7. 31 H. 6. Dyer 169. (a) M. 8 Jac. Curia*.

Of another
consideration.

Se^{ct}. 2.
Of another
use.

2. A man may aver a Consideration upon a Deed that is besides, but not that is against the express Consideration of the Deed, *Co. 1. 176. 11. 24. Dyer 146*.

3. No Averment lieth of another use against, or besides the express uses of the Deed. But where there is no use expressed, or where uses are expressed, but they are doubtfully and incertainly expressed; in this case an Averment shall be admitted, and may serve for addition or explication. So also it will be admitted to reconcile a Fine, and the Indentures to lead the uses thereof, *Co. 2. 75*.

4. When a Deed is utterly and altogether so uncertain, that it is void for incertainty, no Averment shall be admitted to make it good. And therefore it is, that a limitation of an Estate of Land by Deed to two persons & *heredibus*, (i.) to the heirs, and doth not say to their heirs, or to the heirs of one of them, is void. And so is a grant of goods to one of the sons of *J. S.* and he have divers sons, no Averment shall be admitted which of the sons is meant, *Co. 8. 155. 11 Ed. 4. 2. 22 H. 6. 15*.

5. If an Estate be made to a woman that hath a husband, before or after the marriage, by Deed or Fine for her life; in this case it may be averred to be made for her Jointure, albeit there be another Consideration expressed, *Dyer 146. Co. 4. 4*.

6. If a peece of ground be antiently called by one name, and it is of late turned to Tillage and called by another name, and it be granted to me by this new name; in this case an Averment shall be admitted, That it is all one thing; and this will make it good, *Dyer 37. 44*.

For this Averment against, or upon a Record, these things are to be known.

Se^{ct}. 3.
Upon or a-
gainst a Re-
cord.

1. That no Averment shall be admitted of any thing that is against or besides a Record, or any thing that is within it. And therefore if a Recognisance taken before a Justice of Peace do mention that it was taken at *Dale*, you may not aver that it was taken at *Sale*, and not at *Dale*, though it be true that it was so. For this cause a man shall not be suffered to say, a Verdict is false. But such an Averment as may stand with the Record, may be admitted. And therefore if a Fine and Inrolment be both

in one Term, an Averment, That the Fine was before the Inrollment shall be received, *Co. 10. 92. Plow. 493. Dyer 311. Plow. 434. 2.* An Averment lieth of Uses upon a Fine, or Common Recovery. So if a Fine be levied to *A.* the son of *B.* and he hath two sons of this name; or a Fine be levied of the Manor of *D.* and he that doth levy it, hath two Manors of that name; an Averment lieth, which Son or Manor is intended, *Co. 8. 155.*

2. Where a Fine is levied upon a Grant, and render, no other use can be Averred, but what is expressed within the Fine, *Dyer 311.*

3. Hence it is, that no Averment may be received against such Certificates, as are a Definitive Tryal of the thing certified; as when the Bishop did certify Excommunication, Bastardy, or lawful Marriage, &c. *Broo. 312. Coos. 7. 14. 9. 31.* But an Averment doth lie, and shall be received against a Certificate, which is onely to give Information, and in the nature of a Tryal. So it will lie against a Certificate, upon a Commission out of any Court. So it may be received against the Certificate of Commissioners that affirm a Man to be a Bankrupt, *Co. 7. 14. 8. 121.*

Against a Certificate.

4. The same Law is for a Return, if it be such a Return as is a Definitive Tryal of the thing returned, no Averment lieth against it. As the Return of a Sheriff upon his Writs, the Return of the Major, Aldermen, and Sheriffs of London, upon a Writ of *Habeas Corpus* sent to them, and the like. But if it be such a Return as is not Definitive, as upon a *Rescous*, or the like; in these cases an Averment may be had, and upon this it may go to Tryal. So also if it be a Return to endanger a mans life, or his Inheritance; an Averment may be had against it, *Dyer 348. 177.* So also it lieth against the Returns of the Bailiffs of Franchises, so that the Lords be not prejudiced in their Franchises thereby, *Stat. 1 Edw. 3. 3. Goldsb. 139. 129. pl. 23.*

Upon a Return.

For the Averment against a Will, or Administration, or against, or upon any thing within it; these things are to be known.

1. That an Averment lieth against a Testament, or Letters of Administration, although they be under Seal of the Court; and it shall be tryed by the Country.

2. Any Averment may be upon a Will, or any part of it that may help to expound a Will; and of such a thing as may stand with the Will, and may be collected out of the words thereof. As if a Man have two Sons of one name, and one of them long absent, and thought to be dead being the eldest; and he give his Land to his Son, in general, and the eldest is alive; in this case an Averment doth lie, That it was intended to the yongest, and not to the eldest Son; and upon a Tryal the Jury may finde it so, *Co. 8. 31. 41. Plow. 277. Dyer 244.*

3. But an Averment will not lie of any thing that is against, or besides that which is expressed in the Will; nor of any thing that cannot be gathered to be the minde of him that made the Will, by the words thereof; nor of any thing that doth not cohere with the Will, especially if the Devise be about Lands. And therefore if one Devise to *A.* and the Heirs of his body, the Remainder to *B.* and the Heirs Males of his body, on condition, that he or they, or any of them shall not Alien, &c. In this case no Averment shall be taken to prove by Witnesses, that it was the intent of the Devisor to include *A.* within this Condition, by the words, *He or they, &c.* So neither can an Averment be taken, that the intent was to give it to another, besides the Devisee, *Co. 5. 68. 4. 4.*

An Averment may be had against any part of the Rolls, or Records of County Courts, Hundred Courts, or Courts Baron; as that there is no such Record, or it is not so as it is certified, *34 H. 6. 42. 9 Ed. 4. 4.*

If the matter contained in an Award, and the matter contained in the Submission, do not agree; it will hardly be supplied by Averment, *Dyer 242. 52.*

No Averment or Proof is to be admitted against Common Presumption of Law; as that when any Acquittance is made of the last Rent, that yet there was more Rent then behinde, *Co. upon Littl. 373.* Nor against common Reason, as that Land doth belong to a Messuage, &c. *Plow. 170.*

An Averment may be of an use upon any Feoffment, Fine, or Common Recovery. See for this and the rest, more in my Book of *Common Assurances, Chap. 3. Numb. 4.*

Chap.

Sett. 4. Upon, or against a Will, or Administration:

Sett. 5. Against Court Rolls, or upon it. Upon an Award

Against Common Presumption, or Reason.

Of an Use upon a Conveyance.

Chap. 10. Numb. 5. Chap. 14. Numb. 4. Chap. 23. Numb. 5, 6. Chap. 24. Numb. 4, 5, 6.

Self. 6.
Where Averment is necessary, or not.

If the Defeasance of a Recognisance be dated before the Recognisance, if in this case use be made of it, it must be averred to be delivered, at or after the time of the Recognisance entred into, *Perk. chap. 147.*

The Executor of a Grantee of a Rent, or Reversion, Expectant upon an Estate for life, cannot Avow his desires without Averment; that the Arrearages incurred after the death of the Tenant for life, Adjudged.

But things that are apparant, or necessarily intendable by Law, need not be Averred: *Manifesta non probatione indigent, quod constat clare non debet verificare. Co. 111. 25. Plow 8.*

See more of Averment in *Actions of the Case*, throughout; in *Contract*, throughout.

CHAP. XXIII.

Of Ancestors.

Self. 1.
Ancestors, what.



Ancestors are our Forefathers, or Predecessors that went before us, who in relation to them, are called their Successors. But this word in the Law, hath special relation to such a Successor as is an Heir also to his Predecessor, and is especially applied to Inheritances that descend from one man to another.

An Action-Auncestell, is such an Action as is brought when as a stranger hath entred upon him after the dying, seised of his Ancestor.

It is a Writ which lieth where Land descendeth from the Grand-father to his Nephew, the Son or Daughter of the Son of the Grand-father, the Father being dead, before any Entry made by him; and one that hath no right abateth, (*i.*) Entreth, then the Heir may have against him this Writ, *New Terms of Law.*

Besaille, what.

It is a Writ that lieth where Land descendeth from a Great Grand-father, or Grand-mother, and a stranger entreth first, and keepeth out the Heir, then he may have against him this Writ, *F. N. B. 231.*

Cofinage, what.

It is a Writ, and lieth where the Great Grand-father, the Grand-father's Father, or other Cousin dieth, seised in Fee-simple, and a stranger abateth, (*i.*) Entreth into the Lands, then the Heir may have against him, or his Heir (if he be dead) or his Alienee, or against whomsoever after, that cometh to the Lands, *Terms Ley.*

Self. 2.
Mort-Daunces-ter, what.

It is a Writ, and lieth where the Father, Mother, Brother, Sister, Uncle, or Aunt die, seised of Land in Fee-simple, and a stranger entreth into before the Heir, then he may have this Writ, *Terms of the Law.*

Nuper obiit, what.

It is a Writ, and lieth where a Man hath many Heirs, either Daughters that be Parceners, or Sons in Gavelkinde, and dieth, seised, and one entreth into all, and keepeth the other out; in this case, he or they, that be kept out, may have this Writ against the Coheir that is in, *Terms of the Law.*

Rationabili Parte, what.

Rationabili Parte is a Writ, and lieth where an Ancestor was once seised, and made a Lease for life, and dieth, and after the Lessee for life dieth; so that the Ancestor did not die, seised of the possession, but of the Reversion, and one of the Heirs entreth into all, and keepeth out the rest, then he or they that are kept out, may have this Writ. *Terms of the Law.* See more hereof in my second Part of the *Marrow of the Law*, Pag. 192.

CHAP. XXIV.

Of Ancient Demesne.



Ancient Demesne is a certain Tenure, or holding of Land in the nature of Soccage of divers Manors within this Countrey, which are entered in *Doomsday* Book in the *Exchequer*, under the Title of *Terra Regis*. *Terms of the Law.*

Ancient Demesne, what.

Burrow English is a kinde of Tenure in the nature of Soccage, whereby some Burroughs of the Kingdom, do hold of the King or some other great Lord, paying onely a certain Rent, *F.N.B. 6.*

Burrow English, what.

Gavelkinde is a Tenure, and holding of certain Land in *Kent*, in the nature of Soccage, where by their Custom they have many Privileges that men elsewhere have not. *Terms of the Law.* See for these three things in my Second Part of the *Marrow of the Law*, pag 19.

Gavelkinde, what.

This came from *Gavelkinde*, and it is a special and ancient kinde of *Cessavit* used in *Kent*, where the Custom of *Gavelkinde* is. By which the Tenant forfeits his Lands to the Lord, of whom they were held, if he with-hold his Services, *Fitz. Cessavit. 60.*

Gaveler, what.

This is a Writ, lying where the Lord distraineth a Tenant in *Ancient Demesne*, for other Services then are due; then he may have this Writ to prohibite him, *F.N.B. 14.*

Monstraverunt, what.

CHAP. XXV.

Of Avowry.



Avowry is where one doth distrain another for Rent, or other cause, and the party distrained, sueth a *Replevin* against the taker, and then he doth in his Plea the lawful taking of them, shew why he took them; this is called an *Avowry*, *Co. 9. 135. Westm. 2. 2.*

Set. 1. Avowry, what.

Replevin is, where a man distraineth another mans Goods and Chattels, then the party distrained, upon giving security to the Sheriff, or his Deputy, that he will pursue the Action and return the Beasts again, if the taking shall be judged lawful, may have this Writ to the Sheriff. And if it be in a Franchise, the Sheriff may send to the Bailiff of the Franchise to do it, *Terms of the Law, Co. upon Littl. 145. See Stat. Marlb. 31. Westm. 2. 2.*

Replevin, what.

Gage Deliverance is, where one hath sued a *Replevin*, and yet hath not the Goods delivered, and the other avoweth: Now he may shew this in pleading, That the Defendant is still possessed of the Goods, and pray, that he may put in pledges for the Deliverance, which when they come to Issue, or Demurrer shall be granted him, and then a Writ shall go to the Sheriff, to deliver them. But where the Avowant doth claim property in them; this is not grantable. *Terms of the Law. Finch. 120.*

Gage Deliverance, what.

Retorno Habendo is, a Writ that lieth after a *Replevin* is brought, the Plaintiff maketh default, being non-suit, before Declaration, or the like, or Judgment is given against him; then he that distrained the Beasts, may have this Writ, and thereby have the Beasts delivered to him again. *Terms of the Law. Dyer 41:*

Retorno Habendo, what.

Withernam is, a Writ lying where one doth distrain, or the owner after the Distress taken,

Withernam, what.

Sec. 2.

taken, doth Esloyn the Cattle, or carrieth them out of the County, or keep them in some Castle; so that the Sheriff cannot make a *Replevin* or *Retorno Habendo* (as the Case is.) In this Case the party grieved, may have this Writ to the Sheriff, commanding him to take so much of the parties own Goods who hath done this, instead of them: And he may take the *Posse Comitatus*, and break it, and replevie them.

F. N. B. 73.

Second Deliverance and Return Irreplevisable, what.

This Second Deliverance is, a Writ lying where one doth remove a Plaintiff out of the County-Court or Court-Baron, by *Pone* or *Recordare*, into the Common-Bench, and after the Plaintiff in the *Replevin* is non-suited before any Avowry made; this notwithstanding the party that distrained, may have again the same Distress by this Writ, which is onely to revive the first Suit, and the Defendant cannot have a Recaption in this case, for a double Distress; and after this Writ had, and tryal thereupon, or that the Plaintiff be again Non-suit before Declaration Return Irreplevisable, must be awarded to the Avowant.

Recaption, what.

Recaption is a Writ lying where a man is distrained for any Service, and hanging this Suit, he is distrained again for the same cause; in this case, albeit it be for services due, after the first Distress, yet he cannot distrain again till the first Suit ended, and if he do, the party grieved hath this Remedy.

Proprietary Probanda, what.

Proprietary Probanda is a Writ lying where the Sheriff is coming to make a *Replevin*, by Writ or without Writ, before or after *Gager de Deliverance*, and the party who distraineth, doth claim some property in them; so that the Sheriff can go no further in the *Replevin*, till this point be decided, which must be by this Writ. But for all this, and the rest within this Chapter, See in my Book of the *Marrow of the Law*, i Part. Chap. 35. And see *Distress* in this Book.

CHAP. XXVI.

Of Authority.

1. Authority.



It is a power to do something; and this power in some Cases is by the Common Law: As power is given to a man to enter orderly into an Ale-house or Inn; to demolish Houses in a City, to prevent the increase of a Fire, or to fortifie it in a time of Siege. And in some Cases it is by the Statute Laws; as power is given to a Tenant in Tail, or in right of his Wife, to make Leases for three lives, or one & twenty years: So power is given to a Tenant in *Capite* to Devise two parts in three parts of his *Capite* Lands, *Dyer* 36: 12 *Ed.* 4. 8. *Perk* 191. *Co.* 1: 111. 173. *Plow.* 290. a. So to Arrest in divers Cases; for which see *Imprisonment*.

This power also is sometimes given by one man to another. And this is sometimes by word, and sometimes by writing; that which is by writing, is either by Precept, Writ, Warrant, Commission, Letter of Attorney, Provifo in a Deed to make Leases, revoke Uses, or the like. See the *Examples*.

2. The Nature of it.

The nature of this is such, 1. That it is not grantable over by him that hath it. 2. It must be strictly pursued. 3. It dieth with the parties, and doth not go to Executors; for which, see the Cases beneath, *Co.* 81. 46.

3. Licence.

This hath much affinity with the former; for it is defined to be, A leave and liberty to do, or commit something that otherwise ought not to be done; or omit something, that otherwise ought to be done, but now by this means is become lawful and justifiable, and may be pleaded in defence and excuse of the Commission or Omission, if the party be questioned for it. And it is distinguished and regulated much like to the former, and therefore the Rules and Cases of one, are in many cases applicable to the other; this therefore is also sometimes said to be given by the Law:

As

As for a Traveller to enter into an Inn or Ale-house; a Lessor to enter into the House leased, to view the Reparations and Decays, and sometimes it is given by the party, by one man to another; and that sometimes in writing, and sometimes by word onely.

And both these ways it is sometimes general, and sometimes special. There seems then no real difference between Authority and it, but that they may be (as they seem to be) confounded and taken one for another: Howsoever, Licence is most commonly applied to an act done, that otherwise had been unlawful; and by this the party that did it, is excused, but Authority to acts that are lawful, which thereby are justified by the doer; and this in some cases is more compulsoy then the other. *Bro. Trespass* 97. *Co. II. II. 9 Ed. 4. 4. Bro. Licence* 79. *Fitz. Trespass* 92.

The Licences that are had from the Lord Protector, especially those that are to privilege a man from the danger of a Penal Law, are called *Dispensation*; for a Dispensation is a kinde of Licence to transgress, or exemption from the danger of a Penal Law, which the Lord Protector in some special cases, to avoid inconvenience, by his Prerogative doth and may give or grant to some person. Also the Licences of Ecclesiastical Persons that were somewhat of this nature, and they had it by a derivative Prerogative from the King, were sometimes called by this name. But the most proper and peculiar term to set forth this kinde of Dispensation is a Faculty, which is defined to be a privilege or especial Power or Licence granted unto a man by favor, indulgence, and dispensation to do that which by the Law otherwise he could not do: As to eat flesh upon the days prohibited; to hold two or more Benefices, or the like. And that Dispensation which is granted to a Clerk, that being uncapable, is made capable, and *de facto* admitted to it, is called a *Perinde valere*, which name it had from the words which make the faculty as effectual to the party dispensed with, at the time of the Admission: And for the granting of these Faculties, there was a special Officer appointed under the Arch-Bishop of *Canterbury* called the Master of the Faculties, *Co. II. 86, 88. Stat. 25 H. 8. 21.*

Dispensation.

Perinde valere:

Master of the Faculties.

An Authority given by the Sheriff to his Bailiffs to arrest, is good, though it be an Authority derived out of an Authority: An Authority or Power however set up, if it be unlawful, is not good. And therefore in 16. 17 *Car. II.* it is enacted, That no new Court that hath the like, that the High Commission pretended to have, shall be hereafter erected. And that all such Jurisdictions, and all Acts, Sentences, and Decrees made by colour thereof, shall be utterly void.

A Verbal Authority from a Justice of Peace to any man, to apprehend another to finde Sureties for the Peace, when he is there present, and doth break the Peace before him, is good.

What Authority shall be said to be good.

The King in some cases may authorize a man to do a thing, which is *Malum prohibitum* onely, and not *Malum in se*, 1 *H. 7. 3. 3 H. 7. 15. 11 H. 7. 11, 12. vide infra.*

Where a Justice of Peace by word, commands one being present to arrest another, which is also in his presence, this is good, and is reputed as an arrest made by the Justice himself, 14 *H. 7. 8, 9.*

Arrest.

In Case of Ryotors, a Justice of Peace may by word, command his servants to arrest them in the absence of the Justice, 14 *H. 7. 9, 10.*

Grant.

A man that hath his Authority by Record, cannot grant it over without writing, unless it be to arrest a person that is present; as in the cases before, 10 *H. 7. 17.*

An Authority given by a Bailiff to another Bailiff to arrest a man, is not good: So if one have a power to make Leases, and grant it to another, this is not good: For regularly, neither Licences nor Authorities are grantable over. *Poulton de Pace* 19.

See. 1. What not.

A Verbal Authority onely from a Sheriff to arrest a man, is not good. 9 *Rep. 69.* Whether it be to a Bailiff errant, or other special Bailiff. *Fitz. Fann. Imprisonment* 3. *Kelm* 86, 14 *H. 7. 8, 9.*

A Verbal Authority onely from a Justice of Peace to arrest a man that is absent, is not good. *Wodden versus Booker, M. 13 Jac.*

To make or
take Livery of
Seisin.

A Verbal Authority onely to surrender the Lease for years, is not good, though he deliver him the Lease also. *Sleigh versus Bateman, Hil. 17. Eliz. B. R.*

A Verbal Authority to deliver Seisin, is not good without writing: Neither is an Authority in writing, to deliver Seisin after the death of either of the parties good, for it is against Law, *Co. super Littl. 52.*

An Authority given to another to do that which he himself cannot do, is not good. *Quod per me non possum, non per alium. Co. 11. 87.*

A Verbal Authority by a Justice of Peace to a Gaoler, whereby a Prisoner is sent to Gaol, it seems is not good. It is safe for Justices of Peace to send their Warrant in writing, and therein to insert the cause of the commitment. *Wodden, vide Baker.*

An Award that the parties shall obey the Arbitrement of an other, is void; for power cannot be assigned, *8 Ed. 4. 19.*

A Verbal Authority to receive Seisin, is not good without Deed, *Co. super Littl. 48.*

Arrest.

If a *Capias* be directed to the Sheriff to arrest a man which doth dwell within a Franchise, the Bailiff of the Franchise cannot arrest him without a Warrant from the Sheriff in writing, *Vide Commandment infra.*

6. When an
Authority is
well pursued,
or not.

Although it be a rule of Law, that every Authority that is given by Act of Law, or act of the party, must be strictly pursued, or else it is said to be done without Authority; yet when more is done, or when it is done by more persons then be in the Authority; in many cases it is good enough, and it shall be said a sufficient pursuit of the Authority notwithstanding: As whereby the Statute of 32 H. 8. the Tenant in *Capite* hath power to Devise two parts in three parts of his Land; yet if he Devise all, it is good for two parts. An Assignment of Debt was to the Queen, provided, That if the Lord Treasurer, or the Barons of the Exchequer, or any two of them do revoke, &c. And after three Barons do revoke it, this is good. *Omne majus continet minus, Plow. 393.*

Power to
make Leases.

If a greater number of persons do a thing then are appointed by a Statute (unless the Statute do purposely restrain the number) it seems it is well enough done as where more do sit in the Star-chamber, then are mentioned in the Statute of 3 H. 7. 1. *Quando plus fit quam fieri debet, videtur & id fieri quod fieri debetur.*

If a Statute give power to make Leases, so as they do not exceed three lives, or twenty one years (as the Statute of 32 H. 8. is.) In this case, if one Lease for two lives, or for ninety nine years, if three lives so long live, this is a good pursuit of the Authority: But if the word of the Statute be, that they shall make Leases for three lives, or twenty one years; in this case, a Lease for twenty years, or two lives is not good, *Co. 6. 33, 35. 8. 70.*

If one make a Lease for life, and a Letter of Attorney to deliver the possession to the Lessee, and the Attorney deliver possession to the Attorney of the Lessee; this is a good pursuit of his Authority. *Finches 66.*

If a Deed be made of two Acres, and a Letter of Attorney to deliver Seisin in both *Secundum formam chartæ*, and the Attorney enter into one Acre onely, and give Seisin *Secundum formam chartæ*; this is a good pursuit of the power, and a good Livery for both, and that though he did not deliver it to one in the name of both: So when a Feoffment is to two or three, and the Warrant to give Livery so, and he do it to one *Secundum formam chartæ*; this is good to both, and yet the absent party may waive the Livery, *Co. super Littl. 52.*

If one Devise his Land to his Executors to be sold, and one of them die, the surviving Executor may sell it, *Co. super Littl. 181.*

If a *Venire Facias* be sent to four Coroners, to impanel and return a Jury, and one of them die, and the Survivors execute it, it is good. *Idem.*

If the Sheriff upon a Writ make a Warrant to four Bailiffs joynly, or severally to arrest, and two or three of them arrest the party; this is a good pursuit of the Authority, *Pasc. 45 Eliz. B. R. King and Hobbs.*

Self. 2.
To Claim.

If one give another an Authority to make a claim, and he come to any part of the Land, and there make claim, &c. in the name of his Master &c. this is good. So if the Master say to his Servant, that he dares not come to the Land, or any part of

of it, to make his claim, &c. And that he dare approach no neerer to the Land, then such a place called *Dale*, and command his Servant to go to that place, and there make his claim for him; this is good, although it may be the Servant durst to have gone further. So if a man be sick, and not able to go out of doors, and have cause to enter, and he command his Servant to go to the Land, and make his claim for him; and the Servant fearing, &c. dareth not go to the Land, but goeth as near as he can or dare, and there claimeth for his Master; this is good. *Impotentia excusat legem. Littl. Sess. 433, 434.*

And for the most part it is true, where a man doth that which he is authorized to do, and more; there it is good for that which he had Authority to do, and void for the rest, *Co. super Littl. 252.*

And therefore if a Letter of Attorney be to make Livery to one, and he make Livery to two; it is good to him to whom the Warrant extends, and void to the other, *Perk. 39. a.* To make Livery of Seisin.

So if it be to make Livery of Warrant, and he makes Livery of Warrant, and Bargain; it is good for Warrant. *Ibid.*

If a Letter of Attorney be to deliver Seisin to two, and one of them dieth, and he makes Livery to the other; it is good to him for the whole, *Ibid.*

If a Letter of Attorney be thus. I make *A.* and *B.* my Attorney and Attorneys for me, and in my name to enter on the Land, and there to deliver the writing as my Deed, ratifying and confirming whatsoever my Attorneys, or either of them, shall do concerning the premises, and one of the Attorneys doth, and it was held good by two Judges in 11 *Car. B. R.*

Regularly when a man doth less then the Commandment or Authority committed to him, there (the Authority being not pursued) the Act is void, unless it be in some special Cases, *supra.* So where he doth it otherwise, then his Authority doth direct him; and therefore an Authority cannot be apportioned: As where the Statute of 32 *Eliz. 34.* doth give a man power, that is seised of Soccage and *Capite* Land, to Devise or dispose two parts for the benefit of his Wife, &c. And a man being seised of two Acres of *Capite* Land, and one in Soccage, dispose his two Acres to such purposes: Now he cannot Devise the other Acre at his death, and if he do, it is void. *Co. super Littl. 258. Co. 3. 34. 2. 26.* Apportionment.

So likewise is the Law for the power of Commissioners upon the Statute, 13 *El. 7.*

If two Attorneys have a joynnt power to do any thing, and one alone doth it in the name of the other, and him; this is not good. As if a Letter of Attorney be made to two joynntly to take Livery of Seisin, and one of them doth take it; this is void. *Co. 5. 24. 95. & super Littl. 49. b.*

If an Authority be given to three, to do any thing joynntly or severally, and two of them do it in the absence of the third; *Norths Case, M. 4 Jac. B. R.* Or one of them and a stranger do it; this is not good, *Co. 5. 90. Dyer 51.*

If one willeth that *A. B.* and *C.* his Feoffees shall sell his Land; and one of them die, and the Survivors sell it; or if he willeth it shall be sold by the advice of *A.* and *A.* die, and they sell it without advice; this is not good. *Dyer 177. 190. 214.*

If in the Star-Chamber, the Chancellor, Treasurer, and Gardian of the Privy-Seal, or two of them, had not taken with them a Temporal Lord, a Bishop, and the two Chief Justices, according to the Statute of 3 *H. 7. 1.* Their Judgments had not been good, 3 *H. 7. 1. 8 H. 7. p. ultimo. 16. 233.*

If one Auditor commit a man that is an Accomptant to prison, upon the Statute of *Westm. 2. cap. 12.* This is not good nor warrantable, *Plow. 394.*

If a Commission be to eight persons joynntly to hear and determine, seven of them cannot do it, *Ibid.*

If a Warrant be to an Attorney to deliver Seisin generally, and he do it in view; this is no pursuit of the Authority, and therefore void, *Co. super Littl. 52.*

If a Writ be to the Sheriffs of *London* to do any thing, and one of them be dead, the other cannot execute it.

If any Authority be to deliver Seisin to *V.* or *S.* and to make Livery to *V.* and *S.* This is not good, nor pursuant of the Authority, 11 *H. 7. 13. Feoffments, B. 6. 43.*

If I command one to make a Feoffment in my name in *Latine*, according to a Copy shewed him, and he make it in *Englisch* or *French*; this is not good, 10 H. 7. 9.

Felony.

If one Sheriff be commanded to hang a man, and he behead him; this is not good, but Felony in the Sheriff, 35 H. 6. 38.

A. is disseised of Bargain and Warrant, A. makes a Warrant of Attorney to B. to enter in both, and to make, Livery there, if B. enters in Bargain onely, and make Livery *Secund. Form. Chanc.* It is a void Livery, *Co. super Littl.* 52. a.

If a Letter of Attorney be to make Liveries after the death of a stranger, and he makes Livery in his life, it is void, 40 *Aff.* p. 38.

If a Letter of Attorney be to deliver Seisin to H. upon condition, and the Attorney deliver it absolute, this is void, 11 H. 4. 3. a.

If a Letter of Attorney be absolute, and the Attorney delivers Seisin upon condition, this is naught, 12 *Aff.* p. 24. Adjudged.

7. Where an Authority is revocable, and when it shall be said to be determined, and when not.

All Authorities for the most part are revocable, and may determine by the Act of God, (i.) the death of him that gives it, or the death of him to whom it is given; or the Act of the party that doth give, (i.) when he doth actually revoke it himself before the thing be done. And therefore if an Authority be given to two or more joyntly to do a thing, and one of them die, nay in this case the Authority is determined. And if I deliver money, or other thing to J. S. to deliver over, or to give away, and before it be done, I forbid him to deliver; in this case his Authority is determined, *Dyer* 190. *Co.* 5. 90. *Dyer* 190.

But if there be an interest coupled with the Authority, there it will not, nor can be countermanded by any such Act of God, or the party: As where one doth Devise his Land to his Executors, until his son be of full age, and that they shall sell it; in this case they, or some of them die, yet the rest may sell it, and so in all like cases.

If one make two Executors, and Devise that his Land shall be sold by his Executors, and one of them die, it seems the other cannot sell; otherwise it is where an interest is devised also.

If one make a Letter of Attorney to two to give Livery, and one of them die, the other cannot do it; no more then where an Office of Stewardship is granted to two men, can one of them execute it, *Goldsb.* 2. pl. 4.

So where an Authority is once executed, it cannot afterwards be revoked by any means, *Dyer* 210. 24. *Perk.* 105. *Co.* 5. 90. b.

An Authority also may determine by other Accidents: As if an Administration be granted to me during the minority of four Infants, and one of them become of full age, it seems in this case the Authority is determined, *Co.* 5. 9.

Self. 3.
Notice.
Countermand.

See more of this point in *Countermand*; and note that always in case of Countermand of Authority, there must be notice, otherwise the Countermand is not good. And therefore if a Factor, Attorney, or the like, or any other Arbitrator or Commissioner, have a Countermand made them, whereof they have no notice; this doth not determine their Authority, *Co. super Littl.* 55. b. *Co.* 8. 82. 21 H. 6. 29.

1. Commission.

It is the Warrant or Letters Patents from the Lord Protector, testifying, that one or many have some Authority in a matter of Trust committed to their charge: As to hear and determine any Cause or Causes, to examine Witnesses, Purvey, and take up provision for him, or the like. And they that are thus trusted, and in Authority, by vertue of this Commission, are called *Commissioners, Terms of the Law*, 11 H. 4. cap. 28.

Quotuplex.

8. Where Commissions are grantable, and what things may be done by Commission, or not.

By Common Law.

And some of these are to hear and determine offences, and other matters, and require no Return. And some are to enquire, or examine, and to certify what is found, and they must be returned. And some are to seise Lands, Goods, &c. *Stat.* 4 H. 4. cap. 9.

By the Common Law, Commissions are grantable in divers cases, and almost in any case by those Courts, that proceed by that course of Examination of matters by Commissions: Also all the great Officers, Judicial and Ministerial of the Realm, are made by Commission. By this means, are and may Treasons, Felonies, and other offences be examined, discovered, heard and determined. By this means may be, and are

are Oaths, Conu fance of Fines, Offices found, Subsidies and Fifteenths be taxed, and many other things be done as occasion shall require, as to examine Witnesses, take Answers, and the like, *Bro. Commiss. in toto*, Stat. 35 H. 8. 2. 2 & 3. Pl. & M. 1. 10 R. 2. 1.

But Commissions may not be granted against Law, as to take and imprison mens bodies, to enter upon their Lands, or take their Goods without order of Law, and if any such be granted, they are void, and do create no Authority, *Bro. Commission*. 3. 15. *Just.* 6.

By Statute Laws also, Commissions are grantable in diuers cases, and diuers things may and are to be done by Commission. As the finding of Offices after the death of the Kings Tenant, Stat. 1 H. 8. 8. By Statute Law.

To enquire of the employment of Lands or moneys, that have been given to publick and charitable uses, and to set down orders for it, 43 Eliz. 2. 4.

To examine parties and witnesses for any sums of money, that have been gathered for Houses of Correction, or Stocks to set poor on work, and to get it into their hands, 39 Eliz. 4.

To hear and determine Policies of Assurances made amongst the Merchants, 43 Eliz. 12.

To enquire of misdemeanors of Purveyors in taking of Provision, 36 Ed. 3. 4.

To enquire of a Riot that hath been done, and the neglect of the Justice of Peace, and Sheriff therein, 2 H. 5. 8.

To enquire of Servants that imbezel their Masters Goods after their death, and to make Proclamation that they appear and answer it, 33 H. 6. 1.

Also a Commission may be had to grant Licences, and Faculties in some cases, 25 H. 8. 21.

Also Commissions may, and must be had to determine Appeals from the Admirals Court, 25 H. 8. 19.

Also to hear and determine Offences done upon the Sea, 28 H. 8. 15:

And Treasons done beyond the Seas, 35 H. 8. 2. 5 Ed. 6.

And to hear and determine Offences confessed before the Council, 33 H. 8. 23, & 11.

And to enquire of the Account of the Officers and Accomptants of the Lord Protector, which they have made in the Exchequer, whether the same be right or no, 6 H. 4. 3.

And to enquire, hear, and determine of all matters, against true and safe Conducts upon the main Sea, 2 H. 5. 6.

For Reformation of Weers and Banks, and to prevent the inundation of great Waters; a Commission may be had out of Chancery, called the *Commission of Sewers*, *Co. Io.* 138. Commission of Sewers.

The form whereof, and all that doth concern it, and the execution of it, See in Stat. 6 H. 6. 5. 8 H. 6. 3. 23 H. 6. 9. 23 H. 8. 5. 3 & 4 Ed. 6. 8. 13 Eliz. 9.

Also Commissions are grantable, and have been made and had. To enquire and compound for first Fruits. To enquire of the value of each living Spiritual, and the deductions and payments out of the same. And to enquire of *Chantry Lands*. And to end Suits for small debts in the City of London. Stat. 5 Eliz. 1. 26 H. 8. 3: 26 H. 8. 3. 1 Ed. 6. 13. 3 Jac. 15.

But no Commissions of general Inquiries within Seigniories shall be had or sued forth, Stat. 34 Ed. 3. 1.

No Commissions shall be granted by Temporal Judges, to enquire of the proceedings by Spiritual Judges, Stat. 18 Ed. 3. 6.

All the Commissions for the great Offices of the Realm, are made by the Lord Protector under the Great Seal of England. So all Commissions of *Oyer and Terminer* of the great Offences by the Common Law. And so all other Commissions to examine Witnesses, take the Cognizance of a Fine, or to do any other matter for the furtherance of Justice in any matter whatsoever comes in the Lord Protectors name, though it be grantable by the Court, where the matter is depending *Ex Officio*. See the *Commissions*. 9. By whom they must be granted, or not.

All

Sec. 4.

All the Commissions come in the Lord Protector's name: The Commissions for finding of Offices come out of the Chancery: The Chancellor of the Dutchy of *Lancaster*, for the Lands within the Dutchy, under the Seal of the Dutchy: The Lord Chancellor under the great Seal of *England* doth grant Commission for charitable Uses: The Lord Chancellor of *England* doth grant the Commission out of the Chancery to enquire of the money gathered for the Poor; to also he doth that for the policy of Assurance: The Commission against Purveyors is granted, as other Commissions are, out of the Chancery; and so also is the next about Riot: The Commission against Servants for goods of their Masters imbezeled, is granted by the Lord Chancellor, with the advice of one of the chief Justices, and chief Baron, or two of them: The Commission for granting of Faculties is granted as other Commissions are granted; so likewise the Commission to determine Appeals: In all the three cases of the tryall of Offenders, the Commission is granted by the Lord Protector, as other Commissions are: The Commission to examine the Accompts of his Officers, it seems is to come out of the Exchequer: And the Commission for safe Conducts is granted by him and the Admirall. See the Stat. before Cap. 97. a.

10. To whom they may, and must be granted, or not. And who may be Commissioners.

The Commissions for the great Offices, and for Oyer and Terminer of Officers, are grantable to any person that is not disabled by some special Law, to whom it please the Lord Protector: And other commissions out of the Courts in their ordinary proceedings, are grantable to whomsoever the Courts will appoint, Stat. 3. fac. 5. See Stat. 42 Ed. 3. 4.

Any may be Commissioners, unless by some Statute they be restrained. In case of finding of Offices, none may be Commissioners, but such as have forty Marks *per Annum* of Land: In the Commission for charitable Uses, the Bishop of the Diocels if there be any, and his Chancellor, and other sufficient persons whom the Lord Chancellor shall name, so that there be four at least: In that for the enquiry of Money gathered for stocks to set the Poor on work, whomsoever the Lord Keeper will name may be Commissioners: In that for the policy of Assurances, the Judge of the Admiralty, the Recorder of *London*, two Doctors of the Civill Law, two common Lawyers and eight grave Merchants, or any five of them, must be Commissioners, and may execute it: In the Commission against Purveyors, one of the Lord Protector's house, and two others sufficient men, shall be Commissioners, and any two of them, and they may execute it: In the Commission to enquire of the Riot, &c. any may be Commissioners whom the Lord Protector or his Chancellor will appoint: The Commission or writ against Servants is to the Sheriff of the County: In the Commission for granting of Faculties, two spirituall Prelats or others the Lord Protector shall name, must be Commissioners: In the Commission for tryall of Appeals, there must be such Commissioners as the Lord Protector will name: In the Commission for tryall of Offenders: in the first case it must be to the Admirall, his Lieutenant or Deputy, and three or four such as the Lord Chancellor shall name: And in the second and third case, to such persons as the Lord Protector shall appoint: The Commission to examine the accompts of Accomptants, is grantable to whom the Lord Protector, or his Barons of the Exchequer will name: And the commission for safe Conducts, may, and must be granted to the Conservator of the Truce, and to two men learned in the Law, See the statutes before.

All Commissions to enquire of Articles, shall be made to the Justices of the one Bench or the other, or Justices of Assise, or of the place, and other worthy men of the Country, Stat. 42 Ed. 3. 4.

In every Commission of the peace for Gaol-delivery, there must be two men of the Law of the County-Commissioners to deliver the prisoners, Stat. 17. R. 2. 10.

11. The power authority and duty of such Commissioners so made. Charitable Uses.

The power of Commissioners is to do what by their Commission they are commanded to do, and therein also is included authority to doe all that without which that other thing cannot be done: And their duty is first to receive the Commission, and then to execute it; and therein to pursue the authority and direction of the Commission, and faithfully to perform the effect of it; and then to make a due and a true Certificate or Return thereof when the Commission doth so require: But if the Commission be against Law, the Commissioners are not bound to accept or obey it; vide

vide supra. And if they doe any thing they have not authority for by their Commission, it is void, and for so much it is as if no such Commission were, *Co. super Littl. 157 b. Co. 2. 25.*

The authority of Commissioners by statute Laws, is such as the statutes give them, and their duty such as the Statutes prescribe: As in the case of finding of Offices, they are to sit in open places, and let every man to give evidence that will: In the case of charitable Uses, they must by a Jury, and all other ways they can, having the parties and witnesses before them, labour to search out the matter, and set down Orders for the employment of the Gift, and certify their doings in Chancery; and if any be grieved by their Order, he must complain there: In the last case of charitable Uses, they may compell by Attachment of their Goods or Bodies, any to accompt; they shall suspect to have any such Sums in their hands, and force them to pay to them what they finde by sale of their Goods, or imprisonment of their Bodies. In the case of Assurances between Merchants, they may hear and determine the matters, and for that purpose call, and compell the parties and their witnesses before them, and imprison them who will not obey their Orders; and if any be grieved by their Order, he must complain in Chancery: In the case against Purveyors, they may and must examine their doings, and punish their faults: In the case of the Riot and neglect of Officers, they are speedily to enquire of the Riot, and of the neglect of the Justices or other Officers in their duties, and to certify the same into the Chancery: In the commission against Servants for imbezeling, the Sheriff is to make open proclamation according to the direction of the same Commission, and to return the same: In the Commission for granting of Faculties, they may and must grant Faculties under their Seal, in such manner and order as the Archbishop ought to grant them: In the case of Appeals, they are to hear, and definitively to determine them: In the case of Tryall of Offenders, the Commissioners are to proceed against the Offenders by Indictment, arraignment, and such an Order of Tryall as by Law in ordinary cases is used: In the Commission for to examine the accompts of Officers, they must enquire, and certify to the Court the Receipts and Disbursements: In the commission of safe Conducts, the Commissioners may, and must hear and punish all Offences great and small, done against the Truce and safe conducts upon the main Sea, out of the body of any county. *See the statutes before.*

Stat. 5.

Commissioners in divers cases have power to make Bargains, Sales, Feoffments, and Leases of other mens Lands, and their acts therein are good and binding. For which see *stat. 13 Eliz. 7. 2 & 3 Phil. & M. cap. 1. 1 Ed. 6. 14. 23 H. 8. 2. 5. 34 H. 8. 4. 43 Eliz. 2. 3, 4.*

The faults of Commissioners in generall, are the omission or commission of any thing against their duty set down before:

12. Their faults and punishments.

1. To refuse a Commission being sent unto, and offered them, unless it be in case where a man is authorized by a speciall Law to refuse it, as the statute of 1 H. 8. 8.

2. To do any thing against or besides the contents thereof, or to neglect to doe any thing commanded and required by it.

3. Not to return or certify it when it is executed, and where the nature of it is such as it doth require a Return, *Co. 2. 17. 25. 80 9. 77. stat. 7 H. 4. 11. so was it held in 2 Jac. B. R. stat. 4 H. 4. 9. 1 H. 8. 8. 7 H. 4. 11.*

If a Commissioner to examine witnesses, will not suffer a witness to declare the whole Truth of matter pertinent to the question, and pursuing the Interrogatory; or if after he begin to examine, he have secret conference with the party, and take new direction from him: or before publication discover to either party any thing which is deposed on either side: or take gifts to encline to either side; or return not the true Depositions: or make not return of them at all: All these, and such like, are misdemeanors punishable, *Co. 97. 1. 40 A. St. 33. F. N. B. 110. Moors case, 2 Jac. B. R.*

Deposition: Examination.

And for all these defaults and misdemeanors in Commissioners, where by the Law there is no certain punishment set down, the Offenders were punished by Fine and Imprisonment in the Star Chamber; or in some cases in the same Court out of which the commission did issue: And where they do exceed their authority, in most cases they

they may be punished, so as if no such commission were made, *Coo. 9. stat. 4 H. 4. 9. Moor versus Foster.*

For Actions of Trespass, or some other Action (as the case is) may be brought against the Commissioners, and such as act under them, as if no such Commission had been granted. So men have been sued, that have acted under the Commission of Bankrupts, under the Commission to Justices, to hear and end matters of Tithes, if they keep not within their compass, and act in an Arbitrary way.

But where any Statute doth set down any certain punishment, there the offender must bear that also: As a Commissioner to finde an Office, if he have not forty Marks *per annum* of Land, loseth twenty pound. And if he sit in secret places, or hinder the free giving of evidence, he loseth forty pound, and so of others. 2 Jac. B. R. Stat. 1 H. 8. 8. 25 H. 8. 10.

13. When a Commission shall be said to be determined, or not.
By a new Commission.

A Commission that is well made and granted, may determine and become void by divers means and ways: As sometimes by the granting of a new Commission, and that may be when it granted to the same persons; or when it is granted to others: As if a Justice of the Common Pleas be made Justice of the Upper Berch, though it be but for one time, and he surrender it the morrow after, the former Commission is determined: But if such a Justice be made Chief Baron, Justice of *Oyer and Terminer*, or of Gaol-delivery; this doth not determine the Patent. *Littl. Broo. Sess. 498. Stat. 13 Eliz. 9.*

If the Lord Protector grant to a Major and Communalty, and their Successors, to be Justices in such a place, and after grant to others to be Justices there; or if the latter Commission be granted to such as are dead, or it be void for any other cause; in these cases the former Commission doth continue: But if the latter Commission be granted but to one, and the first to four; or it be onely *hac vice*, it doth determine the former Commission, *Litt. Broo. Sess. 569.*

Notice.

If a Commission of *Oyer and Terminer* be granted to some persons, and after a Commission of Gaol-delivery is granted to others, this latter doth not determine the former, for these may stand together; but when the latter is contrary to the former, the former is determined. As if there be a Commission of the Peace, is granted to some, and after another Commission of the Peace granted to others; this doth determine the former: But in all these, and such like cases, there must be notice, *Litt. Broo. Sess. 474. 509. and Broo. Commission 2. See Notice.*

By *Supersedeas*.

If a Commission be granted to some persons to do a thing, and before execution, another doth come to countermand this; this is a *Supersedeas* to the first, if there be notice given of it, and whatsoever the Commissioners do upon the first, is void. And it seems the Lord Protector may determine an Authority given by a Commission under the Great Seal by a Privy Seal. Also he may at his pleasure by a Writ of *Supersedeas* out of the Chancery, determine any such Commission, and discharge the Commissioners, *Broo. Commis. 13. Just. 24. Stat. 13 R. 2. 2. 23 H. 8. 5.*

By death of the King.

By the death of the King, all Commissions and Patents of Officers, who were made onely by Patent, and had but a naked Authority, did determine, and were at an end; but such Officers as are made by Writ, and such as are so by grant: As if the King had granted to a Major and Communalty, and their Successors to be Justices; it seems these Patents do not determine, for in the last case it is not revocable. 4 Ed. 4. 44. *Littl. Broo. 509.*

By default of Adjournment.
By acceptance of a Dignity.

If the Justices sit by Commission, and do not adjourn it, the Commission is determined, *Littl. Broo. Sess. 509.*

If one be the Lord Protector's Steward by Commission, to keep his Courts, and after be made Justice; this doth not determine his first Patent: Yet if a man be Forester by Patent, and after be made Justice of the same Forest; this latter Patent doth determine the former, *Broo. Offices 47.*

If the Lord Protector's Remembrancer in the Exchequer be made of the Barons there; it seems this doth not determine his Patent before, *Dyer 197. 47.*

Sess. 6.

But if a Commission of the Peace be granted to *J. N.* and others, or *J. N.* be Justice of the Bank, and after he is made Knight; this doth not determine the Commission, nor his Authority, or Office in either case: So if a man learned in the Law, be

be put in Commission, and after he is made Sergeant at Law, yet he doth remain in his Authority. *Litt. Broo. Stat. 287. 309.*

If any being Justices of Gaol delivery, Assize, or the Peace, or being any other of the Lord Protector's Commissions and fortune to be advanced to the Dignity of Duke, Archbishop, Marquis, Viscount, Baron, Bishop, Knight, Justice of the one Bench, or of the other, Sergeant at Law, or Sheriff, their former Commission shall continue notwithstanding. *1 Ed. 6. 7. Dyer 205. 209.*

For other Commissioners, (i.) all the Officers of the Realm, and others. See *Officers, Courts, Purveyors, Bankrupts, Fines, and other Titles.*

This word is diversly applied; for sometimes it is applied to the Mandat of the Lord Protector, as in *14 Ed. 3. 14.* The Justice shall not delay to do right and Law for any Commandment that shall come to them from the King, under the Great or Privy Seal, but shall proceed notwithstanding. By which Mandat, the King of his mere motion castrer a man into prison, and sometimes to the Mandat of Justices. And this is either absolute (i.) when of their own Authority, Wisdom, and Discretion, they commit any man to prison for a punishment; or Ordinary, when they commit one rather to be safely kept then for punishment; and in this last case the party committed is bailable. But this word doth most commonly signifie the offence of him that willet another man to do any thing contrary to Law, as Murder, Theft, &c. And is also frequently applied to any Commandment whatsoever; and so in many cases it serveth to give and make an Authority. *Crompt. Jur. 91. 6. Terms of the Law, Stamps. Pleas of the Crown. f. 72. 73.*

To make a Commandment good to Warrant the doing, or excuse the not doing of a thing; these things must concur.

1. He that doth it must have power in the thing.
2. The thing commanded to be done must be lawful.
3. The Commandment must be given in that manner, and order that Law requireth. *2 H. 7. 14.*

A Verbal Commandment in most cases is sufficient, and as good as a Commandment in writing, unless it be in some special cases: As where it is given and made by a Corporation (for which see *Corporation*;) or where the Sheriff doth make Warrant to a Bailiff of a Franchise, or other Bailiffs to arrest a man: And some such other special cases, whereof see some in Authority, *supra: Fa. Imprisonment 3. Subpena 1. 13 H. 7. 17. Broo. Trespas 288. Dyer 102. 83. 319. 12.*

Any thing (for the most part) that a man may do by himself, he may do by another; and therefore the Commandment to do such a thing is good, and may be obeyed without danger: As to enter into or claim Land, seize Goods, demand Rent, or the like: Arresting of mens Bodies, attaching of their Goods, or the like, and this Commandment will excuse them: But if the thing commanded be unlawful, as when one doth command another to kill a man, or to seize another mans Goods: These are unlawful, and therefore such Commandments will not countenance such actions. And therefore if one doth command another to kill a man, or dispossess a man, or do a Trespas, both he that gives, and he that obeyeth the Commandment, shall be punished as all alike guilty. (See *Patience Criminis*.) See *Dyer 102. 83. 173. 15. Kels. 89. 2 H. 7. 14. Doff. & Stu. 18.*

By Magistrates and Officers that have power, a man may be commanded to arrest mens Bodies, Goods, &c. As if the Sheriff in doing of Execution commandeth me to help him; or an Officer to help keep the Peace; or a Justice of Peace to arrest Ryoters, or the like; these are good Commandments, and these all men must obey, or expect punishment for their refusal: And if I command my Servant to impound another mans Cattle, or drive them out of my Ground, I may command another to cut down my Trees upon mine own ground; these are good Commandments, and may be obeyed without danger of punishment; for this Commandment shall excuse, *Fitz. Faun. Impr. 3. Trespas 253. Avowry 260. Broo. Trespas 53.*

If I have a Warrant or Commission to Purvey for the Lord Protector, I may command another to do it, and it seems good. *Fitz. Bar. 259.*

If I being an Executor command another to seize the Goods of the Testator, and

14. Commandment or Mandat.

15. Where a Commandment shall be said to be good or not, and how, in respect of the manner.

In respect of the matter commanded, or person commanding, &c. To excuse the doing of something, otherwise wise unlawful.

Entry Seizure.

Claim.

Entry.

Infant.

Arrest.

Sect. 7.

To excuse the
not doing of
something
that otherwise
ought to be
done, or the
like.

16. Where he
that doth a
thing by Com-
mandment of
a Judge or Of-
ficer shall be ex-
cused, though
the thing be
wrongful, or
not.

Jurisdiction.
Quotuplex.

after I refuse, and another doth administer, yet the Commandment is good, and will excuse him against the Administrator. *Fitz. Administ. 2.* If I have cause to enter into, or make any Claim to any Lands, I may command any other to do it: And in this case, and such like of things done by another, the rule is, *Qui per alium facit per seipsum facit.* And in the case of Entry any man where the Entry is lawful, may of his own head, in the behalf of him that hath right of Entry, although he be an Infant that hath the cause of Entry, without any Commandment enter for him. *10 H. 7. 12.*

The Commandment of an Infant in most cases is void, but he may at full age agree to a thing done before, which is *ratum*, for the Rule is, *Omnis ratio mandatum equiparat*: If he in Reversion command the Tenant for life to dig Clay or Gravel in the Land of the Tenant: This will not warrant nor excuse him, if I bring an Action of Waste for it. *Perk. 3. 2 H. 7. 14.*

If I suspect a man for Felony, and command another to arrest him; it seems this is not good, unless I be a Justice of Peace. See *False Imprisonment. Br. False Impr. 14.*

If I command one to take the Goods of J. S. and J. S. die, and make me his Executor; in this case I may sue him, for the taking of these goods, and my Commandment will not excuse him: So that, as in the case before, matter *Ex post facto* would not make a good Commandment void; so here it doth not make void Commandment good, *2 H. 7. 14.*

And so generally, where an Authority had by a Commandment is good, there the Commandment is good, *Et sic contra.* See *Authority, supra.*

If a Lease be made of a House on Condition, that the Lessee shall not suffer any Woman great with child to abide in the house six moneths after warning given: Now if the Lessor contrary to this Condition, command the Lessee to suffer her there, he is not to obey it; for though he do it, by his Commandment, yet it will not excuse him: So if one be bound to me in an Obligation, with Condition to pay me money at a place and day, and I command him not to go there, to pay the money, if he do not, he forfeiteth his Obligation; but if I in this last case, or the Lessor in the first case, use any violence to keep him from coming thither, or to keep the Woman in this house, this will excuse. *Fitz. Bar. 163. Covenant 31. Kelm. 60.* If one be bound to pay me Rent on his Lease, and I command him to repair, and lay out some of the money, yet he must pay me the whole Rent, and this Commandment will not excuse him. But *Fitz. Bar. 65. Fitz. Bar. 45.* If one be bound in an Obligation with Condition to pay me money at the day, and I command him he shall not pay it to me; or that he shall keep it for money I ow him, it is said this will excuse him, and will be a good Plea in Bar to an Action upon the Obligation: So if I command him to pay it to another, to whom I ow money, some say this will excuse. But then I must plead payment to him by the hands of that other. *Kelm. 60 b. Perk. 145. Broo. Condition 181.*

Where a Court hath Jurisdiction of the Cause, and doth proceed *inverso ordine*, or erroneously, there the party that doth sue, and the Officer that doth execute the Process or Precept is excused: As if a *Capias* come out of the Common Pleas, and there is no Original; or a Sheriff send a Precept to a Bailiff, and hath no Writ; or a Justice of Peace make a Warrant to arrest a man that is not indicted. But if the Court have no Jurisdiction of the matter, and all the proceeding is *Coram non iudice*; here the Precept will not excuse, but it is as if there were no Process: And so it is if there be an Appeal of death in the Common Pleas, or a *Capias* come out of a Court Baron, or the like. *Co. 10. 76. Plow. 394. Kelm. 66.*

It is the lawful power and authority to execute and minister Laws; or the extent of the Authority of every Court. And this is either Ecclesiastical (i.) that which is limited to certain spiritual and particular cases, and the Court wherein these causes are handled, is called *Forum Ecclesiasticum* which is governed for the most part by the Civil and Canon Laws; or else it is Secular and general, and the Court wherein these causes are handled is called *Forum Seculare*, which is governed by the Common and General Law of the Realm. And for the deciding of all controversies, and distribution of Justice within the Realm, the Law hath provided these two distinct Jurisdictions, which it doth take care also to preserve and keep distinct and entire; and therefore it taketh order, they shall keep their bounds, and that one shall not in-
croach

croach upon another. It doth not therefore permit the Temporal or Secular Courts to meddle with Spiritual matters; nor the Spiritual Courts to meddle with Temporal matters. If the Temporal Court meddle with Spiritual matters, as matter of Divorce, or Marriage, or the like, the Defendant in the suit may in some cases in the beginning of the suit, take exception thereunto, and desire of the Court that he may not be suffered to proceed in that matter which is not within their Jurisdiction, and thereupon it shall be staid; or if it go further, the proceeding is afterwards avoided as erroneous. And if the Spiritual Court meddle with Temporal matters, the party grieved may have a Prohibition out of the Secular Court, and by that means stop their proceeding there; for which look *Prohibition*. And in some cases, both the party that doth prefer the Suit, and the Judge of the Court that doth receive and allow it, be in danger of a Premunire; for which, see *Premunire. Co. (super Lit. 96. a. b. 44 Ed. 3. 5. Cromps. Jur. 100. Fitz. & Broo. Jurisdiction in toto. 18 Ed. 3. 6. Co. 10. 76. Doff. & Stu. cap. 55. & cap. 31. 5 Ed. 4. 6.*

The Secular Courts have also their limits which they must not pass. And therefore if a Suit be begun in one Court, the Consuance whereof doth properly belong to another; the party sued by exception in time may abate the suit and stay the proceeding there. And in some cases although he do not so, yet is the proceeding erroneous, and may be afterward for error avoided. And in some cases one of these Courts do by Writs or Commandments in the nature of Prohibitions, stop the proceeding in another. See *Broo. & Fitz. Jurisdiction in toto Stat. 13 Rich. 2. 1.*

And in some cases it doth fall out, that albeit, the Court have Jurisdiction of the matter, yet by reason of some Plea the Defendant hath pleaded, it is ousted of the Jurisdiction, and cannot proceed. As if in the Court of a Corporation, the Defendant plead a Foreign Plea that cannot be tried there. See *Court and Officers.*

A Licence is much of the nature of Authority, and the Rules of both, have much affinity.

For as of Authority, so of Licence: There is a Licence in Deed, and a Licence in Law. The Law gives one leave to go into an Inn for his refreshing. If a Butcher buy a Calf, the Law gives him leave to take him out of the Close where he is, but not to drive the Cow out of the Close. By Baron Denham at Gloucester Assises, 1654. And therefore for this he must have License by Deed, or he will be a Trespasser. 1. For Regularly a Licence is not grantable, nor transmissible; it is a thing of a personal nature, it doth for the most part die with the person. 2. It is subject to Revocation, especially if it be in matter of pleasure. 3. It must be strictly pursued, especially if it be in matter of pleasure; for if I Licence one to hunt in my Park, walk in my Orchard, or eat at my Table, he must not bring any other with him: But if it be in matter of profit, it is more largely. And therefore if one Licence me to go over his ground with my Plough, or to cut down a Tree in his ground; in this case I may rake as many with my Plough, as is needful, and as many to cut and take away the Tree as is requisite. And if a man exceed in a Licence given by Law, he is a Trespasser *ab initio*, and so shall be punished, but not so in case of a Licence given by one man to another, for there he shall be punished for the exceeding onely. *Co. 8. 146. 23 Eliz. 447. 21 Ed. 4. 75. Broo. Licence, 25. 13 H. 7. 13.*

It is a general Rule, that the King by his Prerogative may dispence with a Penal Law when the forfeiture is popular, or given to the King alone, *Propter impossibilitatem providendi de omnibus particularibus*; but this is limited to *Malum prohibitum* onely, and doth not extend to that which is *Malum in se*. In all such cases therefore, and where the Statute it self doth not take this Prerogative from the King, and conclude him to grant any such Licence; the Lord Protector by a grant with a *non obstante*, may make that lawful to a man by his Licence, that otherwise were unlawful and a Trespass. Hence it is that the King may Licence a man to coyn money without offence, and he that hath such a Licence, may then do it lawfully: So also to transport Corn, Wool, &c. albeit Transportation be in general prohibited. See *Transportation, Co. 11. 86, 88. Dyer 34. 17. 11 H. 7. 11. b. See divers presidents in Writ 362, &c. Sess. 2. Phil. and Mary. 5. Eliz. 5. Eliz. 8. Ph. & M. 14.*

The Lord Protector also may grant a Licence to do any thing which by the express

Licence, what:

18. The nature of a Licence, and how it shall be taken.

19. What things may be done by Licence, and what not, By Dispensation.

Prerogative;

See 2. 8.

words

words of any Statute he is enabled to do. As he may Licence any of his own Chaplains to have plurality of Benefices of his own gift, and to be *Non resident*, &c. by the Statute of 21 H.8. 13.

The Lord Protector may also Licence the doing of Acts prohibited by the Common Law, as to depart out of the Realm, &c. 176. p.30.

Or an Officer to neglect his Office, &c. Co.9. 101.

But if the thing be *malum in se*, for the doing or not doing, whereof the Licence is granted; as if it be to kill a man, or to do a Nuisance, or to break a Recognisance for the Peace, or the like; this will not serve to excuse the doer thereof from blame, or free him from punishment, 11 H.7. 11. Co. 11. 88.

So if the thing be but *malum prohibitum* onely, yet if the King be restrained by the Statute it self, and there be express words therein, that his dispensation shall not be granted; or if it be, that it shall be void; in this case the Lord Protector's Licence will not help: And so it is in the Statute of 33 H.8.6. against Shooting. See the Statutes.

And of 1 Eliz. 2. Phil. & Mary 4 against Egyptians; and of 21 H.8. 13; against plurality of Benefices; and of 1 Jac. 22. against Tanners, &c. In all which cases, no Licence or Dispensation will help any breach or transgression of any branch of the said Statutes.

So if the Lord Protector dispence with the breach of a Statute before it is made, this is void. As if he grant a Licence to transport Bell-mettal, notwithstanding any Statute hereafter to be made, and a Statute be after made, this Licence will not dispence with, nor excuse the breach of the Law; but if it be in a thing that doth concern the King alone, As if he grant a man shall be free from all Customs and Taxes, &c. this may be a good Exemption, Dyer 52. 1.

By Faculty.

A man may have a Licence to eat flesh on days prohibited, to hold two or more Ecclesiastical Livings, the Son to succeed the Father in a Benefice, or any such like thing as this; and in such cases where they have been used to be granted, and which is not contrary nor repugnant to the Word of God. Stat. 21 Jac. 13. 25 H.8. 21. 3 Eliz. 5. 1 Jac. 27.

But a man may not have a Licence to do any thing which is *malum in se*, or contrary to the Word of God; as to commit Adultery, live in Incest, break a lawful Oath, and the like, such as the Pope did heretofore grant. But all such Licences are void; nor to allow any thing expressly restrained by any Statute: As to dispence with any other Pluralities of Benefices, and *non residence*, then such as is tolerated by the Statute of 21 H.8. 13.

By others Licences.

By Licence from the Lord Chancellor, any man may convey Butter and Cheese to any other place beside the Staple, by the Statute of 3 H.6. 4.

By Licence a man may practise Physick and use Surgery in London, and within seven miles thereabouts, by the Statute of 3 H.8. 11.

By Licence of the open Sessions, a man may continue a Cottage against the Statute of 31 Eliz. 7.

By Licence a man that is a householder, and hath lived three years in the County, may be a Drover of Cattle, Badger, Lader, Carrier, Buyer, Seller, or Transporter of Corn, Grain, Butter or Cheese; and by apt and special words in such a Licence, may buy any Corn out of an open Fair or Market to sell again, and buy Cattle where they have used, and sell them again forty miles from thence, or more, at any Fair or Market, at reasonable rates: But without Licence no man may do so. Stat. 5, 6 Ed. 6. 14. 3 Eliz. 12.

By Licence, Knights of the Parliament or Burgesses, may depart, but not otherwise, by the Statute of 6 H.6. 13.

By Licence, a Soldier may depart from his Captain, but not otherwise; for then it is Felony, by Statute of 18 H.6. 19.

By Licence, poor people of any place, may travel to *Barbe* or *Buxton*, but without such Licence they may not by Statute, 39 Eliz. 4.

So also by a Testimonial and a Licence of the Justice of Peace, next to the place where a Sea-faring man landeth, that hath suffered Ship-wrack, he may beg the next way

way home, keeping the way and time set him by the Justice of Peace, 39 *Eliz. cap. 4.*

But no Licence to beg in any other case, unless they be made by the King himself, will excuse Soldiers, Marriners, or any going to the *Bath* or *Buxton* to beg: Neither may Tinkers, or petty Chapmen be licenced to wander up and down, and use their Trade in the Country, by Statutes of 39 *Eliz. 4.* 3, 6 *Ed. 6.* 21. 22 *H. 8.* 12. 2, 3 *Phil. & Mary.* 5.

By Licence any man may sell Ale as a common Ale or Beer-seller, and not otherwise, by Statutes of 5, 6 *Ed. 6.* 25. 4 *Jac. 4.*

Any man that may justify the shooting in a Gun, by the Statute of 33 *H. 8.* 6. may by Licence in writing, authorise his Servant to carry such a Gun to be attended. So a Master may Licence and allow his Servant to play at any unlawful game, with him and in his company without danger of the Statute of 33 *H. 8.* 9.

And regularly by the Common Law, I may by Licence of another man do, or not do any thing to or touching his Body, Lands, or Goods; for the doing or not doing whereof, he might otherwise have an Action of Trespass of the Case, Waste, or the like against me; as imprison his Body, Wife, or Servant, suffer Escapes, kill his Cattle, break his House, ride his Horse, impound his Cattle, or go over his Ground with Horses, Wayns, Carts, or otherwise, kill his Game in his Park, or the like, depart out of his Service, and the like; and this Licence will excuse me, if he sue me for it: But then I must take heed I plead it, and do not plead nor guilty. *Broo. Licence in toto.* Co. 11. 48. *Fitz. Bar.* 81, 89. 253.

By Licence of the Lord a Copiholder may alien for longer time then one year, although such alienation without Licence would be a Forfeiture of his Estate. See *Copihold.*

But if the Omission or Commission be *Malum in se*, prejudicial to the Commonwealth, or to others, or a thing out of my power; in these cases Licence will not excuse, nor make the thing lawful. And therefore if a man Licence him to kill him, or cut off his arm, or a Lord will Licence a Parson that is bound by Tenure to say Divine Service, not to say it, a Steward that is bound to keep Law-day not to keep it; it seems all these Licences are void: So if my Parker Licence one to kill my Game, or my Shepherd Licence one to kill my sheep, or I having a Reversion of Land, Licence a stranger to take the Profits, or cut down the Trees, this is void; for this is more then I can do my self. *Broo. Licence* 20. *Fitz. Bar.* 83. *Curia, M.* 18 *Jac. B. R.*

See much of this question in the last Division. And when the Kings Tenant that holdeth of him in *Capite* would alien, he must have the Kings Licence. See *Alienation.*

A Licence from the Bishop, or one of the Universities, was needful for him that would Preach, or teach School.

He that would make a Warren, must have the Lord Protectors Licence for it.

An Appropriation cannot be made without Licence. See *Adyson.*

An Alienation in *Mortmain*, cannot be without Licence from the Lord Protector: See *Mortmain.*

A Bishop could not be chosen without the Kings Licence, called *Conge Declier.*

An Elect Suffragan Bishop could take no profit of, or have any jurisdiction by his See, but such as had been given him by Licence of the Archbishop, or Bishop of the Diocese. See *Suffragan.* 26 *H. 8.* 14.

In cases of Dispensation with Penal Laws, none but the Lord Protector may grant the Licence: And he may not give liberty or power to another to dispence with others, or to give Licence or Toleration to do or use any thing against any Statute or Common Law, or make any Warrant for such Dispensation, or compound for the Forfeiture of any Penal Law; neither may he grant or promise the benefit of any Forfeiture that shall be due upon any Statute, before Judgment be thereupon had, and if he do, all such Grants shall be void, 21 *Jac. 3.*

In all cases where the Archbishop or any other Bishop, might have granted Licences, it seems the Lord Protector himself may do the same immediately: But the Archbishop

20. What a man must plead in some Cases of Licence, and how.

See B. 9.

21. Where a Licence is necessary, and where not.

22. Who may give or grant the Licence, and who not. Dispensation.

Faculties.

bishop of *Canterbury*, or his lawful Deputy, or Commissary: And in some case where he did deny him, some other Bishop might; and in this case the party may, and if the cause be great, must have the confirmation of the Lord Protector's Broad Seal, 25 H.8. 21. 28 H.8. 16.

And in case of necessity of sickness, the Bishop of the Diocese, or Parson or Vicar of the Parish, may give Licence for the eating of any flesh besides Beef, Veal, Mutton, or Bacon; but unless it be in case of necessity, the Licence is not good, 5 Eliz. 3. 1 Jac. 27.

But neither the Pope, or any other may give or grant any such Dispensations; neither may any sue for them from the Pope, under a great penalty. See *Premunire* and *Treason*. 25 H.8. 21.

Other Licences.

The Licence for Butter and Cheese, must be made and had from the Lord Chancellor: The Licence to practice Physick and Surgery from the Bishop of *London*, or Dean of *Pauls*, with the advice of three of the Doctors of Physick there: The Licence for the continuance of a Cottage from the Justices of the Sessions; the Licence for Drovers, and the rest, must be by the general and open Sessions, and three Justices hands to it; the Licences of Knights and Burgesses of the Parliament, must be from the Parliament, and must be enrolled there; the Licence of the Soldier must be from the Captain; the Licence of the poor that travel to *Bath* or *Buxton*, must be by the two next Justices; the Licence of the Seafaring-man to beg who hath suffered Shipwrack, must be by the next Justice of the place where he landed; the Licence to sell Ale or Beer, must be by the open Sessions of the Peace, or by two Justices of the Peace, whereof one must be of the *Quorum*: And the rest of the Licences must be made by the persons before set down. See the *Statutes* before.

The Licences to excuse at Common Law, must be made from the party himself whom the thing doth concern, or some other under him: For if my Wife or Servant do by my appointment, Licence a man to do any such thing, it is as good as if I did it, and shall be pleaded as my Licence: As if I bid my Tenant give the Hawk there to whom he will, and he Licence a stranger to take them, this is a good Licence: And my Bailiff may Licence one to ride my Horse, milk his Kine he hath in custody, or the like. But none other person may give any such Licence in any of these cases. *Fitz. Bar* 36. 10 Ed. 4. 4. 12 H. 7. 25. *Fitz. Treas.* 125.

23. How and in what manner the Licence shall be made.

The Lord Protector's Licence or Dispensation is, and must be always by Patent under one of his Seals, *Dyer* 54. 17.

The Archbishop must have granted his Faculties under his Hand and Seal by writing, and in some cases (as before) the Kings Confirmation was requisite. So if any Bishop had granted any Licences, it must be in writing under their Hand and Seal. See the *Statutes* and *Cases* above.

If the Licence be made and given by a Corporation, it must be in writing, and cannot be by word onely. See the *Statutes*.

If it be made upon a Statute, it must be according to the Statute: As that which the Master doth give his Servant for the carriage of a Gun, must be in writing: But that which is given to the Servant, to Licence him to play at unlawful games with his Master, may be by word. All the rest of the Licences upon all the Statutes it seems must be in writing.

And in all the cases at Common Law of Omission and Commission, for the most part a Verbal Licence without any writing, is sufficient. *Co.* 9. 99. *Fitz. Bar.* 30. 89.

See H. 10.

But if a Licence be to take Common, as if I have Common Appreder in another mans Ground, and I Licence another man to take this; or if a Licence be claimed, as annexed to an Estate of Inheritance, it must be by Deed, and cannot be by word; or if it be to have a thing for life, as if I claim a Licence from a man to go over his Ground, during our lives; it seems this is not good without writing. 22 H. 6. 32. *Dyer* 281. 19.

24. When a Licence shall be said to be pursued, and when not.

The Licence in Law is then pursued, when we do as much as the Law doth authorize, and no more: As for a man to go into an Inn, and there to behave himself orderly; for him that hath a Reversion to go into his Land, and view it, and be gone;

gone, &c. But if a man that goeth into an Inn or Tavern, shall then take away a Bowl with him, or break the windows, or the like: Or the Lessor that comes to view the reparations of the house shall break the windows, or stay there all night: Or one that distraineth Cattel, Kine, or Oxen, shall milk the Kine, or labor the Oxen: Or if it be Corn, if he thresh it out: Or if a Commoner that hath power to take his Common, shall cut down the Trees upon the Common: Or a Purveyor that taketh Cattel by vertue of his Commission, shall afterwards sell them; in all these cases he doth exceed the power or leave the Law doth give him, and therefore the Law doth judg all that he doth unlawful, *Bro. Licence* 17. *Co. 8. 146. Perk. sess. 190.*

Licence in Law

The Licence of the party is then pursued, when he that hath it doth what he had Licence to do, and no more, and in some cases when he doth less then that. As if the Lord licence his Tenant to alien for twenty years, and he alien for three years, this is good. But if a Lord licence his Tenant to alien from Michaelmas last for twenty one years, and he alien it from Christmas next for twenty one years, this is an exceeding of the Licence, and a forfeiture of his Estate. *Bro. Licence in toto. M. 37. Eliz. 38. Eliz. Adjudg. Trin. 36. Eliz. Co. B. Jacksons Case, 13 H. 7. 13.*

Licence in deed by the Party.

If I licence a Nobleman to walk in my Garden, or hunt in my Park, and he come there with a reasonable company of Attendants, this is no exceeding, but a pursuit of the Licence. So if I licence a man to go with his Plough over my Close, or to cut down a Tree, there he may take a reasonable company to do it. So if I licence a man to take two Horses out of my Stable, and he do take but one, this is a good pursuit.

So if I licence any man to kill a Buck in my Park, and he take a reasonable company to do it, this is a good pursuit of the Licence.

But if I licence another to ride my horse three miles, and he ride him four miles: *Alien.*

Or I licence him to take my black or white horse, and he take both: Or I licence an ordinary mean man to hunt in my Park, and he take other company with him: Or I licence a man to go into my house to fetch somewhat there, and he takes away somewhat else, or breaks the windows, or the like: Or I licence one to go into my Close, and deliver the Cattel there to *I. S.* and *I. S.* go into the Close also: In all the first cases it is an exceeding in them that had the Licence, and in the last by *I. S.* And therefore they are all punishable accordingly for the exceeding only, *Bro. Licence* 17. *Fitz. Trespass* 139. 242. 18 *Ed. 4. 14.*

All Licences for the most part (be they made by King or subject, word, or deed) are revocable, so that if either the party doth countermand it, or either of the parties dye, it is determined. But herein there are differences taken between Licences of pleasure, and Licences of profit; and Licences for a time certain, and Licences for a time uncertain. For generally all Licences of pleasure onely, as to hunt or walk, &c. are revocable, and by any act whereby an Authority is countermanded, will be determined; and so likewise if it be a Licence of profit, as to dig clay in my ground, or to take the profits of my ground, if there be no certainty in the time of the granting of the Licence, or if it be granted onely during his pleasure that doth grant it, this will also determine as the former. But if the Licence be of matter of profit, or be mixed therewith, and be for a time certain, then no countermand in Deed or Law will determine it, for then in many cases it doth amount to a Lease for a time certain, which cannot be recalled, neither will death determine it. If a Licence therefore be made in writing to go over a mans ground during both their lives, it seems this is not revocable, *Bro. Licence* 7. 9. 15. *Per Inst. Glom. 9. Jac.*

25. Where a Licence is revocable, and when it shall be said to be determined, or not.

If the King grant Licence to Alien land held of him, and after dye before it be done, it seems the Licence is determined; but if he grant Licence to Alien in Mortmain, or grant a Licence to a man to go beyond Sea, and stay there for a certain time set down in the licence, or to stay there for all his life, or the like; in these cases, the death of the King will not determine the licence. But in other cases the Kings Licence may be determined by the act of God, or the King himself, as other mens: *Dyer* 92. p. 17. 54 p. 27. 92. p. 17. 117. p. 22. 176. p. 30.

Dispensation. Trespasses.

If I Licence a man to cut down Trees, or to do any other thing that may be done by

Other Licences by

by Licence, and before it be done, I forbid him to do it, or he die, or I die, or if I be a Woman, I take a Husband; in these cases the Licence is determined. But if I give a man leave to come into my house (as *rigore juris*, I must, if his coming into my house, be lawful,) and when he is in, I bid him go forth, if it be such a tempest, or there be any such case that he cannot go forth without danger, he may stay a little while, and so long he may justify as the necessity doth last. 39 H. 6. 7. 20 Ed. 4. 4.

23 H. 7. 13.

So if I Licence one to leave a Rick of Hay in my Close, until he can conveniently take him away, and after I sell the Close to a stranger; this is a determination of the Licence, and the Purchaser may put in his Cattle, and eat it up if it be not fenced, without giving him notice. Adjudged. *Hill. 17 Jac. B.R. Shirel Wibi Case.*

And in all these cases where the Licence is determined, the act is done without Licence, and then the party that doth it, is an offender, and may be punished as if such Licence had never been made.

But if an Estate be made for life, or years, or condition, that the Lessee shall not Alien without Licence of the Lessor in writing, and he by his Deed in writing do grant a Licence to Alien, and after die, or revoke it by his own act before the Alienation; yet this is not determined, neither is this Licence revocable, for it differeth from all the cases before; and this Licence is of another nature.

CHAP. XXVII.

Of Badgers and Drovers.

Badgers and
Drovers:



Badgers are those that buy Corn or Victual in one place, to carry into another. And Drovers are those that buy Cattle in one place, to sell in another place. Touching whom these things are to be known.

1. None may be a common Badger or Drover, or take that course that is not a married man and householder thirty years old, or above; and being so, that is not licenced, in pain of five pounds.

2. This Licence must be in open Sessions of that County, where he dwelt three years before, under the Hands and Seals of three Justices, at least, (one of the *Quorum*.) And this Licence shall be in force but for one year, from the date of it; and all other Licences are void.

3. The Justices may, if they will, take Recognizances of them, that they shall not forestall, ingross, &c. See *Chap. 40.*

4. But a Badger duly licenced, may notwithstanding, 5 Ed. 6. 14. against ingrossing, &c. sell and deliver, in open Fair or Market, within one moneth after the buying thereof, to any Victualler or other person, for the provision of their Houses, all such Corn, Butter, or Cheese, as any such person shall buy of them.

5. And yet unless he hath special words in his Licence so to do, he may not buy Corn out of a Market or Fair.

6. But they must take heed of forestalling, &c. in their buying and selling. Drovers also may buy Cattle in such places where they have used to buy Cattle, and sell the same again. See the Statutes of 3 Eliz. 13. 13 Eliz. 25.

7. If a Drover go with his Cattle on the Lords day, he loseth twenty shillings. 1 Car. 1.

CHAP. XXVIII.

Of Bailment and Delivery.

IT is the delivering of things to another, whether Writings, Goods, or Stuff, either to be redelivered to him that delivered it, or to be kept by the other, to his use, or to be delivered over to a stranger, *Terms Ley. Perk. 712.*

Sec. 1.
1. Bailment.

And this is sometimes upon Condition (*i.*) to be redelivered when money is paid, and something is done, and then it is a Pledge; and sometimes it is simple without any Condition, then called a *Simple Bailment*, (*i.*) when one receiveth them to keep for another; whether it be for the Bailor to redeliver him again

(in which case he may retake them without request) or for a stranger to deliver them over to him (in which case before the delivery over, the Bailor may countermand and require the Goods again; and if the Bailee refuse to deliver them, he may have an Account, for the property is not altered.) And this Delivery is also sometimes to imploy, as when he hath the things delivered to use to anothers profit, as to sell, *Meliori modo quo poteris*. In which case, if he sell it for twelve pence, though it be worth a hundred pounds, and he might have had more, yet is the Bailor without Remedy, *5 H. 7. 18. Finches Leyen Anglois, 179. 1 Ed. 5. 2. 41 Ed. 3. 2. Co. super Littl. 286.*

Note, that wheresoever I may have a Detinue for Goods, I may justifie the taking of them where I finde them: Sheaves of Corn to *B.* to deliver over to *C. B.* thresheth them, *A.* may seize the Corn threshed, as it was resolved in *38 R. B. Roy*; for *B.* by his threshing may not alter the property of *A.* *Littl. Sess. 498.*

It is a Writ that lieth where a man hath Goods or Cattle of mine, either by finding, or by my Delivery to him, to keep or deliver over, and he doth refuse to redeliver them, or to deliver them over according to appointment, and detaineth, or hath lost or mis-imploied them; then by this Writ I may recover the thing it self, if it be to be had, or if not, damages for the thing and the detaining, *14 Ed. 3. 2. F. N. B. 138. Co super Littl. 286.*

In this Action the thing demanded must be so certain, as it may be known and distinguished from others; for the Judgment is to recover the thing in kinde detained, with damage for the Detainer; or if the thing cannot be had, then damages both for the thing and Detainer also; or if it be to be had, it is at the election of the Plaintiff, to have the thing it self, or damages for it, *18 Edw. 4. 23. Kelsw. 64. 3 Hen. 6. 43. 39 Hen. 6. 44. Dyer 331. 22.*

The Judgment thereupon.

This Writ lieth for any personal Goods or Cattle that is valuable, and whereof and wherein one may have a property: As for Cattle, Cloath, Household-stuff, Money in Bags or Chests, Corn in Sacks, Charters or Writings, Loads of Wood, Tuns of Oyl, or the like, *Dyer 22. 1 Rich. 3. 2.*

But it lieth not for Money out of a Bag, or Chest, or Corn out of a Sack, because it cannot be distinguished, *12 H. 8. 5.*

In all Cases where this Writ may be had, these things must be in the Case:

1. The thing must be of that nature, as for which this Writ may be had, *vide supra.*

2. He that brings this Writ, must have right to, or a property in, the thing demanded, at the time of the Writ brought, or be chargable over for it to some other.

3. The thing demanded must have been once in the custody of him that is to be charged.

4. This custody and possession must continue, and not be removed by an Act of Law, as of *Seizure*, or the like, *Co. 11. 89. 27 H. 8. 33.*

If I deliver Goods to one, to deliver to *J. S.* and before they are delivered to *J. S.* I do

For Goods and Chartels.

I do forbid the delivery of them, and require them, and he refuse to deliver them to me, I may have this Action, 1 *Ed. 5. 5. 5 H. 7. 18.*

If Goods be delivered to one to my use, or to be delivered over to me, and the party do refuse to deliver them to me accordingly; I may have this Remedy, 5 *H. 7. 18. F. N. B. 38. 21 Ed. 4. 51.*

If Goods belong to me by Custom, as a Harriot, Heirlooms, or as *rationabilis pars bonorum*, and they be withheld or esloined from me, after the death of my Tenant or Ancestor, I may recover them by this Writ. *Kelw. 184. 8 H. 7. 10. Plow. 90. 39 Ed. 3. 6. 9.*

If I buy Cloth, or other Goods of one upon a good Contract, and he keep it from me, and will not deliver it; I may have this Writ, *Dyer 30. 203.*

If a Woman have Goods as Executrix, and her Husband continue the possession and die, and his Executor keep the Goods, she may have this Writ against him and recover them. *Dyer 331.*

If I deliver one my Goods as Pledge, and at the day the money is tendred, or thing done, and yet the party refuse to re-deliver it to me; in this case I may recover it by this Writ. *Co. 4. 84. 29 Aff. p. 28.*

If I leave my Goods with another man to keep, and he take them into his house, although he be to have no recompence for the keeping of them, yet he must answer them; and I may recover them by this Writ. *Co. 4. 84. 29 Aff. p. 28.*

If one finde my Goods and have them in his custody, I may recover them by this Writ. *39 H. 6. 2. 12 Ed. 4. 8. 27 H. 8. 13.*

If I deliver my Goods to *J. S.* and he deliver them to *W. S.* it seems I may have this Writ against either of them, and recover them. *12 Ed. 4. 8.*

If Goods be given in free marriage to a man and woman, who are after divorced; in this case after the Divorce, she may recover the Goods by this Writ. *F. N. B. 139.*

If I deliver one a Box of money to keep fast locked, or otherwise made fast; or deliver or lend a man my Horse to ride, or deliver a Tailor my Cloth to make a Garment, or deliver Goods to a Common Carrier, or my Horse to a Common Hostler. And the party break the Box, and use the money, or ride my Horse further, and do not re-deliver him, or the Tailor spoil, sell, or mar my Cloth, or the Carrier lose, or spoil my Goods, or the Common Hostler abuse or detain my Horse. In all these cases for the Detainer I may have this Writ; and for any voluntary abuse done to the thing delivered, an Action of the case also. *Co. 4. 95. 18 Ed. 4. 23. D. & St. 102. 2 H. 7. 11. 12 Ed. 4. 8.*

For Charters.

If a man keep my Charters from me which concern the Inheritance of my Land, if I know the certainty of them, and what Land they concern; or if they be in a Bag sealed, or a Chest locked, though I know not the certainty of them, I may recover them by this Writ: And herein it is policy, if I can, to declare of one Charter in special, for then the Defendant, shall not wage his Law. *41 Ed. 3. 2. 8 H. 6. 18. 3 H. 6. 19. 9 H. 6. 18. Co. super Littl. 286. Co. 1. 2. 4 H. 7. 7.*

As if Lands be given to me, and *J. S.* and my Heirs, and he die, and another get the Deed, I may have this Writ against him: So if one be out-lawed that is an Oblige, the King may have this Writ for the Obligation. So if the Tenant in Tail give away the Deed of Intail, and die, his Issue by this Writ shall recover the Deed. *38, 39 Eliz. 2. B. R. Kelw. 8. Sock's Case.*

Where and in what case not.

If I deliver one Money, or Coyn, or any such like thing, which cannot be known nor discerned from other of the same kinde, and it be not in a Bag, Box, or Chest; this Writ lieth not in this case, but rather an Account. *Dyer 22, 29. 12 H. 8. 3. 6 Ed. 4. 11.*

For Goods and Chattels.

If one take my Goods or Cattle by wrong as a Trespassor, or distrain them for Rent, or for Damage-feasant, I cannot have this Writ for this. *Co. 11. 89. Broo. Dr. 111. 242.*

Self. 2.

If one deliver Goods to me, and I bid him take his Goods again, and he refuse to do so, and thereupon I distrain them Damage-feasant, he cannot have this Writ against me. *43 Ed. 3. 21.*

If a man take Cattle of mine upon his Pasture, and there they die or be stolon; in this case I shall not have this Writ: But the opinion of Justice *Hutton* at *Sarum* Assizes, 21 Jac. was, That if they be stolon, the owner of the Pasture must answer them; of which I must doubt, *Quere* therefore. See Co. 8. in *Caleis* Case, by Just. *Bridgm.* 7 Car.

If a man take any Goods of mine in a special manner (i.) to keep as he keepeth his own, or the best he can, or if they be lost that it shall be at my peril, and they be stolon from him, he shall not answer them, neither doth this Writ lie; or if he bring this Writ, the Defendant may plead this in Bar, Co. 4. 84. 3 H. 7. 4.

If I finde Goods, and I sell them, or they be stolon from me before Action brought, there it seems this Writ will not lie, but that an Action of the Case, *Trover* and *Conversion* will lie, 27 H. 8. 13.

If I deliver one a Coffer locked, and something be taken out of it, if I keep the Key my self, I shall not have this Writ; but if the whole Coffer be taken away, there it seems I shall have this Writ, at least for the Coffer, Co. 4. 83.

If a Bailiff of a Sheriff distrain a mans Beasts in *Withernam*, and after do deliver them to the party from whom he took them, or otherwise; this Writ lieth not for him for whom they were distrained, *Broo. Condition* 34.

If the nature of the Goods be altered, as if it be Leather and made into Shoos, or if Parchment and Paper, and made into Writings; no Detinue will lie for it, *Per Just. Fenner, M.* 38 Eliz.

If a Woman great with Childe by her deceased Husband, keep the Charters from his Daughter and Heir, that do concern the Land, whilst she is so with Childe; this Writ lieth not against her, 41 Ed. 3. 11. For Charters.

If two Executors be, and one deliver an Obligation to the Debtor, and die, the other doth survive, cannot recover it again by this Writ: So if a Tenant in Fee-simple give away his Deed, his Heir cannot recover him by this Writ. So it seems if one Lessee for years, give away his Lease, that his Companion is remediless, and yet nothing doth pass by the gift of the Lease, *M.* 38, 39 Eliz. *B. R. Relsack vers. Nicolson.*

It is a good Plea in Bar to say, That the things were delivered to be delivered over to another, and that he did deliver them accordingly, if there were no Countermands; and so it seems it is, though the delivery over were after this Writ was brought. 5 H. 7. 18. *F. N. B.* 138. 12 Ed. 4. 8. 4. Where, and what matters are Pleas good in Bar to this Action, or not.

If the Detinue be brought for a Horse lent, it is a good Plea to say, That the Horse was sick of divers diseases at the time of the delivery, and that he died thereof before any request was made for re-delivery. 21 Ed. 4. 55.

It is a good Plea to say, That he delivered or offered to deliver the thing for which the Suit is, before the Writ brought. 12 Ed. 4. 8.

It is a good plea to say, That after the party delivered the Goods, he gave them to the party to whom they were delivered. 21 Ed. 4. 55. 12 Ed. 4. 8.

It is a good plea to say, That after the Goods taken and delivered, the party that delivered them was out-lawed, and the Goods seised for the King, or that they were taken in Execution: 12 Ed. 4. 8.

If the Writ be against a Tailor, it is a good plea to say, That the party would not pay him for making his Garment. If against an Hostler, to say, That he would not pay for his Horse-meat, for they may justify the detaining till payment. 5 Ed. 4. 2.

If the Writ be for Goods that were pledged, and that the party would not deliver; it is a good plea to say, They were stolon before the money tendred, or the time of redemption: But if the money were tendred at the time, and the party refused to deliver them, and after they are stolon; this is no good Plea. Co. 4. 21. 20 Aff. p. 8.

If the Writ be brought for Goods found, it is a good Plea to say, he delivered away the Goods before the Writ brought, and hath not the possession of them, 27 H. 8. 21.

If the Action be brought for goods delivered, to be re-delivered, or delivered over to another; it is a good plea to say, He took charge of them specially (i.) to keep as his own, &c. *vide supra*, and that they were afterwards stolon: So if he take charge 3. R. 31

charge of them generally : So if they were Cattle at Pasture, it is a good Plea to say they died, or were stoln, *vide supra*, Co. 4. 84. 10 H. 8. 21.

If a man have Goods of mine in his House, in a Coffer, and *q.* keep the Key, and they be stoln, it is a good Plea that *q.* had the Key, *vide supra*.

If *A.* bail Goods to *B.* generally to be kept by him, and *B.* takes them without having any thing for them ; if the Goods be stoln from him, he shall not be charged in a Detinue, 29 Aff. 28. 3 H. 7. 4. b. 10 H. 7. 26. a. & Acc. per *Just.* Dodd. H. 16 Jac. B. R. Entr. 4. Rep. 83. b. Doff & Stu. 130. a.

Garnishment.

It is where a Detinue is brought for Charters, and the Defendant saith, they were delivered to him by the Plaintiff, and another upon certain Conditions ; and therefore he prayeth that the other may be warned to plead with the Plaintiff, and shew whether the Conditions be performed, yea or no : And hereupon a *Scire facias* shall go forth of the Court, to warn him to come into the Court for this purpose ; and this is called *Garnishment* : And when he cometh, he shall plead with the Plaintiff, and this is called *Enter Pleader* : And then upon the *Enter Pleader*, if the Garnish cannot bar the Plaintiff, the Judgment shall be given against the said Defendant for the Deeds : and against the Garnishee for the damages ; and so shall the Execution be likewise ; and if the Garnishee made Default, the Plaintiff shall recover the Writings against the Defendant, but no damages ; and a Distress shall go forth against the Defendant to require him to deliver the Writing ; and if Judgment be given against the Plaintiff, the Garnishee shall recover Damages : This word also is taken in another sense ; for which see 2 Ed. 3. 17. *Terms Ley.* Co. 5. 90.

6. Where and how a man shall be charged for another mans Goods delivered to him, or not.

If a man lend me Money, Corn, or such like thing, he cannot expect the same again, but the like, or so much : But if one lend me a Horse, or the like, he must have the same again restored ; and if the thing be used to any other purpose, or otherwise taken to that end, for which I borrowed it, he may have an Action of the Case against me for it, though the thing be never the worse : But if the thing borrowed be lost (though it be not by any neglect of mine) as if I be robbed of it, or it be impaired or destroyed by my neglect, albeit I do put it to no more service then I borrowed it for : As if I put a Horse I have borrowed in an old rotten house ready to fall, and it doth fall and kill him ; in these cases I must make them good : But if such Goods delivered to me, perish by the act of God in the right use of them ; as if I put a Horse I have borrowed in a strong house, and it fall and kill him, or it die by a disease, or by the default of the Owner, without any neglect of mine ; in this case I shall not be charged with them. And if any man deliver me his Goods to keep, and I take them, I must answer for them, and see them safely restored ; and if they be stoln, or as it seems burnt or drowned by inevitable Accidents, albeit I do neither undertake to keep them safe, nor promise to restore them : And if a man deliver Goods to a Carrier for hire, and he be robbed of them, yet he must answer the Goods : But if a man deliver Goods as a pledg, and they be stoln before tender of the Money ; he that had them for a pledg, shall not answer for them, but after tender of the Money he shall, 5 Germ. lib. 2. c. 38. 2 H. 7. 11. 2 Ed. 4. 5. Co. 4. 38. Co. super Littl. 89 a. 29 Aff. p. 18.

CHAP. XXIX.

Of Bakers, Brewers and Victualers.

IN *London* the Fishers, Butchers, Poulterers, be they *Aliens* or *Denizons*, may sell to whom they will: But the Major and Aldermen may redress the faults of them, as they do of the Bakers, Brewers, and Vintners. And all Vintners, Victualers, Fishers, and others that come with Victuals to the City of *London*, shall be under the Governance and Rule of the Major and Aldermen there. 31 *Ed.* 3. 10. 7 *Rich.* 2. 11. 6 *Rich.* 2. 10.

Victuallers shall have reasonable gains according to the discretion and limitation of the Justices, and no more. 13 *Rich.* 2. 8.

Butchers, Fishers, Regrators, Hostilers, Brewers, Bakers, and all others that sell Victuals, shall sell their Victuals at a reasonable price, as the prices of the time go; and having respect to the distance and place, whence the same came, under pain to forfeit double so much as he taketh excessively. And Majors and Head-officers must enquire and punish it; and if they be negligent, they shall be punished by the Justices. 33 *Ed.* 3. 6.

The Assise of Bread and Beer, (i.) that proportion and rate of payment for it which is reasonable, and set down, is to be kept, and the breakers thereof to be punished by the Common Law; and he that doth break it, is to be punished; and when the Law appointeth a corporal punishment, it must not be changed for a fine or sum of money. And Majors and such Head-officers of Towns, &c. are to look to search and view, and punish the breach thereof, 51 *H.* 3. 31. 13 *Rich.* 2. 8. 12 *Ed.* 4. 8.

Hostilers or Inn-holders that dwell in any City Corporate or Market Town, where is a Common Baker that doth sell, and hath served the Trade seven years, shall not make Hors-bread in their Hostern without; but Bakers must make it, and the Assise must be kept, the weight reasonable. And the prices of their Hay, Hors-bread, and Provender, shall be reasonable, having respect to the places adjoyning; and they must take nothing for their Litter, under pain to suffer the first time a fine, secondly, a moneths imprisonment, thirdly, Pillory, and fourthly, to be forejudged for keeping an Inn. And Majors, Justices, and Stewards of Leets, may hear and punish these offences, 21 *Jac.* 21.

Upon Complaint of Inhanfing of prices of Victuals, the Lords, Chancellor of *England*, Treasurer, President of the Kings Council, Privy Seal, Steward, Chamberlain; and all other Lords of the Kings Council, the Treasurer, and Comptroller of the Kings House, the Chancellor of the Dutchy of *Lancaster*, the Kings Justices of either Bench, the Chancellor, Chamberlains, under Treasurer, and Barons of the Exchequer, or seven of them at the least, whereof one of the first four Lords to be one, may set down prices how it shall be sold, in gros, or by retail, and to set forth Proclamation thereof in the Kings Name, under such pains as they think fit; and he that shall not submit thereunto, shall forfeit the penalty appointed by the Proclamation, 23 *H.* 8. 4.

Also Justices of Peace, Majors, Bailiffs, and such Officers may Tax and Rate as they have been used to do. And if Brewers sell their Ale or Beer at other Rates, then they set down, they forfeit for every Barrel six shillings, half a Barrel three shillings four pence, Firkin two shillings, &c. 23 *H.* 8. 4.

No Brewer of Ale or Beer to sell, shall use the Trade of a Cooper, or making Vessels, but the same shall be made by Coopers, under pain to forfeit three shillings four pence for every Vessel so by him made. The Coopers also that make Barrels for Ale and Beer must make them of Seasonable Wood, and mark them, and of such

Rates for Pro-
vision.

Justices of
Peace.
Rates for Beer
and Ale.

Contents,

Contents, and sell them at the prices in the Statute of the three and twentieth of Henry the Eighth, *cap. 4.*

If Victuallers, as Butchers, Bakers, Fishers, &c. sell any Victuals that is corrupt or unwholsome for mans body, or Bakers and Brewers sell at unreasonable prices, or keep not the Assise, they are punishable in the *Leet* for it. And if a Victualler refuse to sell his Victuals, being offered ready money for it, as much as he demands; this (it seems) is punishable there also. See *Leet*.

No Hostler, Brewer, or other Victualler, may take other mens Goods, under colour of Letters Patents for Purveyance, when it is for their own advantage. See 28 H.6. 10. 2, 3 *Phil. & Mary, 6. Purveyors and Patents.*

Victuallers may buy Butter and Cheese, and sell it again in their houses, notwithstanding the Statute of 3 Ed.6. 21. for *Brewers.* 31 *Eliz.* 2.8.

CHAP. XXX:

Of a Bankrupt.

Sec. 1.
Bankrupt, what
it is.



Bankrupt is such a one that doth use the Trade of Merchandise by way of Bargaining, Exchange, Bartry, the Visance, or otherwise in gross, or by seeking his living by buying and selling, or that makes a Trade of buying and selling, and gets his living thereby, or one that doth use the Trade of a Scrivener, receiving other mens Money or Estate into his hands or custody; if he shall depart the Realm, begin to keep his house, or otherwise absent himself, or take sanctuary, or suffer himself to be arrested willingly for any debt, or other thing not grown, or due for Money delivered, or Wares sold, or any other just or lawful cause, or good consideration or purpose; or if any suffer himself to be Out-lawed, or yield himself to prison, or depart from his dwelling house, to the intent or purpose to defraud or hinder his Creditors of their due debt, or willingly or fraudulently procure himself to be arrested, or his Goods, Money, or Chattels, to be attached or sequestred, or make any fraudulent Grant or Conveyance of his Lands, Rents, Goods, or Chattels, to the intent, or whereby Creditors may be defeated or delayed the Recovery of their Debts: Or shall by himself or others, by his procurement, get any Protection, other then such as are lawfully protected by Privilege of Parliament, or shall prefer to the Lord Protector, or any of his Courts, any Petition or Bills against their Creditors, to desire or endeavor to compel them to take less then their just and principal Debts, or to get longer time of payment then is upon the original Contract; or being indebted to any one a hundred pounds or more, shall not pay or compound for the same within six moneths after it shall be due, and the party arrested, or within six moneths after an original Writ brought, and notice thereof given to him, or left at the house where he last dwelt, or being arrested for debt, shall lie in prison two moneths or more for that, or any other arrest or detention of prison for debt; or being arrested for the sum of one hundred pounds or more, just debt, shall after escape out of prison, or get out by putting in common or hired bail, he shall be accounted a Bankrupt. And the Lord Chancellor may grant a Commission for the sale of such a persons Lands and Goods, and the commitment of his person to prison, and to see the Debts paid as far as the Estate will go.

And for the farther opening and clearing of these Statutes, these things are to be known,

1. A Brewer that brews his own Beer, and utters it to his own guests in his house, is no Bankrupt: So a Farmer that doth buy and sell Cattle, is not a Bankrupt; nor is he that doth buy and sell Land within the sense of the Statute. So neither is an Inn-holder as an Inn-holder, but happily if an Inn-holder buy and sell all that he spends, and hath it not of his own, he may be within the Statute.

2. It is said, That he that liveth by buying or by selling, and not by both, shall not be accounted within the Statute.

3. It is said, That every buying and selling will not bring a man within this Statute. But he that shall be reputed a Bankrupt within this Statute, must be such a one as doth get the greatest part of his living by it, and doth live chiefly or altogether by it.

See 1.

4. Such Creditors only as do come in and make known their Debts to the Commissioners, and not such as shall obstinately refuse, or carelessly neglect, shall have benefit by these Statutes, *Vigilantibus & non dormientibus subveniunt Jura* Co. 2. 26. And yet if certain Creditors sue a Commission forth, and after within four moneths, or more, and before the distribution. Other Creditors come in and make known their Debts, and tender their parts of the charge; they must be admitted to have a part with the rest of the Creditors.

5. But if any distribution be made of any part of the Estate, the Creditors that come after this is done, come too late. *Rugles Case. Hobb. Rep. pl. 374.*

6. Any sale of Lands or Goods by the Bankrupt, before his trading, is without question good; so before he becomes in debt. And so also (it seems) it is for all that he doth, before he begins to appear a Bankrupt; otherwise all that ever he hath done is avoidable; and who shall Trade in safety with any man? *Crisps Case. March. Rep. f. 34.*

7. Copihold-Land may be sold; and if a man purchase Land after the time of his trading, and his being in debt fraudulently in the name of his Wife, or his Children; this will be liable to Sale. But if it be purchased before he becomes a Merchant, it seems otherwise; and therefore the case was this, *A.* purchased Copihold to him and his Son for their lives, the Remainder to his Wife in Fee, and after this becomes a Merchant and a Bankrupt; it was adjudged that this Land cannot be sold. *Crisps Case.*

8. If a man be a Merchant, and not in debt, and he purchase for another, or give to another, and there be no fraud in it to deceive the Creditors; this is good. *March. Rep. f. 34.*

9. If the Commissioners do not make an equal distribution to all that do come in and make known their debts, and desire relief; all their doings will be as without authority, and void. Co. 2. 26. And the party grieved may upon a question in Law, allege, That he is not Bankrupt, albeit the Commissioners have found him so; and upon a traverse it shall be tried.

See for these things, and for the authority and proceeding of the Commissioners, and the rest that doth concern this point, my *Second part of the Marrow of the Law*, Page 267: And the Statutes of 13 Eliz. cap. 7. 1 Jac. cap. 15. 21 Jac. cap. 19. 34 H. 8. cap. 19.

CHAP. XXXI.

Of Bargain and Sale, and of Contracts.

1. Bargain and Sale, what.



His word Bargain and Sale, doth signifie the transferring of the property of a thing from one to another, upon valuable Consideration. And herein onely it doth differ from a Gift; that this may be without a Consideration, or Cause at all, and that hath always some meritorious Cause moving it, and cannot be without it. This word also is sometimes applied to the Assurance or Conveyance, whereby this is done, and made, which is called a Deed of Bargain and Sale; for this may be done with writing, or without writing. *Terms of the Law.*

Plow. 301.

The kindes.

And sometimes this is, and may be of Lands, Tenements, and Hereditaments; and to this the term is most properly applied: And then it is said to be, where a Recompence is given by both parties to the Bargain. As where one doth Bargain, and sell his Land to another for money; in this case the Land is a Recompence to the one for the money, and the money to the other for the Land. And this now also is become one of the Common Assurances of the Nation; so that such an Assurance may now be averred to be fraudulent within the statute of 27 *Eliz.* as well as any other Assurance. A Rent may be reserved upon it, or a Condition made by it, as well as by any other kinde of Assurance. And sometimes this is, and may be of movable things, as Trees, Corn, Grasse, Oxen, Kine, Household stuff, and the like, the property whereof is, and may be altered by this kinde of Conveyance, as well as by Gift or Grant.

Fraud.

Rent.

Condition.

Contract, what.

And this kinde of Bargain and Sale, is that which is commonly called a Contract: Which largely taken, is an Agreement between two or more concerning something to be done, whereby both parties are bound each to other, or one is bound to the other. But strictly it is, the Buying and Selling of some personal Goods, whereby the property is altered *Plow. 301. Co. 2. 35, 54.*

Bargainor.

Bargainee.

And in the Cases of Bargain and Sale, he that doth sell is called the Bargainor, and he to whom the Sale is made, is called the Bargainee.

The kindes of Contracts.

These Contracts are of divers kindes; for some of them are in Fait or Express, and some of them are in Law, or implied: those in Fait, are some of them Absolute, and some Conditional. And both these also are sometimes in writing (of which see in *Leases, Obligations, and Covenants,*) and sometimes by word onely: And these also are sometimes accompanied or clad with a Consideration, and have *Quid pro quo* in them, which is the material cause of the Contract, when some Recompence in Fait or in Law is given, which maketh it binding, and actionable. And such a Contract is defined to be a Covenant or Agreement with a lawful Cause or Consideration; for an Agreement concerning personal things, is a mutual assent of the parties, and ought to be executed with a Recompence, or otherwise to be so certain as to give Action, or other remedy for Recompence. And sometimes they are alone, and without consideration, and then if it be by proof, and not in writing under Hand and Seal, it is defined to be *Nudum pactum*, a naked Covenant, (*i.*) When there is no Consideration or Cause, but the Covenant it self, *Ex quo non oritur actio*, out of which no Action ariseth. They are also real (*i.*) When they are about, and concerning Land: As when a Lease is made of Land for years, for Money, or Rent, or I covenant to make a Lease of my Manor for twenty pounds to be paid me: And sometimes personal, (*i.*) When they are of, and about a personal thing: As when one doth sell an Horse for money. They are also executed as an Accord with satisfaction (which see in *Accord*) or they are executory; as when something is to be done or paid at a day to come; and this is an *Assumpsit*. For which see more in

Assumpsit.

Assumpsit. Finch. 451. Dyer 336. 27 H. 8. 15. Plow. 30. 140. 30. 8. Co. 4. 44.

Plow.

Plow. 138. Br. 458. Pl. 1. Dyer 30. 14 H. 8. 19. Some of them also are simple and absolute; some conditional and with reference.

Those that are Contracts in Law, or implied, are such as do not arise from the special Agreement of the parties, but are made by the Act and operation of Law. As where an Ostler giveth my horse meat, or a Tailor maketh my garment; that the one shall be paid for his meat, and the other for his work: And therefore the one may keep the horse, and the other the garment, till they be paid, if they will; or deliver him, and bring his Action. So where another findeth my goods, he is chargeable to me by reason of his possession. So he that receiveth money to my use, or to deliver over to me, is chargeable as a Receiver. So if one entrench into an Infants or anothers land, and take the profits, he is chargeable as Bailiff. So if a *Liberate* be delivered to the Clerk of the Hamper who hath Assets in his hands, an Action of Debt lieth against him. So it doth upon every Judgment. So if a man come into an Inn or Tavern, and call for Victual, Wine or Beer: And in this case some hold, the Inn-keeper or Taverner may detain the body of the man until he pay his shot, (But I much doubt this.) And so it was agreed in *Trin. 3 Jac. B. R. Finches Ley, f. 180.*

Self. 1.

The effect of this is to transfer the Property; and this it will as effectually do, as any other kind of Conveyance whatsoever. And therefore the Bargainee of a Reversion, howsoever he may not have benefit of a Condition upon the demand of a Rent, without giving notice of the Bargain and Sale to the Lessee: And howsoever if a Conusee by a Fine of a Reversion, before Attornment of the Tenant, bargain and sell the Reversion to *B.* that *B.* cannot distrain for this Rent, until he can get an Attornment of the Tenant; yet the Bargainee shall have benefit of a Condition as an Assignee within the Statute of 32 H. 8. And it seems he may vouch by force of a Warranty annexed to the Estate of the Land, because he is in partly in the *Per*, and partly in the *Poss.* *Co. 8. 94. 5. 113. 3. 62.*

4: The effect of it.

Assignee.

Condition.

Distrain.

All things (for the most part) that are grantable by any other way from one man to another, are grantable, and may be transferred by way of Bargain and Sale from one to another. And therefore Lands, Rents, Advowsons, Commons, Tythes, Profits of Courts, and the like, may be granted by way of Bargain and Sale in Fee-simple, Fee-tail for life or years. And all manner of Goods and Chattels, as Leases for years, Wardships, Cattel, Corn, Household-stuff, Wood, Trees, Merchandizes, and the like, are grantable by way of Bargain and Sale. But it seems Estovers and such like things *de novo*, and that have not essence before, are not grantable by way of Bargain and Sale, as they are by way of Grant or Lease; and therefore that a Bargain and Sale of such things is void, 6 *Jac. B. R. Adjudged, 21 7. 6. 23.*

5. Of what things a Bargain and Sale may be, or not,

If one do bargain and sell his Land to me for money, to have and to hold to me generally, and do not say to me and my heirs; by this I have but an Estate for life, and no more, *Co. 1. 87. and upon Lit. 10. Dyer 169.*

6. How a Bargain and Sale shall be taken, Of Lands.

If one in Consideration of Ten pounds paid by me, doth bargain and sell his Land to me and my heirs, To have and to hold to me to the use of the Bargainor for life, the Remainder in tail to me, the Remainder to the right heirs of the Bargainor, this *Habendum* in this case is void, and I and my heirs shall have the Land for ever, *Dyer 155.*

Use.

If one in Consideration of Ten pounds sell me Land for the Term of Twenty years, and doth not say when this Term shall begin; in this case it shall begin presently. See more in *Exposition of Deeds, Chap. 63. in toto. Co. 6. 33.*

If any Estate of Freehold or Inheritance be made of Land by way of Bargain and Sale, the same must be made by a Writing or Deed indented, and cannot be made by word of mouth only, as a Lease for years, whether it be created *de novo*, or be in esse before, may be. But Lands in London, by a special Proviso within the Statute, may be bargained and sold by word of mouth without any writing. The Brother was Tenant in tail, the Remainder to his Sister in tail; the Brother by Deed, which was indented in parchment, but made in the first person, and no mention of Indenting in the Deed, and was inrolled within the three moneths, and after Livery of Seisin

6. What shall be said a good Bargain and Sale, and what things are requisite to make such a Bargain and Sale, or not. Of Lands:

Discontinuance. was made, it was adjudged a good Bargain and Sale, and that the Land should pass so, and not by way of Feoffment, and therefore no Discontinuance to the Sister, Stat. 27 H. 8. 16. Co. 8. 94. 7. 40. 2. 36. *Brownl. 2 part, 291.*

2. The very words *Bargain* and *Sell*, are not necessary to a good Bargain and Sale; for words equivalent will suffice to make Land pass by way of Bargain and Sale. And therefore if a man seised of Land in Fee, do by Deed indented, and by the words *Alien* or *Grant*, sell them to another; or if such a man Covenant to stand seised of his Land to the use of another, and these Deeds are made in Consideration of money, and the Deeds be after enrolled; these will amount to good Bargains and Sales. And if a man by a Deed indented and inrolled, in Consideration of Ten pounds paid to him, by the words *Demise* and *Grant*, pass his Lands to another for Twenty years, this is a good Bargain and Sale, Co. 8. 94. 7. 40. 2. 36. *Brownlow, 2 part, 29.*

3. There must be some good Consideration given, or at least said to be given for the Land. And therefore if *A.* [for divers good Considerations,] or [in Consideration that the Bargainee is bound for the Bargainor, and for divers other good causes,] or [for divers great and valuable Considerations] bargain and sell his Land by Deed indented and enrolled to *B.* and his heirs, *Nihil operatur*, it worketh nothing. But if in these cases in truth there be money, or other good Consideration given, albeit it be not expressed upon the Deed, the Bargain may aver it, and being proved, the Bargain will be good. And if the Deed make mention of money paid, as in Consideration of an Hundred pounds, or the like, and in truth no money is paid, yet the Bargain and Sale is good; and no Averment will lie against this, which is expressly affirmed by the Deed. And if the Deed mention and say, [for a certain sum of money,] or [for a certain competent sum of money,] these are good Considerations.

Livery of seisin.
Attornment.

4. There needs no Livery of Seisin or Attornment in this case: And therefore if one bargain and sell a Reversion by Deed indented and enrolled for good Consideration, the Reversion will pass without any Attornment of the Tenant: And if it be only a Lease for years of a Reversion that is granted, there needs no Attornment nor Inrolment. And so it was adjudged in *Smalman's Case*, Hil. 7 Jac. *Brownl. 2 part, 291.* Where the Case was: A man made a Lease for life rendring Rent, and after the Lessor by Indenture, for Fifty pounds, demised and granted the Reversion, To have from the day of the date for Ninety nine years, rendring a Rent also, which was less then the first Rent: It was agreed good by way of Bargain and Sale, and that the Reversion and Rent did pass without Attornment.

Sell. 2.

Trespass.

And in case of a Bargain and Sale, the Bargainee is in actual possession before any Entry, so that the Lessee may attorn to the Grant of the Reversion, as hath been Ruled in *Mittons Case*, Mich. 18 Jac. in *Cur. Ward*, by the two Chief Justices and the whole Court. And yet I think he hath not such a Possession, as to bring any Possessory Action for Trespass, or the like, until an actual Entry. For where the Statute of 27 H. 8. of Uses provides, that the Actual Possession shall be adjudged according to the Use; yet it ought to have a Circumstance which is requisite by the Common Law, viz: an Actual Entry indeed. But there must be an Inrolment of the Deed in case where any Freehold doth pass: For it is provided, That no Lands (except in some Corporations only) shall pass from one to another by any Deed whereby any Estate of Inheritance or Freehold shall be made or take effect, in any person or persons, to be made by reason only of any Bargain and Sale thereof, except the same be made and done by Writing indented, sealed and enrolled in one of the four Courts, (the Chancery, Kings Bench, Common-Pleas, or Exchequer,) or else within the same County or Counties where the Lands so bargained and sold do lie, before the *Custos Rotulorum*, and two Justices of the Peace, and the Clerk of the Peace of the same County or Counties, or two of them at least, whereof the Clerk of the Peace to be one: And the same Inrolment to be within six moneths next after the same Writing or Deed is dated.

7. Inrolment,
where necessary,
and how
it must be
done.

And this Statute was made in the same Parliament, wherein the Law of transferring of Uses into Possession was made; to the end that mens Lands might not suddenly and

and privately pass upon payment of a little money in an Alehouse, or the like. And herein these things must be observed.

1. The Inrolment upon such a Deed, as to make this Estate to pass, must be in Parchment; for an Inrolment in Paper is not good.

2. The Deed inrolled must be Indented; for if it be but Poll, the Estate will not pass.

3. It must be inrolled within six moneths of the Purchase or Sale. And this Account must be, 1. From the date, and not from the time of the delivery of the Deed. 2. After twenty eight days to the moneth, and no more. 3. The day of the date to be taken exclusive, and for none of the days of the six moneths. And yet if a Deed be inrolled the same day it bears date, it is good. 4. If it be inrolled any part of the last day of the six moneths, it is sufficient. And thus the Deed may be inrolled within the six moneths, *Brownl. Rep. 1 par. 33.* albeit either of the parties die within the time. And if the Deed be not thus inrolled, it is of no force at all. So that if one bargain and sell his Land to me, and the Trees upon it; in this case albeit the Trees might have been sold alone by Deed without Inrolment, yet now being not inrolled, because the Sale is not good for the Land, it shall not be good for the Trees also. And no subsequent Act will help in this case: For if one by words of *Bargain* and *Sell* only, without any other words in the Deed, grant a Reversion, and the Deed be not inrolled, and after the Tenant doth attorn; hereby nothing doth pass, neither shall it enure as a Confirmation. But yet this must be noted, That in some cases where a Deed will not enure by way of Bargain and Sale for some of the causes aforesaid, it may enure to some other purposes, *Dyer 90. Coz. 40. 8. 94. 5. 112. St. 27 H. 8. 16. Co. 5. 1.*

But a Bargain and Sale may be made of Goods and Chattels without any such solemnity as before: For it may be by word, as well as by writing; with, or without any words of *Bargain* and *Sell*, as well as by those words; by a Deed poll, as well as by a Deed indented; and that without any Inrolment at all, and without any delivery of any part of the things sold, or of any piece of money (as the manner is) in the name of Seisin. Of Goods and Chattels.

But in this case also some respect is to be had unto the cause and consideration of the Bargain, as well as in the case of the Bargain and Sale of Lands. For howsoever perhaps in the case of a Grant or Bargain, and Sale of Goods or Chattels by Deed in writing, the Consideration is not material; and that if a man do by his Deed under his hand and seal bargain and sell Timber-trees or any other thing, without any Consideration at all, the same may pass well enough: Yet if the Contract be by word, or by Writing sealed and not delivered, if there be no Consideration, or no good Consideration of it, it is of no effect at all. And therefore if a man by word of mouth sell to me his Horse, or any other thing, and I give him, or promise him nothing for it, this is void, and will not alter the property of the thing sold. But if one sell me an Horse, or any other thing for money, or any other valuable Consideration, and the same thing is to be delivered to me at a day certain, and by our Agreement a day is set for the payment of the money, or all or part of the money is paid in hand, or I give Earnest money (albeit it be but a penny) to the Seller, or I take the thing bought by Agreement into my possession, where no money is paid, Earnest given, or day set for the payment: In all these cases there is a good Bargain and Sale of the thing, to alter the property thereof; and in the first case I may have an Action for the thing, and the Seller for his money; in the second case I may sue for, and recover the thing bought; in the third I may sue for the thing bought, and the Seller for the residue of the money; in the fourth case, where Earnest is given, we may have reciprocal remedies one against another; and in the last case, the Seller may sue for his money. Property altered.

If *A.* sell Cloth to *B.* for ten shillings, and *B.* takes away the Cloth against the will of *A.* in this case *A.* shall have an Action of Trespass against *B.* And if *A.* sell Cloth to *B.* for ten shillings, in his election to make it a Bargain, or not, and if he will he may keep his Cloth till the other pay him; and if *A.* say nothing, but doth suffer *B.* to take it away, he may make it a Bargain if he will, and bring an Action of Debt Sed. 3.

8. How Contracts about Goods or Chattels shall be taken.

Debt for his money. If I offer money for a thing in a Market or Fair, and the Seller agree to take my Offer; and whiles I am telling the money as fast as I can, he doth sell the thing to another; or when I have bought it, we agree that he shall keep it until I can go home to my house to fetch the money; in both these cases, especially in the first, the Bargains are good, so as the Seller may not sell them afterwards to another; and upon the payment and tender, and refusal of the money agreed upon, I may take or recover the things, *Dyer* 218. *Co.* 11. 48. *Plow.* 308. *Dyer* 29. 30. 14 *H.* 8. 19. 9 *H.* 7. 21. 10 *H.* 7. 6. 21 *H.* 7. 6. *Plow.* 432.

In these Contracts the Law doth not so much respect the form of words, as the substance of the Agreement, and the minds of the parties, *Kelm.* 87. 27 *H.* 8. 14. And therefore,

If one sell Tods or Pounds, Bushels, Yards, Ells, or Pearches of any thing, it shall be accounted, measured and reckoned according to the Custom of the Country and place, and not of the Statutes, or of any other Country, *Plow.* 140. 41.

If the Bargain were for Twenty Pieces, and say not of what, it shall be expounded of Twenty pieces of Gold of Twenty shillings a piece, by common intentment.

If a Contract be made for Twenty Barrels of Ale, or for Ten Pottles or Cups of Wine; the Buyer shall not have the Barrels also in the first, nor the Pottles or Cups in the next case: But if the Bargain were for Firkins of Wine, there it seems he shall have the Firkins also. If it were for an Hogsheaf of Wine, he shall have the Hogsheaf, *Com.* 86. a. *Bro. Contract* 4. 27 *H.* 8. 276.

If one agree with another to make him a Lease for years indefinitely, and say not when it shall begin, it shall begin presently, *Co.* 6. 33.

If one for Ten pounds promise to make good such an House by a day, this is a good Contract, and it shall be taken that he shall repair it. So if one owe me Twenty pounds, and I say I will sue him, and *L.S.* prayeth me to forbear till Michaelmas, and he will make it good to me, *Ket. vers. Michel, M.* 21 *fac. B.R.*

If one sell all his Trees in such a Wood, and it is agreed that the Vendee shall not cut them until Michaelmas, and in the interim Hawks do breed in the Wood, it seems the Vendor, and not the Vendee shall have the Hawks, 27 *Aff.* 29. *Co.* 11. 58. q. *Semble, see all contrary.*

If one lease Land excepting the Trees, and Herons or Hawks breed in the Trees; now in this case the Lessor shall have them, not the Lessee, and so also the Acorns of the Trees, 14 *H.* 8. 11. *Kitch.* 264.

9. How Contracts in Writing shall be taken.

In Contracts and Agreements that are in Writing under hand and seal, as Bills, Bonds or Covenants, the Cause or Consideration is not material; for whether it be with or without Consideration, it bindeth the party, and an Action may be brought upon it, (unless it be in case of Bargain and Sale of Land, as before.) As if a Carpenter by Writing delivered under his hand and seal, promise to build an House, or to pay another Twenty pounds, although there be no Consideration for it. (a) But if it be a Writing under his hand only, and not sealed and delivered, it bindeth no more then a bare verbal promise: So also if it be sealed, and not delivered, *Plow.* 308, 309. 11 *H.* 8. 4. 33. *Dyer* 90. 336. 21 *H.* 7. 43. **Fitz. Dibs* 126. *Plow.* 309. *Br. Aff. sur le case*, 40. (a) *Trin.* 18 *fac. B.R. per Curiam.*

10. Where it is, what makes a perfect Parol-Contract, upon which an Action may rise, or the Property of the thing be altered.

Communication.

These things only seem to be necessary to the making of a good and binding Contract, such an one as to produce an Action.

1. That the person contracting be not disabled for Infancie, Coverture, or the like.

2. That there be a good Consideration, (called) *Quid pro quo*, in the Agreement.

3. That the Contract be consummate and perfected: For if there be only a party, and no perfect agreement, that is no such Contract as on which to ground an Action, and it is called a Communication. But if it be about the Sale of any thing to alter Propriety, a fourth thing is requisite, That the Seller have an ownership in the things sold, or power to sell them; or else that they be truly and without Covin sold in a Market overt. For which see *Property. Co.* 5. 83. *Plow.* 302. 479. *Dyer* 98. For the opening whereof, take these Cases following.

If

If I make a Lease for years to another, and he in consideration hereof promise to pay me a sum of money in gross, or a Rent by the year; this is a good Contract, upon the failure of performance whereof I may have this Action; and for the Rent, I may have an Action of debt every year, *Lit. Br. selt. 452. Fitz. Debt. 129.*

If I sell a man my Land for Twenty pounds to be paid me on a day certain; in this case after the day, if the money be not paid, I may have an Action for the money, though the Land be not assured, for he may compel me to make an Assurance, 3 *H. 7. 14. 2 H. 7. 12.*

If one in consideration of a Pint of Wine promise to assure me of Land by a day, and do not, I may have Action, and that this is a good Consideration: But in this case it is probable the Jury will give but small damages. Adjudg. *Friends Case, Trin. 7. Jac. B. R.*

If A. be in debt to me, and deliver goods to B. to pay it, I require it of B. and he pray me to forbear it three weeks, and he will pay me; this is a good Contract, on which an Action will lie. *Williams Case, M. 7 Jac. B. R.*

If I promise to one, if he will marry my daughter, kinswoman or servant, that I will pay or give him Twenty pounds, or Twenty pounds with my daughter in marriage, and he do so; now he may recover this Twenty pounds on this Agreement, and sue for his money in the Temporal Court. And this is done daily, notwithstanding all the Opinions to the contrary. *Plow. 305. Fitz. Prohib. 2. 22 Ass. p. 70. 45 Ed. 3. 24. 14 Ed. 4. 6. 15 Ed. 4. 32. 17 Ed. 4. 5.*

If I promise money to a Physician to cure a poor man, or to a Labourer to amend an High-way; this is a binding Contract, on which Action will lie in respect of the nature of the works. *17 Ed. 4. 55. Doct. & Sr. 105. Plow. 305.*

If a Ter-tenant of Land promise to do a thing to me that have a Recognisance, wherewith his Land is chargeable, in consideration that I do assign to him the Statute by way of discharge; this is a good Contract and Consideration on which Action lieth. But if the Assignment of it were to a stranger, that were not good, for it is Maintenance. Adjudg. *Pasch. 38 Eliz. Fitz. Barrow vers. Green.*

If one be in Debt to me Twenty pounds by Bill, and I promise to deliver him the Bill, and he promise me to bring two sufficient Sureties, and give Bond for the money by a day; he may sue me, and I him, and there needs no Averment of the performance of the one side to enable the suit: And so in all such like reciprocal Promises. But if the Promise were conditional, *contra*, Adjudg. *M. 38, & 39. Eliz. Gower vers. Capper.*

If I buy an Horse of another for Corn, it is a good Contract, and I must pay so much Corn as is agreed upon, and not money. *Fitz. Debt. 68.*

If one promise to me Ten pounds, when I have done such a work; now this is a good Contract, and when I have done the work, I may sue for the money, *Plow. 5. 44 Ed. 3. 22.*

If a Contract be to pay for a thing Five pounds, or a Gown such a day, this is good; and if one be not paid at the day, an Action may be had: And before, and at the day, he that is to pay hath election; but after he to whom it is to be paid, 9 *Ed. 4. 39. Fitz. Debt. 89. See Election.*

If a man take my money, and promise in consideration thereof to build me an House by such a day, this is a good Contract, and I may sue for breach of it, *Kelw. 69.*

If I be seised of Land in Fee, and make a Lease thereof for life, and after in consideration of a certain sum of money demise and grant the same Land to another for Fifty years, to begin presently; this is a good Contract, and Bargain and Sale to pass the Reversion and the Rent, *Co. 9. 2. 35. 4.*

If one make a Lease for years in consideration of a Rent, there is in this *Quid pro quo*, and the Consideration is good on both sides to raise an Action, *Kelw. 69.*

If I lend one money, and thereupon he enfeoff me of Land, and by Agreement I am to have the profits of the Land till he pay me my money; this is a good Contract, and it seems I can bring no Action for the money whiles I have the Land, *Fitz. Debt. 100.*

If I agree with another to give him so much for his Horse as *I. S.* shall judge him to be worth; when he hath judged it, the Contract is compleat, and an Action will lie upon it; and the Buyer shall have a reasonable time to demand the Judgment of *I. S.* and if *I. S.* die before Judgment, the Contract is determined, *Plow 6. 14 H. 8. 19.* But then it seems the Horse must be delivered, or money paid, ere the Property will alter, or Action lie for the money.

So if an Agreement be, that the Buyer shall go and see the thing, and if he like it shall give so much for it; and he, when he seeth it, doth once declare his liking of it; and thereby his Bargain is perfect, he cannot afterwards disagree to it; and then Actions will arise on both sides, *18 Ed. 4. 16.* And if he once dislike it, hereby the Contract is determined, *18 Ed. 4. 16.*

If the Contract be to pay part of the money presently, and the rest at a day to come, and the Seller give him time till that day to refuse it; in this case, if he agree before the day, the Contract is compleat, and reciprocal Actions will lie for the things and money, *Dyer 99.*

If the Agreement be, that he shall see the thing; and if he like it when he hath seen it, for so much money he shall have it; in this case when he hath paid the money, and agreed to have it at the rate, the Contract is perfect, and Action will lie, *17 Ed. 4. 1.*

If a Contract be made for Twenty Bushels of Corn at a price, and that the Buyer shall pay for them as he doth fetch them; this is a good Contract, and the party must pay for it as he doth fetch it, or the Seller may refuse to deliver it, *Dyer 30.*

If the Contract be to have for Cattel sold Ten pounds, if the Vendor do such a thing, else Twenty pounds; this is a good Contract and certain enough, and Actions will lie accordingly, *Perk. sett. 712. 714.*

If I sell one Ware for Twenty pounds, to be paid when they are delivered; this is a good Contract; and when they are delivered, and not before, the Action will rise, *Fitz. Debt 56.*

Sett. 5.

If I sell a thing to another, and no price is agreed upon, and he take the thing into his hands, yet the Contract it seems is good; and if it be Wine, or any such like thing, the certain price whereof is known and set by Law, the Seller may sue for so much money in certain. But in other cases he must in his Action surmise that he promised to pay as much as it was worth, and aver it was worth so much in certain, *Trin. 3 Jac. R. R.*

Uncertainty.

Parson.

If a Parson agree with me, I shall keep my own Tythes this year; if this be after I have sown my Corn, this Contract is good. So some say, if a Parson contract with me by word for the keeping back of my own Tythes for three or four years, this is a good Bargain by way of Retainer: But if we agree for the Tythes of another man, though but for one year, it is not good but by a Deed, *Brownl. 2 par. 11.* But some hold, that if the Contract be before the Corn is sowed, or for more years than one, that this is not good. And this seems to be agreed, and to be good Law; That a Contract made by word of mouth with a Parishioner, for the keeping back of his Tythes for so many years as he shall be Parson, is not good: And the Contract with the Parishioner is not good but by way of Retainer, *Brownl. 2 par. 11. & 17.*

Retainer.

If one bargain and sell his Land, and the Trees upon it, but the Deed is not enrolled, and the Land doth not pass, in this case the Trees will not pass neither, *Co. 11. 48.* If a Tenant in Fee-simple for good consideration sell his Trees upon the Land, the Sale is good, and the Buyer may cut and take them away, although the Seller be dead. But otherwise it is of a Tenant in Tail; for there the Buyer must cut them in the life-time of the Seller, or he cannot take them after his death, *Co. 11. 50. Perk. sett. 58.*

If I sell my Horse to one first, on condition that he pay me Five pounds at a day, and before the day I sell him to another; this second Contract, it seems, is void, albeit I be not paid my money, and I do afterwards seise my Horse again, *Plow 432.*

If a Contract be for any thing at a price, but withall it is agreed that the thing must be delivered to the Buyer at such a time and place; this is a good Contract to alter Property, if it be delivered accordingly, *Fitz. jurans defaite*, 144. And so if it be to give so much as *I.S.* shall set down, when he doth set down, and the thing is delivered, the Property is altered, 14 *H.8.20.* So if it be that he shall see it, and if he like it, and take it away, he shall give so much, and he take it away. And so in all such like cases the Law is alike, 18 *Ed 4.16. Dyer 99.*

If two lay money on a Wager, and put it into the third mans hands, he that wins it may have it, and he that loseth it hath no remedy for his money again. *Agreed at Sarum-Affizes, 9 Car.* And if a Contract be about a Horse-race, if it be certain, it may be good and binding: But the Law doth not favour such vain sports, nor the Contracts that are made about them. *By Baron Thorp, at Gloucester-Affizes, 1654.*

If one owe me Twenty pounds, and I buy of him Goods to the value of Five pounds, and it is agreed he shall keep up this Five pounds towards his Twenty pounds; it is said this is no good Contract, nor pleadable in bar, if he sue me for the Five pounds, *Fitz. Debt 56. Quare.*

If one promise me that I shall retain a Rent I owe him, for money he is to pay me; it seems I cannot plead this in bar to the Rent, but I may bring my Action upon the Promise, if there be Consideration for it, *M. 9 Jac. B.R. Jarvis Case:*

If the Contract be to pay part of the money presently, and the rest at a day, and the Seller gives him leave to refuse until such a day: Now if he agree before the day, the Contract is compleat, and reciprocal Actions lie for the things and the money, *Dyer 99.*

If an Agreement be made in this manner between *I.S.* and my self, That if he deliver me Twenty pounds worth of Clothes, or assure me such a piece of Land, that I shall pay him Twenty pounds: Now this is good, and after the performance of the Condition (though not before) he may have an Action for the money. So in the like cases: As if I promise to make new Pales, so I may have the old, 33 *H. 6. 43. 27 H. 8. 34. Perk. sect. 7. 13.*

If a Lessee for years lease over his Land, on condition that the Lessee shall get the favor of the Lessor, and pay so much as *I.S.* shall arbitrate: This is a good Contract; and when he hath gotten his favor, and the other hath arbitrated how much, the Contract is perfect and binding, 15 *Ed. 4. 2. Dyer 76. 14 H. 8. 20.*

If the Agreement be, that the Buyer shall go and see the thing, and if he like it he shall give thus much for it, This is good; and when he seeth it, and doth once declare his liking, the Bargain is perfect, he cannot dislike it, 18 *Ed 4. 16.*

If one sell Cattel upon condition, that if the Vendor do such a thing, he shall have Twenty pounds for them, else but Ten pounds; this is a good Contract, and the same will be more or less, as the Condition is, or is not performed, *Perk. sect. 712. 714.*

If I buy Wares of one for Twenty pounds, to be paid to him when he delivers it me, it is a good Contract; but if he never deliver it, I shall never pay for it, *Fitz. Debt 56.*

If I lend one money, and thereupon he enfeoff me of Land, and by Agreement I am to take the profits of the Land until he pay the money; this is a good Contract, and it seems I cannot recover the money whilst I have the Land, *Fitz. Debt 100.*

If a Contract be for an Horse at a price, but withall that the Seller shall bring and deliver him at such a place, This is a good Contract; but this must be done also, or the Action will not rise, *Fitz. 144.*

A Contract may be bad and void, either for some defect in the Cause and Consideration, or for default in the Promise it self. In the Cause, when either there is none, or no good Consideration, (*i. e.*) when there is no benefit to the party to whom, nor prejudice, loss or trouble to the party by whom the Contract is made; for then it is but *Nudum pactum*, a naked Covenant. Or when the Cause and Consideration is unlawful.

3c. 6.

2. In the Promise it self it may be defective, either for uncertainty, (i.) when it is either altogether uncertain, or else so uncertain, as it cannot by any means be made certain. Or when it is imperfect, (i.) when it is only in inchoation, and but a Communication only, and not perfect and compleat. Or it may become void by matter *Ex post facto*. In either of these a Contract may become void, as in the Examples following. *Co.* 10. 102. 76. *Dyer* 356. 17 *Ed.* 4. 4. 9 *H.* 7. 21. 10 *H.* 7. 6.

Nudum pactum.

If I promise to pay another Twenty pounds, because he is my Kinsman or Acquaintance; he can have no Action upon this, for it is *Nudum pactum* only, *Plow.* 309. 302: So if I contract with my Son, that because he is of my blood, I will give him Ten pounds; this is *Nudum pactum*.

If one buy of me an House, or other thing for money, and no money is paid, nor Earnest given, nor day set for payment, nor the thing is delivered; here no Action lieth for the money, or the thing sold, but I may sell it to another if I will, for it is but *Nudum pactum*, a naked Covenant, *Plow.* 309. 302. 11 *H.* 4. 33.

If one promise to give or do to another somewhat for that which is past, as because he hath builded an House, or because he hath let his Friend have Wares, or because his Friend doth owe the other money, That if he do not pay him, he will; this is but *Nudum pactum*. This hath been often adjudged, *Doll. & Str.* 105.

If I promise to one, That in consideration he will deliver me Twenty crowns, I will deliver them to him again; this is a Promise upon which no Action will lie, unless he had delivered them to me first, and thereupon I had promised to redeliver them: *Adjudg.*

If I promise to one without any cause to give him Twenty pounds to make his House anew, or towards his losses by fire, or the like; this is such a Promise as will not yield an Action, 17 *Ed.* 4. 4. *Plow.* 308.

If I. S. owe me Ten pounds, and another comes to me and tels me he will be my Pay-master for the Ten pounds, and pray me to take him for Debtor, and nothing is given by me for this; now no Action will lie for this, *Fitz. Debt.* 126.

If I promise to another, in consideration that he will make me a Lease generally, to do such a thing; this is but *Nudum pactum*; for he may make me a Lease at will, that may end as soon as it begins; *Pasch.* 39 *Eliz.* *Co. B.* *Lurking's Case*, *Adjudg.*

If one promise to me in consideration that I will relinquish my Suit, to do such a thing; this is no good Consideration, for he may relinquish it, and begin again, *Pasch.* 39 *Eliz.*

If the Cause of the Promise be to do an unlawful thing, as either that which is *malum in se*, or *malum prohibitum*, (i.) Evil in it self, or evil forbidden, there the Contract is void: But if part of the Consideration be lawful, and part unlawful, there it may be good: But if it tend wholly to Maintenance, or the like, it is all naught, *Co.* 12. 102. *Dyer.* *Onleys Case*, *Churches Case*, *Pasch.* 7 *Jac.* *B. R.*

If I come into the Market; and ask the price of any thing, and the Seller set a price, and I go home to my house to fetch the money as fast as I can, and he sell it the while; now in this case I have no Action for this, neither was the Property changed, for the Sale was not perfect, 14 *H.* 19.

If one bargain and sell his Land, and the Trees upon it; but the Deed is not inrolled, and so the Land doth not pass, nor the Trees will not pass neither, *Co.* 11. 48.

If I sell and deliver my Horse to one first, on condition that he may pay me Five pounds at a day for him, and before the day I sell him to another; this second Contract, it seems, is void, although I have not my money paid, and I sue him again, *Plow.* 432.

If I prize Wares, and the Tradesman say so much; now the Bargain is not perfect until the money be paid, unless a day be agreed, it is imperfect and void until then, 17 *Ed.* 4. 1.

If the Promise be to do a thing either *malum in se*, or to do a *malum prohibitum*, (i.) Evil in it self, or Evil forbidden, (although the Consideration be good) or to do

do any thing contrary to Law, it is void and will not bind, no more then where the Consideration is naught; for Law will not work with such unlawful Contracts. (See more in *Obligations* and *Covenants*.) Also a Contract that is Usurious, is against Law and void. See for this *Usury*. Co. 10. 102. *Dyer* 356.

A Bishop hath the First-fruits of the Clergy within his Diocess; and if a Parson pay him part, and promise him the rest by a day, but doth not pay it; the Bishop can have no Action, because the thing is meetly spiritual, Co. on *Lit.* 162. b.

Sess. 7.

If an Agreement be between another and me for ten pounds for such a parcel of Wood, if he like it when he seeth it, and he when he seeth it doth dislike it; now by this the Contract is become void, and he cannot after by his liking make the Agreement good, 18 *Ed.* 4. 16.

If an Agreement be between me and another, that one shall go and see my Corn in such a place, and if he like it when he hath seen it, for so much money, that he shall have it: Now the Contract is not perfect, until he hath paid the money and agreed to take it at the rate. See more of these matters in *Assumpsits*, 17 *Ed.* 4. 1. and *Agreement* and *Properties*.

If one make a Lease for years rendring Rent, and the Lessee be evicted by title Paramount, the Contract is discharged, and he shall pay no Rent: So if the Lessor had nothing in the Lands at the time of the Lease, the Lessee may plead it and avoid the Rent, *Bro. sess.* 52. 135. *Lit. sess.* 58.

11: Where a Contract is extinct or determined, or not,

If one sell an Horse or other Wares for money to be paid at a day, and before the day the true Owner thereof take his Horse or Goods, the Debt is not discharged, but the Seller may have an Action to recover the money notwithstanding, *Finches Ley*, f. 45. Co. 3. 22. a. 18 *Ed.* 4. 6. a.

If one have a Debt due to him by a Contract, and he do after take an Obligation for it, or any part of it; now hereby the whole Contract is determined. So if he sue upon the Contract, and recover and get a Judgment, the Contract is determined, so if he sue upon the Contract, and recover, and get a Judgment; the Contract is determined, 3 *H.* 4. 17. Co. 5. 45. 9 *Ed.* 4. 54. *Dyer* 21. *F.N.B.* 121.

If I be an Artist, and one promise me Ten pounds to teach him in such an Art seven years, and I die before the money paid or seven years expired; now the Debt is gone, 21 *Ed.* 3. 11. But if I take a Writing indented only, or indented and sealed also, of a Contract made to me, but it is not delivered and made an Especialty, this doth not determine the Contract. So if a Debt on a Contract be due to me, and I take an Obligation from a stranger (and not from the party) for it; this doth not determine the Contract. So I take an Obligation from the party, and it be void, or it become void by matter *ex post facto*, this will not determine the Contract, *Dyer* 130. *Fitz. Debt* 68. 3 *H.* 4. 17. 21 *H.* 7. 5.

If I contract with J.S. that if he lay me into my Cellar three Tuns of Wine before *Michaelmas*, that I will bring into his Garner twenty Quarters of Wheat before *Christmas*, and before the days they agree to dissolve the Contract, this doth determine it; but after the first day of the two days is come, it cannot be dissolved, but it may be released by word or deed. And so of all such like Contracts.

If one promise me Eight pounds to teach him in my Art seven years, and he pay me the money, or give security to pay it by a day, and I die before, yet the money must be paid, and it seems the other hath no remedy, 21 *Ed.* 3. 41. See more in *Apportionment*, *sess.* 4.

12: Where a Contract may be divided, or not.

A Contract cannot in any case be apportioned, but either the duty must be all paid, or all lost: As if a Lease be made yielding Rent, and the Lessor enter upon part of the Land leased, the whole Rent is suspended. And if a stranger enter by title Paramount upon a part of the Land only, the whole Rent shall remain, 9 *Ed.* 4. 1. *Bro.* 52.

If the Husband sell the Trees upon his Wives Land, and the Vendee take part of them, and after before he take the rest she die: Now though he cannot take the rest of the Trees, yet he must pay all the money upon the Contract. But if a day were set to cut them, and not before; and she die before the day, there if he had cut part of the Trees, he should not pay any of the money, 18 *Ed.* 4. 6. *Bro. Contract* 26.

Sess. 8.

If one make a Lease for years, and sell Goods, all by one Contract, for one sum of money, and the Goods be took away from him before the money be paid, yet the Buyer must pay all the money. So if one sell two Horses for Ten pounds, and one Horse is the Horse of another mans, and he take his own again, he must pay the whole Ten pounds, (but he may have remedy against the Seller.) *Et sic fuit opinio Just. Dodd. Tr. 14 Jac. B.R. 7 H. 7. 4. Bro. Contract, seq. 52. 135. Lit. Bro. 12 H. 8. 13. 9 Ed. 4. 1.*

If an Abbot had made a Contract for Goods, and part of the Goods had come to the use of the House, and part not, yet the Successor was chargeable with all, 38 H. 6. 28. a.

If a Bond be made to secure money lawfully lent, and money upon Usury, it is void for all. See more in *Apportionment, numb. 4.*

13. Where one shall be charged or bound by the act of another, and where not. Husband and Wife.

If a Feme-covert do sell the Goods of her Husband by authority precedent from him, or if he do afterwards agree to it, or it seems if he do not disagree to it in his life-time; this shall bind the Husband. *Qui tacet, consensire videtur.* So if she buy any thing by any authority general or special, or without any authority, if it be for her necessary Apparel, the Husband shall be charged, (*Vide Baron & Feme.*) But if she buy Goods for her Husband, or to his use, without his authority general or special, he shall not be charged for it (although it be spent in his house,) unless he do afterwards agree to it, 27 H. 8. 25. 21 H. 7. 40. 20 H. 6. 22. *Old N. B. 62.* So where she is used to buy and sell for the Husband, or the things sold be things fit for the Wife to sell, as Butter, Cheese, Milk, Eggs, and the like, the Contract is good.

Servant.

If I give my Servant authority to buy for me, or he be my common Bailly and buy for me, I shall be charged, though they never come to my use, and though I never have notice of it, 21 H. 7. 40. *F. N. B. 120 g.* See *Master and Servant.*

If a Purveyor, Clerk of the Market, or other that taketh up for the King, buy any thing for the King; after he hath made his Accompt to the King and is allowed, he may be sued and charged for it, but not before, unless he made a promise to pay for it, for then he may be charged before his Accompt, 11 H. 4. 28. 2 H. 4. 28.

14. What shall be said a good Bar in Debt upon a Contract, and what not.

If a Servant buy for his Master, and promise to pay the Seller, and do not, the Seller may charge him in an Action of the Case; and if he had an authority from his Master, he may charge him in an Action of Debt. Arbitrement is a good Bar in Debt upon a Contract, 4 H. 1. 17. 6.

So a Bond made by the Debtor to the Creditor for the Debt, or any part of it; for by this all the Contract is determined, *Dyer 21. b. S. N. Br. 121. M. 3 H. 4. 17. b. 11 H. 4. 79. b. 9 E. 4. 50. b. 29 H. 8. Br. Contract 29. 21 H. 7. 5. b. 6 Rep. 45. a.* Otherwise if the Bond were made by a stranger, 29 H. 8. *Br. Contr. 29. Goldsb. 153. pl. 84.*

A Judgment had upon the Contract, is a good Bar in Debt upon the Contract, although Execution be not done, *Dyer 21. b. 39 H. 6. 34. b. 9 Ed. 4. 54.*

To an Action of Debt upon a Contract, payment is a good Plea, 41 Ed. 3. 7. a. by *Thorp. Br. Debt 29. 9 H. 6. 9. b.* by *Passon.* But yet by 1 H. 5. 6. b. *per Cur.* 40 Ed. 3. 24. b. 41 Ed. 3. 7. a. by *Candish.* 46 Ed. 3. 6. a. Payment is no good Plea in such case, without shewing an Acquittance.

And *Martin* in 9 H. 6. 9. b. saith accordingly, because (saith he) he may wage his Law.

If the Plaintiff hath brought an Action of Debt upon the Contract, and hath been barred by Wager of Law, and now he brings an Action of the Case for the same Debt, the Defendant may plead this, and bar the Plaintiff, *Fitz. 116. Action for the Case, 109.*

If I be bound to you to pay you a certain sum of money, and a stranger deliver you a Horse by my assent for the debt, this is no satisfaction. So if I be indebted on a simple Contract, and a stranger make an Obligation for this debt, this doth not determine the Contract, *Brownl. 57. pl. 14.*

CHAP. XXXII.

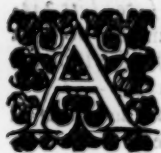
Of a Barretor.

Barretor or Common Barretor, is a Common Mover or a Barretor, whad Common Stirrer up or Maintainer of Suits, Quarrels or Parts, either in the Courts or out of the Courts in the Country. And in the Courts, either of Record, or not of Record, as the Country Court, Hundred Court, or other such like Courts: And out of Courts it is three ways.

1. In disturbing of the Peace; secondly, in taking or detaining of possessions of Houses, Lands, or Goods in question, either by force, or subtilty, and deceit, and usually in the suppression of right, and truth. Thirdly, by false Inventing, and serving of Calumnies, Rumors, and Reports, to make Discord, and Debate between Neighbors.

The punishment of such a person may be by Articles or Information upon Oath before one, or more Justices of the Peace; and hereupon he may be bound to the Good-behavior, or he may be indicted for it at an Assizes, or Sessions, and there fined for it at the discretion of the Judges, or Justices of the Peace, before whom he is found guilty of it. And for this see *Co. 8. 36, 37. and Littl. 308. Westm. 2. 36. And my Book of Justice of Peace.* The punishment of it

CHAP. XXXIII.

Of Bastardy.

Bastard is one that is born of any Woman, so as his Father is not known by order of Law, and he is called *Filius populi: Co. 8. 102. 6. 65: Super Littl. 244.* *Bastardy.*

*Cui Pater est populus, Pater est sibi nullus, & omnis:
Cui Pater est populus non habet iose Patrem.*

Mulier is one lawfully begotten and born: And this word is used always in comparison with, or opposition to a Bastard, to shew the difference between them: For, *Filius natus vel filia nata ex iusta uxore appellatur in legibus Anglia filius mulieratus, seu filia mulierata. Co. super Littl. 243. b.* *Mulier.*

If a Woman have a Childe before the Espousals (by whomsoever it be) it is a Bastard, for that is born out of lawful marriage: And if the Childe be begotten by him that doth afterwards marry her; yet it is in Judgment of the common Law a Bastard, but this the Church doth hold legitimate. *Stat. 20 H. 3. 9. 1 H. 6. 3: Co. Super Littl. 244.* Where, and what Issue shall be counted a Bastard.

If one marry his Cofin, *Infra gradum maritaggi*, and have issue by her, and after they be divorced in their life time, their Issue is a Bastard. *48 Ed. 4. 28. Broo. Sect. 48.*

If a Man or Woman marry a second Wife or Husband, the first being living, and have Issue by that second Wife, or Husband, such Issue is a Bastard. *39 Ed. 3. 14. 7 H. 4. 9. 18 Ed. 4. 26.* Where not.

If one marry a Woman, and die before night that he lie with his Wife, and she have a Childe after, it seems it shall be accounted his Childe, and Legitimate. See the *English Lawyer. 117.*

If a Woman elope with a stranger in Avowtry, and hath a Childe, her Husband being *infra quatuor menses*; this is legitimate, and shall inherit his Land when he dies, 44 Ed. 3. 10. 7 H. 4. 10.

No Devise made after the death of the Father and Mother, can make the Issues Bastards. *Broo. Bastard* 23. 39 Ed. 3. 32.

If a Woman elope from her Husband, and live in Avowtry, her Husband being beyond the Sea, that he cannot come at her, and she have Issue in this time, it seems this is a Bastard: But by the Common Law, if the Husband be within the four Seas (i.) within the jurisdiction of the King of England; if the Wife have Issue, no proof is to be admitted to prove the Childe a Bastard, unless there be an apparent impossibility in the Husband of Procreation, as if he be but eight years old, or under the age of Procreation; for in that case, such Issue is a Bastard, albeit he be born within marriage, 43 Ed. 3. 19. 7 H. 4. 9. 7 H. 5. 9. 44 Ed. 3. 10. 1 H. 6. 7. 19 H. 6. 17. *Co. super Lisl.* 244.

If a Childe be born within the usual time, which is within the tenth Solary moneth, (accounting the moneth thirty days) after a mans death; it shall be reputed a *Mulier*, and the Childe of him that is dead; but if not, it shall be reputed a Bastard, unless the Woman be married to another Husband; but the most natural time is eight and twenty days, nine Solary moneths and ten days; which is forty weeks, but some come sooner, and some stay longer, as occasions be; and therefore it is held by the Doctors of Physick, that any day in the tenth Solary moneth, the first or last is natural enough. But the breeding and travail is sometimes longer or shorter, according to the weakness or strength of the Mother, or Childe, or other matters, *Co. super Lisl.* 123. *Arfops* case, *M.* 17 Jac. R. B.

This Case was: The Husband died the three and twentieth day of March, after his death his Wife (being known a leud Woman) was in travail five weeks, and in the midst of her travail, was turned out of doors, so that she was not delivered until the fifth day of January, which was one and forty weeks, yet was adjudged that this Childe was legitimate, *Arfop versus Botrel*, *M.* 17 Jac. B. R.

But if the Issue be born within a moneth, or a day, after marriage, between parties of full, lawful age; the Childe is a legitimate Issue, and no Bastard, albeit it be apparent it was anothers Childe, and not his that married the Woman; and he must Father him; for whose is the Cow, his is the Calfe, 18 Ed. 4. 28. *Co. super Lisl.* 244.

If a marriage be *infra gradum maritagii*, and they have Children, and one of them die, and after a nullity and divorce is made of the said marriage, yet the Issue between them are no Bastards, but *Muliers*. 39 Ed. 3. 32. *Broo. sect.* 48.

If a Divorce be well made of a former marriage, *causa pracontractus*, and either of the parties marry again, and upon this second marriage have Children; these Children are legitimate, and not Bastards, *Co.* 4. 29.

All Children that are born beyond Sea, whose Parents at the time of their birth be of the Faith and Legiance of the King of England, shall be legitimate, and have the same advantages as others born within the Realm, 25 Ed. 3. *de natis ultra mare* *Dyer* 224.

A Bastard the Elder and *Mulier*. Where possession of the Elder Issue which is a Bastard, dying seised, makes his Son his Heir, where not, and although the younger Son occupy the Land with the elder.

If one have a Son or a Daughter by a Woman before marriage (which is a Bastard) and after he marieth the Woman, and they have another Son or Daughter (which is a *Mulier*) and the Father die seised of Land, the second Son or Daughter shall have this Land, and not the Bastard; and if the Bastard enter upon it, the *Mulier* may oust him: But if the Bastard shall enter first, claiming as Heir to his Father, and shall occupy the Land all his life-time without any entry, or continual claim made by the *Mulier* all the life-time of the Bastard, and he have Issue and die seised of such Estate in Fee, and the Land descend to his Issue, and his Issue entreth, &c. In this Case the *Mulier* which is lineal, as also the Collateral Heir is remediless, and the Issue of such Bastard shall have it, notwithstanding the *Mulier* be an Infant, or Feme Covert, and notwithstanding the Issue of the *Mulier* enter before the Issue of the Bastard; and notwithstanding the Issue of the Bastard endow the Wife of the Bastard, and notwithstanding the Bastard after his entry, enter into Religion, and thereupon the descent be, and notwithstanding the descent be of Rents, Services, Reversions, expectant upon

upon Estates in Tail; whereupon Rents are reserved, *Littl. Sett.* 399, 340. *Co. super*
Co. 17 *Ed.* 3. 15. 20 *Ed.* 3. 16. 14 *H.* 4. 9.

But if the *Mulier* do make continual claim during the Bastards life; or if the *Mulier* do once enter, and be after disseised by the Bastard, or if the Bastard die without Issue, and the Land Escheat, or if the entry of the Bastard were by a stranger, without any commandment, precedent, or assent subsequent of the Bastard; in these cases the *Mulier* is not barred. *Co. super Littl.* 243, 244.

If one have Issue two Daughters, and one is a Bastard, and the other is a *Mulier*, and they enter and occupy together all their lives, and the Bastard die seised; the Law will adjudge the moyety in her Heir, *Co. super Littl.* 214.

A Bastard may purchase Land, or buy and sell Goods or Chattels, as another man may: Also he is capable of Land by Devise from his Father, or any other, by that name whereby he is commonly called, *Perk. Sett.* 48. 505.

But he cannot inherit Land as Heir to his Father, neither can any inherit Land as Heir to him, but one that is Heir of his body; but it will rather Escheat, *Littl. Sett.* 401. *Fitz B.* 20.

If he be a Bastard born in Adultery or Incest, it seems he is not capable of any benefit from such Incestuous Parents, more then for necessities onely, *Swinb. in wills.*

It seems he may do all Acts, as give, or grant, or sell his Lands, Goods, or Chattels, by act executed in his life, or by his Will at his death, as any other man may, by the name whereby he is commonly called; but he cannot bring a Writ of Detinue, or the like, as Heir to any man, *Perk. Sett.* 26. *Co.* 6. 65. 35 *H.* 6. 9.

Bastardy is pleaded and alleged sometimes generally (i.) when one saith that another is a Bastard, but sheweth not how, or specially (i.) when he doth shew how: In the first case it was to be tried by the Certificate of the Bishop, albeit the Issue were born beyond the Sea; and this had bard the parties, and all others: But if the Bishop had certified he is a *Mulier*, this was examinable and traversable. In the second case, when it is pleaded, it is to be tried by the Country, not by the Bishop. For which, see the Statutes of 9 *H.* 6. 11. 40 *Ed.* 3. 39. *Plow.* 74. 25 *Ed.* 3. *de natu ultra mare.*

If one marry a Virgin with Childe, and it be born during the Espousals, he must Father it, let it be whose it will: And if she be a Widow, and with Childe visibly by her first Husband at the time of his death, and take another Husband, and be delivered during the next Espousals; in this case it shall be reputed the Childe of the former Husband: But if she were so privily with Childe at the time of her latter marriage, as it cannot be discerned, it shall be reputed the Childe of her latter Husband, if by possibility of nature, it may be so, 21 *Ed.* 3. 39.

If *A.* marry *B.* and die, and within ten days after his death she do marry *C.* and hath Issue *D.* eleven days after the usual time of forty weeks, from the death of *A.* this shall be reputed the Childe of *C.* and not of *A.* So it seems if the Childe come eleven days before the usual time, it shall be reputed the Childe of *C.* not of *A.* 18 *Ed.* 1. *Com. Bedf. Case, R.* 13. *B. R.*

Bastardy is an offence against the Spiritual Law, and therefore was punishable in the Spiritual Court: It is also offence against the Common Law, and punishable in the Temporal Courts; and two Justices of Peace, whereof one to be of *Quorum* that are next to the place where the Bastard is born, may examine the matter, and punish the parties offending according to their discretion: And if it be a Bastard that may charge the Parish, the Justices may send the Mother to the House of Correction: As also for the keeping of the Bastard to discharge the Parish where it is born, and to charge the Mother and reputed Father: And if they refuse to obey the Order made by such Justices, or to give good bail to perform the said Order, or to appear at the next quarter sessions, they are to send them to Gaol, there to abide without bail or Mainprife. 18 *Eliz.* 3. 7 *Jac.* 4. 3 *Car.* 4.

It is murder in a Woman to conceal the death of her Bastard, unless she prove by one witness (at least) that it was still born. 21 *Jac.* 17. See Justices Office in my Book.

What things a Bastard shall have, and of what he is capable, where not.

What acts a Bastard may do, or not do:

Pleading and trial of Bastardy:

What person shall be reputed the Father of a Childe.

The punishment of Bastardy.

CHAP. XXXIV.

Of Books, Images, and Printers.

Importation.



IN this, these things are to be known.

1. That none may buy to sell again any Books Printed, ready bound in Boards, Leather, or Parchment from any place beyond Sea; nor buy of any but Denizens. Printed Books brought from beyond Sea by Retail, but in Gross onely.

2. The Lord Chancellor, Lord Treasurer, and the two Chief Justices, or any two of them may set the prices of Books. 25 H.8. 15.

3. No Imported Books shall be Landed any where, but in London Port. *Act*. 20 Sept. 1649. 7 Jan. 1652.

4. None may bring in here any Scandalous or Seditious Book under pain of five pound. *Ibid*.

5. None may bring in from beyond Sea any English Bible, Psalms, or Book, or part of any Book formerly Printed here; nor Binde, Stich, or put to sale any such Book, upon pain of loss, and forfeiture thereof, and of ten shillings a Book. *Ibid*.

Popish Books and Images.

6. None may bring from beyond Sea, nor Print, Sell, or Buy any Popish Primmers, Ladies Psalters, Manuels, Rosaries, Popish Catechisms, Missals, Breviaries, Portals, Legends, and Lives of Saints, Printed or Written in any Language: Nor any other Superstitious Books written in the English Tongue. But Popish Books and Images must be taken away. And Justices may search the Houses of Popish Recusants for them. 3 Jac. 5.

Directory, Common-Prayer Book.

7. The Book of Common Prayer may not now be used, but the Directory must be used in Church Service. See the *Ordinance*. Aug. 23. 1645.

8. All Primmers used in the times of the Kings, are to be suppressed, *Act* July 24. 1651.

9. None may demise, or let, or being within his dispose, suffer to be held or used, any House, Vault, Cellar, or other Room whatsoever, for a Printing-house; but before he let it, he must give notice thereof to the Master or Wardens of the Stationers for the time being thereof, *Sub pena* five pound. This they must enter into their Register Book, *Sub pena* five pound.

10. No Joyner, Carpenter, or other, shall make any Printing-Presse, Rolling-Presse. Nor any Smith forging Iron-work for a Printing-Presse; nor any Founder cast any Printing Letters for another; nor any person Import from any part beyond Sea, into this Country, any Printing-Presse, or any such Letters, but he must first acquaint the Master and Wardens of the Company, for whom the same work is to be done, under pain of five pound. This the Master and Wardens must enter in their Register Book, under pain of five pound.

11. No Printers nor Printing, shall be but in London, and in the two Universities, York, and Finsbury, under pain of twenty pound, and to have all their Printing-Presses, Letters, and Materials defaced, and be for ever disabled to be a Master Printer, and owner of a Printing-Presse.

12. None may Print, but such as have served seven years with some lawful Printer in England.

13. Then he must use the Trade in his own house, not elsewhere, under pain of forty pound.

14. They must in every thing they Print, in the Title-page of each Book, prefix the Authors own name, with his quality and place of Residence, or at least the Licenses names, where Licenses are required; and his own name and place of Residence at length, under pain to forfeit for the first offence ten pound, and to have all the

the Printing Materials defaced; and for the second offence, to be disabled from any more Exercise of his Trade of Printing.

15. None shall Print or Reprint out of the two Universities, any Book, or part of any Book legally granted to the said Company of Stationers, for the relief of their poor, without the License and consent of the Master, Wardens, and Assistants of their Companies.

16. None shall Print or Reprint any Book or Books, or part of Books, which shall be duly entered in the Register Book of the Company, for any particular Member of the said Company, without the License and consent of the owners thereof.

17. None may counterfeit the Name, Mark, or Title of any Book, belonging to the said Company, or particular Members.

18. Nor shall any person Binde, Stiche, or put to sale any such Book or Books, upon pain of forfeiture of the sum of six shillings and eight pence, for every Book Printed, Stitched, Bound, or put to sale contrary hereunto.

19. None may sell News-Books without leave of Parliament, or some appointed by them.

20. To Print, publish, or utter, or cause to be Written, Printed, published, or uttered any Scandalous or Libellous Books, Pamphlets, Papers or Pictures, under pain of ten pound, or imprisonment forty days, or until he pay the money. The Printer to forfeit five pound, and be imprisoned twenty days until he pay it; to have his Press and Implements of Imprinting, broken and seized. The Book-seller and Stationer forty shillings, or be so imprisoned ten days, or pay the money; and he that buyeth it, and doth not within four and twenty hours give notice of it, and of the party that sold it, to a Justice of Peace, under pain of twenty shillings.

21. Such Hawkers and Sellers, and the like, as go with Scandalous News in Ballads, and the like, are to forfeit the Books and Ballads, and be by the Constable carried to the House of Correction to be whipt as Common Rogues, and the Keepers must take them and whip them; or if no House of Correction be, then to the Constable of the place to be whipt there by him as a Rogue.

22. That no Drifats, Packs, Maunds, Chests, or Fardels of Books, be permitted by the Officers of the Excise or Customs, to be opened, or conveyed, until before notice given to, and view made by the Master and Wardens of the Company, or such as they shall appoint, so they do it within eight and forty hours after notice given (the Lords day and days of Humiliation excepted) *Sub pena* five pounds. And this the Officers must do, under pain of five pound to be forfeit by them. See *Act July 24. 1651. 10 Sept. 1649. 22 Nov. 1650. 5 Jan. 1652.*

23. For turning the Law into English. See *Act. 22 Nov. 1650.*

CHAP. XXXV.

Of Boatmen and Bargmen.



Or this these things must be known.

1. Overseers of them are to be in *Thames*, between *Gravesend* and *London*.
2. They must order Watermen, set down their names, and oversee their Boats.
3. Allow one of two that Row in Boats:
4. No singleman, but one that hath been in service, is to be a Waterman.
5. Their Boats must be of such a length and breadth.
6. They may not take more for their Fare, then is set down.
7. No man hinder their passage on *Severns*, or require money of them for their passage.
8. The Watermen may take Apprentices, or Servants.
9. They may not Transport Offenders into, or out of *Wales*, or Corn to the Ships.

2, 3 *Phil. & Mary* 16. 9 *H. 6. 5.* 23 *H. 8. 12.* 19 *H. 7. 18.* 1 *Jac. 16. 1.* 2 *Phil. & Mary* 3.

CHAP. XXXVI.

Of Brass, Latten, Copper, Pewter, Bell-Mettal and Burning.



Or this thing all these things are to be known.

Brass, Pewter, Latten, Copper, and Bell-Mettal Transportation.

Making a Merchandising of it.

1. None may carry away, or convey by Water, or otherwise, any Brass, Latten, Copper, Bell-Mettal, Finmettal, Gun-Mettal, or Shroff-Mettal beyond Sea, under pain to forfeit the double value thereof, neither may it be carried by Sea from one part of the Land to another, before the party hath given Bond to the Customer of the place, where it is carried by Sea, to discharge it at that place within the Realm, where he pretendeth to carry it. See the Statutes of 23 *H. 8. 7.* 2, 3 *Ed. 6. 37.*
2. No Pewterer, or Brasier, may sell or change any Pewter or Brass, new or old, at any place, but in open Fairs or Markets, or in their own dwelling Houses, unless the Buyers desire it; otherwise *Sub pena* ten pound for every default. *Stat. 19 H. 7. 6.*
3. All Pewter and Brass Vessels, cast and wrought, must be of good Mettal, such as they are bound to cast in *London*, under pain to forfeit that which is not so cast; and the Ware that is hollow must be made after the Assize they are bound unto in the City of *London*; and the maker of the Ware must set his mark upon it, under pain to forfeit the Ware, that is otherwise. 5 *H. 8. 7.* 25 *H. 8. 9.*
4. None may use any false Beams or Weights about the selling and buying of Pewter and Brass, *Sub pena* twenty shillings. And if the party cannot pay the money, he must be put in Stocks and on the Pillory. *Ibid.*
5. Majors and Justices, may and must appoint a searcher in every place to look to these things. *Ibid.*
5. None may buy or take by Exchange for other Wares, any Wares made of Tin, as Platters, Dishes, Sawcers, Pots, Basons, Flagons, Goblets, Salts, Salt-sellers, Spoons, under pain to forfeit the same, and the value thereof also. 25 *H. 8. 9.*

7. No stranger born may work any Pewter or Tin, neither may a Pewterer teach his Trade in a foreign Country. See the Statutes at large, 33 H.8. 7. 2 & 3 Ed.6. 37: 4 H.8. 7. 19 H.7. 6.

Of Burning.

For Burning, these things are to be known.

1. It is Felony to burn a Dwelling-house, or a Barn full of Corn, or any Outhouse adjoining to such House or Barn. See *Brown*. But to burn a Frame of an House, is not Felony now, 37 H.8. 6.

2. To burn any Heaps of Wood prepared for Coals, Bitles, or Talwood, is not Felony, but a great Trespass, for which a man shall pay treble damages to the party wronged, and forfeit Ten pounds to the Lord Protector, 37 H.8. 6.

3. If my Neighbor, his Servant, or any other that shall come into his house by his good will and agreement, shall wilfully or through negligence burn his house, and thereby my house is burnt, I may have relief against him for this loss by Action of the Case: But if it be by Gods hand, and without negligence, it is otherwise, 3 H. 4. 28. *Brownl. 1 part, 197.*

CHAP. XXXVII.

Of Butchers.

Or Butchers, these things are to be known.

1. No Butcher or other may buy any Cattel in a Market or Fair, and sell them again alive in the same Market or Fair during the time thereof, under pain to forfeit the double value thereof: Neither may they buy any Oxen, Steers, Redds, Kine, Heifers, Calves or sheep, and sell the same again alive under pain of forfeiture of the Cattle, Stat. 4. Ed. 6. c. 1. 3 Car. ch. 4.

Butchers, Buying and selling of Cattel.

2. Butchers must kill no Beasts within any walled Town, or Cambridg, 4 H. 7. 3.

3. But there is now no Law in force to restrain Butchers from killing a Calf weaned before two years of age, or from buying Cattel out of an open Fair or Market, or from killing of Calves between the tenth day of January and the first of May; for those Statutes are ended.

4. If he sell Swines flesh muzzled, or dead of the Murrain: For the first offence amerced; the second, Pillory; third, Imprisonment and Fine, &c. See St. 24 H.8. 9. 21 H.8. 2. 31 Ed. 1. Stat. of Bakers and Brewers. See Cattel.

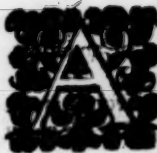


Bb

CHAP.

CHAP. XXXVIII.

Of Butter and Cheese, and Cable-Ropes.

Butter and
Cheese.

As to this, these things are to be known.

1. None but Victuallers and Inholders, for their House-provision, may buy to sell again any Butter or Cheese, unless he sell the same again by Retail, i. a Weight of Cheese, or a Barrel of Butter, or a less Quantity, in open Shop, Fair or Market, and not in gross, under pain to forfeit the double value thereof, *Stat. 3 & 4 Ed. 6.*

Chap. 11. 21. 14.

2. None may get into his hands any Butter or Cheese to sell again, by unlawful ingrossing, *5 Ed. 6. 21. Jac. 22.*

3. But the Traders of Butter and Cheese, Cheesemongers and Tallow-chandlers that have been seven years of the Trade, within the City of London and the Liberties thereof, may notwithstanding the said Statutes buy and sell again in open Shop, Fair or Market, *21 Jac. 22.*

4. None may transport Butter and Cheese. See *Transportation. St. 2 & 3 Ph. & M. 5.*

5. A Weight of Cheese shall be 32 Cloves, and every Clove 7^l. 9 H. 6. 8. See more in *Stat. 18 H. 6. 3. 21 Jac. 22. 5 & 6 Ed. 6. 14.*

Of Cable, Ropes and Halters.

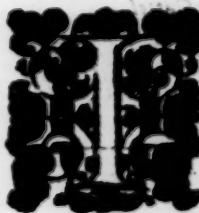
Cables, Ropes
and Halters.

None may make Cables, Halters, or other kind of Cordage of any old or overworn stuff, which shall contain above seven inches in compass; nor Tar any Cordage of such old and overworn stuff, being of less assise, and after sell the same, *35 Eliz. 8.*

No great Cables, Halters, Ropes, and other Tackling for Ships shall be made within five miles of *Burport* in the County of Dorset, nor Hemp sold which shall grow within five miles of that Town, in any place, but in the Town it self, *Stat. 21 H. 8. ch. 12.*

CHAP. XXXIX.

Of Capacity and Incapacity.

Capacity, or
Ability.
Personable.Disability, or
Non-ability.

It is an aptness or power to do, or have and receive, or retain something: As where one is able to give or grant, have or take Lands; or to sue, or be sued. And the person that is so capable, is said to be personable, inabled to grant, give, or take a thing granted or given. And this is opposed to Disability or Non-ability: which being taken largely, is defined to be an Incapacity, Incapability, or Impotencie of some persons for some causes, to have and enjoy some benefit, or do some act which another might have or do. As where one is not able, or

not able but after such a manner to give or grant, have or take Lands; or to sue, or to be sued.

And in this sense Disability is sometimes Absolute; as of an Infant, Man attainted of Treason or Felony, or the like, who are utterly disabled by any way or means to make any Conveyance of their Lands, but that it may be avoided by some body. So the

the son of such a person attain is utterly disabled by any means to inherit any Land from that father. And sometimes it is *secundum quid* only; as that of a Feme-covert, who cannot give or grant but by Fine, and is only disabled to give or grant by Deed: And that of the King, who is disabled to give or grant, or take or receive any thing but by matter of Record: And that of a Clergy-man that hath a Benefice of Eight pounds *per annum* in the Kings Books, who is incapable of another, unless he be first qualified according to the Statute.

It is also distinguished into Disability particular or personal, and temporal, as that which reacheth not unto any other person, and is but for a time only: And perpetual or universal, as that which reacheth to others, and is for ever. And this is caused sometimes by the act of God, as in case of the non-ability of an Ideot, and the like; and sometimes by the act of the Law, as in case of the disability of an Alien or a Monk: And sometimes by the act of the party, as when he is attaind of Felony, or Treason: And sometimes by the act of a stranger, as in case of the disability of an Heir by the Attainder of the Ancestor, *Terms of the Law* Kitch. fol. 214. *Plow.* 27. *Fitz. N. B.* 35. *Co.* 11. 77. 4. 127. 7 H. 7. 7. 16 H. 8. 1. *Co.* 8. 10. *St.* 33 H. 8. c. 29. § 6 *Ed.* 6. c. 13. *Co. super Lis.* f. 3.

StB. 1.

But Disability is taken sometimes more strictly, for an Exception taken against the Plaintiff or Demandant upon some cause why he cannot commence some Suit in Law, and the Defendant saith that the Plaintiff is not able to sue an Action, and demandeth Judgment if he shall be answered. And this is also sometimes Absolute, and sometimes *secundum quid* only. And briefly there are six causes of this Non-ability: As if he be, 1. An Outlaw. 2. Condemned in a *Premunire*. 3. Professed in Religion. 4. Excommunicate. 5. A Vilain. 6. An Alien. But in the last case the disability is only in real actions, and not in personal actions, *F. N. B.* 35. 95. *Terms of the Law*.

Note, persons capable are of two sorts:

1. Persons natural created of God, as *J. S.* and *J. D.* &c.
2. Persons incorporate or politique, created by the policie of man: And these be of two sorts. 1. Sole. 2. Aggregate of many. And these also are of persons capable, as Mayor and Commonalty, Dean and Chapter: Or of persons incapable, as Prior and Covent, &c. And some men have capacity to take, but not to hold; and some to take and hold, or not to hold at the election of them or others; and some to take and to hold both; and some neither to take nor hold; and some specially disabled to take some particular thing, *Co. super Lis.* f. 2.

If an Alien purchase Land in fee for life or years, after Office found, the King will have it, for the Alien is not capable of it to retain it, though he be able to purchase it: But such a person is capable of having and retaining both, a house for his habitation; and therefore he may purchase and hold such a thing. See for this *Alien*, *Co. super Lis.* f. 2.

StB. 2.

Where a man shall be said to be able to do or receive a thing or not, but he shall be said to be disabled or incapable, and how.

If a man commit Felony or Treason, and be attaind thereof, and after Attainder he sell any of his Lands or Goods, this is void, for he is disabled: And if he do it before Attainder, any sale of his Goods or Chattels is good against all men; but if he make any sale of his Lands, that may be avoided by the King or Lord to whom it doth belong by the forfeiture, but it is good against all others. And if a man commit Felony, and after purchase Land, and then is attaind; now though he were not disabled to purchase, yet he is to hold, for the Lord will have it by Escheat. And if a man be attaind of Felony, yet he hath capacity to purchase to him and his heirs, though he cannot hold it, for in this case the King shall have it presently. See *Creon*, *Co. super Lis.* 2. 49 *Aff.* 2. 49 *Ed.* 3. 11.

A Felon.

Attaind.

A sole Corporation, or Aggregate of many, either Ecclesiastical or Temporal, may grant or give away that they have in most cases, as persons Natural may; but they have not capacity to hold and retain Lands, as such persons may, without special licence from the King: And yet such Corporations may purchase; but after they have purchased Lands, the Lord may enter and have it. See *Mortmain*, *Co. super Lis.* 2. 6.

A sole Corporation.

Vilains:

Vilains and Bondmen may do and receive as other men, save only against the Lords; for if they purchase Lands, or buy Goods, their Lords will have them. See *Vilains. Co. idem.*

Infants or Minors.

An Infant or Minor, one under the age of Twenty one years, cannot give or grant away any thing they have, but it will be void or voidable. But such a one, without the consent of any other, hath capacity to purchase, and at his full age he may agree to it, or disagree, and waive it without any cause shewed. See more of this in *Infant. Co. idem.*

Ideots.

An Ideot, or man of non-sane memory, cannot give or grant away any thing he hath, but it will be void or voidable: But such a one hath capacity to purchase without consent of any other, and himself cannot waive it; but if he die in his madness, or after his memory recovered, without agreement thereunto, his Heir may waive it without any cause shewed. See more in *Ideot. Co. idem.*

Hermaphrodites.

An Hermaphrodite may give or grant, take or purchase as another person may do, according to that sex which prevailleth, *Co. idem, & 3.*

A Bastard.

A Bastard may grant or give, purchase or take, as another person may do, after he hath gotten a name by reputation, by that name so gotten. See more in *Bastard.* But if a Lease be to *A. B.* for life, the Remainder to the eldest Issue-male of *I. S.* and the Heirs males of his body, and *I. S.* have a Bastard, this Issue is not capable within this limitation. *Co. idem & 3.*

Persons deformed, &c.

Persons deformed, having humane shape. Lepers, Deaf, Dumb, and Blind men, it seems may take and give as other persons may. See more in *Fair. Co. 3.*

Grants void by incapacity of the Grantees.

No person but one qualified and fitted is capable of an Office: And therefore if the King grant an Office that doth concern the Administration of Justice or the Kings Revenue, or if he grant a Judicial Office to one in Reversion, or a Stewardship be granted to an Infant; these Grants are void, for they are or may be incapable, *Co. 3 b.*

Some are, capable of things to special purpose to give or grant, and not to use; so the King is capable of an Office, *Idem.*

Such as buy Offices or Benefices, are incapable thereof. See *Offices, Advowsons, and Simony.*

Where a man shall be said to be able to sue or to be sued, and where not, but he shall be said to be disabled, and how.**A Vilain.****A person outlawed.****An Alien-Enemy and Amy.****Attaint in Premunire.****A man professed in Religion.****A person excommunicate.**

Women covert may sue or be sued, but their husbands must be joined with them. See *Baron and Feme:*

Ideots, and men of Non-sane-memory, may sue or be sued; also such as be deaf and dumb.

Infants also may sue or be sued, and are not disabled: But if he sue, he must sue by *Prochein amy*; if he defend, it must be by his Guardian.

A Vilain is disabled to sue his Lord in any real or personal Action; but he may sue any other besides his Lord, *Co. super Lis. 127 b.*

An Outlawed person is disabled to sue any Action against any man in any Court of Law or Equity; but it seems any man may sue him, *Co. idem 128.*

An Alien-Enemy is disabled to sue any Action real or personal: An Alien-Amy to sue any real Action; but a personal Action he may sue, *Co. idem.*

A man that is attainted in a *Premunire*, may not sue in any Action, *Co. super Lis. 129.*

A man that is professed in Religion, cannot sue or be sued, *Idem 132.*

A man that is Excommunicate, is disabled to sue in any Court any Action whatsoever, unless the Excommunication were by the Defendant himself, *Idem 134.*

A man that is convict Recusant, is disabled to sue whiles he doth so continue. See more in *Stat. 3 Car. 2. and of Recusants.*

But note, that all these Disabilities continue only whiles the same Impediment doth continue. For after Infranchisement of the Vilain, Reversal or Pardon of the Outlawry, Pardon in the *Premunire*, Dearthment of the party Professed, and Absolution of the Excommunication, the Disability is gone, and the party may sue as another man: Also during that time he may sue in the right of another, as an Executor or Administrator; so the Vilain may sue his Lord, and the rest in the cases before. And therefore a Mayor and Commonalty in their Politique capacity may have an Action

SeB. 3.
How long such Disabilities shall continue.

Action, though the Mayor be outlawed, *Co. super Litem* 128. 12 Ed. 4. 12.

And in a Writ of Error to reverse an Outlawry, Utlary in that Suit or any other shall not disable him in that case, *Co. Idem.*

Also Outlawries in *Chester* and *Durham* are not Disabilities to sue at the Court and London: See more in other places.

CHAP. XL.

Of Captives, Castle, and Cattel.



Or Redemption of Captives, and preventing their taking in time to come, See the Act, *March 26. 1650. 16 & 17 Car. 24.*

of a Castle.

A Castle doth sometimes signifie a strong House or place of defence; and sometimes it doth signifie one or more Manors, *Castle, what.*

Co. upon Lit. 5. For this,

1. What Purveyance, and in what manner shall be made to victual a Castle. See *Stat. 9 H. 3. 19. 3 Ed. 1. 7.*

2. What is to be, and by whom, for the erecting, maintenance and using of several Castles, Fortresses and Bulwarks, See *Stat. 4 H. 8. 1. 2 Ed. 6. 16. 2 & 3 P. & M. 1. 28 Ed. 1. 7. 4 H. 4. 31. 33. 13 R. 2. 15.*

Castelain was sometimes taken for the Owner or Captain of a Castle, who sometimes also was called the Constable of the Castle. *Castelain, what*

Castle-guard is a Tenure or Imposition laid upon such as do dwell neer a Castle, towards the maintenance of such as keep Watch in the Castle, which was a kind of Knights service. For this, *Castle-guard, what.*

1. Who shall be bound to this Tenure, and for what time he may be discharged thereof, See *Stat. 9 H. 3. 20.*

2. The Tenants of the Castle of *Dover* that hold by this Tenure, are to pay their Rents at the Exchequer yearly, *Stat. 33 H. 8. 18. See Westm. 17 Ed. 3.*

of Cattel.

For Cattel, these things are to be known.

1. None may buy any Cattel, and sell them again alive, until he have fed them five weeks in his own house or ground, or where he hath Common, under pain to lose the double value thereof, *Stat. 5 & 6 Ed. 6. 14.*

2. None may buy any Cattel but in open Fair or Market, nor may he sell the same again any where in the same Fair or Market, under pain to forfeit the double value thereof, *3 & 4 Ed. 6. 19.*

3. Any person may buy Oxen, Steers, Runts, Kine, Heifers or Calves, for their provision for Household, Teem, or Dairy, or otherwise, in any Fair or elsewhere as they please, *3 & 4 Ed. 6. 19.*

4. Spiritual persons may not buy Cattel to sell again, but in some special cases, *21 H. 8. 13.*

5. Drovers that buy and sell Cattel, must be licensed, and how. See *Chap. 27. b.*

6. Any man may keep upon his own Lands or Liberties of Foldage that he hath, any Estate in use, or possession of Inheritance, or for life, as many Sheep as he will. But Farmers and Renters of great Farms may not have or keep at one time above Two thousand Sheep, (120. to be accounted to the Hundred) of all sorts, besides Lambs

Lambs under a year old, under pain to forfeit Three shillings four pence for every Sheep, unless it be Sheep for the provision and expences of their houses: Or where one is made Executor, or is married to a Wife, where the Testator hath left, or Wife had more then Two thousand Sheep; and there they must dispose of the overplus by the space of a year: Or where Sheep are given to a Child by Will, and the Will is, they shall be kept for him, 25 H. 8. 13. See in the Statute an Order for the Fold-courses in *Norfolk* and *Suffolk*.

7. He that doth keep above an hundred and twenty Sheep the most of the year upon his own several inclosed grounds, (and not upon Commons fit for Milch Kine) shall, so long as he shall keep and feed them, for every sixty Sheep keep and feed yearly one Milch-Cow, and for every Hundred and twenty Sheep shall raise yearly one Calf, under pain to lose Twenty shillings for every moneth he shall not keep such Cows, and for not raising every year a Calf, *Stat. 2 & 3 Ph. & M. ch. 3.*

8. And he that shall keep and feed upon his Pastures above twenty Oxen, Rants, Shrubs, Heifers, or Kine, shall for every ten Beasts keep and feed yearly one Milch-Cow, and for every twenty so kept shall raise yearly a Calf, under the pain aforesaid. But the Sheep and Cattel men keep for provision of their houses, are not to be reckoned amongst the number.

9. The Statute of 2 & 3 Ph. & M. 3. shall also extend to Grounds, which since the said Act have been or shall be made several, *St. 7 Jas. 7.*

CHAP. XLI.

Of Causes and Effects, Certainty and Incertainty.

Causes and Effects.



He Law in most cases hath much respect to the cause, original, and foundation of things; and in some cases none at all. As if one whiles that he is a servant have an intent to kill his Master, and after depart out of his service, and then kill him, this is Petty-treason by Relation. So if a man *de non sane memorie* give himself a deadly wound, and after come to himself again, and die by that wound, he shall not be a *Felo de se*. So if a Covenant be to make a man a Lease for years, and the Covenantee die before the Lease be made, and then the Lease is made to his Executors, this shall be accounted Affets. *Causa & origo est materia negotii*. And for this cause it is, that an Outlawry in Felony, is a Forfeiture of a mans Land: And so it is not in Trespass; for albeit the not appearing be the next cause of both, yet in the first cause they do differ, *Co. 1. 99. Plow. 292. Co. 2. 92.*

Felo de se.

Affets.

Tythe.

If Timber-trees that are not tithesable become rotten and dry, *non portans fructum nec folia in astate, nec existens macie minus*; yet their privilege doth remain, and they are Tythe-free still. So if an Estate in tail become an Estate in tail after possibility of issue extinct, yet many of the Privileges annexed to the first Estate remain still. And hence appeareth, that effects do sometimes continue when their causes are gone. But for the most part these Rules hold, *Sublata causa tollitur effectus, & cessante causa cessabit effectus*: As when a Guardian in Socage dieth, the Wardship of the Infant shall cease, and not go to his Executor; So if one give Land or Goods with his Daughter or Kinswoman in Marriage, and after they are divorced, now she shall have all the Goods again that are not spent. So if one enter into Religion, and make his Executors, and after be arraigned, he shall have the Goods again that remain.

Guardine.

Husband and Wife.

Office.

If the King grant an Office at will, and also Forty pounds Fee to him for his life, *pro Officio illo*: In this case if he put him out of the Office, the Fee shall cease. If a Rent be granted for a Way, stop the Way, and the Rent shall be stopped.

If an Annuity be granted *pro consilio*, or *pro servitio impendendo*; if the Counsel or the Service be withdrawn, the Annuity is determined.

It is not a principal challenge to a Juror, that he hath married with the Mother of the party, if she be dead without issue; for the cause of favor is removed. Challenge.

If one give a man a wound the first of May, and the King the second of May pardon to him all Felonies and misdemeanors, and the third day of May the party dyed of this stroke; by this Pardon the Felony is discharged. But yet, *Sublata una causa, si alia remanet, non tollitur effectus.* Pardon.

In case of Soccage-Tenure, whereas in times past the Tenants did use to ear the Demesns of the Lord with their Ploughs, the which service was afterward changed into an Annual Rent by consent of the Lord and Tenants; in this case notwithstanding the Lord do alien his Demesns, and have no Land to plow, yet the Tenants shall pay their Rents yearly to the Lord.

Where one doth hold by Rent for Castle-guard, although the Castle fall, yet the Rent doth remain. And albeit the Religious Houses be dissolved and suppressed, yet the money that is paid in lieu of Proxies by the Owners of those Houses remain, *Co. 11. 81. 48. 49. 1. 98. Pla. 293. Dyer 13. Co. super Lit. 204. 208. 5 Ed. 4. 8. Dyer 76. 9 Ed. 4. 10. 15 Ed. 4. 14. Dyer 2. Davis Rep. 1. 13 Ed. 4. 10. 14 H. 7. 2. 1. 401. Davis Rep. 3. Co. 4. 88.*

A. leaseth White-acre to *B.* for life, *B.* doth make waste; *A.* doth grant the Reversion to *C.* *B.* doth attorn: *A.* cannot have an Action of Waste, because the Reversion in respect of which it is given, is out of him. So if there be Lord and Tenant, and the Tenant alien in *Mortmain*, and then the Lord grant the seigniority to a stranger, and the Tenant attorn; in this case the Grantor shall not enter for the *Mortmain* (albeit it be within the year,) because the Seigniority in respect of which the Entry is given, is out of him, *Perk. f. 20.* Waste. Mortmain.

Of Certainty and Incertainty.

Certainty is the plain, clear, and distinct setting down of things, and is said to be the mother of Repose; and is opposed to Incertainty, (i.) when a thing is so ambiguously and doubtfully set down, as one cannot tell how to take or understand it; and this is said to be the mother of Contention. And this Certainty is of three sorts. Certainty and Incertainty.

1. To a common intent; and that is sufficient in a Bar in pleading, which doth defend the party and excuse him; and this is sufficient in Deeds.

2. To a certain intent in general; and this is required in all Counts, Declarations, Replications, and Pleadings of the Plaintiff, and Indictments to convince the Defendant.

3. To a certain intent in every particular: And this the Law doth altogether reject; for *Nimia subtilitas in iure reprobatu, et talis certitudo certitudinem confundit. Co. 5. 121. Plow. 25.*

The Questions of Certainty and Incertainty grow upon Records; as Writs, Counts, Pleas, Replications, Verdicts, Offices, Retorns, Fines, Recoveries, and such like: And Writings; as Feoffments, Gifts, Grants, Leases, Wills, and the like, and Tenures, Warranties, and other things. But in all these things this Rule is admitted; *Id certum est, quod certum reddi potest.* And therefore if one lease his Land in *W.* rendering Rent for every Acre twelve pence; this is a good Render enough, for this may be made certain. So if one hold his Land of his Lord, to shear all the Sheep depasturing in the Lords Maner, this is a good Tenure, for here is a certainty in an uncertainty, *Plow. 6. 7 Ed. 3. 8. Co. super Lit. 96.*

A convenient Certainty is required in Writs, Declarations and Pleadings, and especially in Writs, more then is in Writings: For if a Writ be abated for Incertainty, the Plaintiff may have another Writ; but if his Deed be avoided for Incertainty, he cannot have a new Deed at his pleasure, *Co. 11. 25. Co. 5. 21. Dyer 84.*

If the King grant by Patent *Cognizans de Plea*, and say not *ubi, nobiscum ipso*, this is it seems void for Incertainty, *Br. Patent 200.*

2. When, and what Certainties require; and where Incertainty will hurt or defect. In Record.

In a Verdict. If an Action of Debt be brought against Executors, and they plead they have fully administred, &c. and the Jury find they have enough in their hands, and say not to what value; this Verdict is void and insufficient for Incertainty, 40 Ed. 3. 15. Co. 9 74. b.

In Writings. Writings are sometimes void for Incertainty in all, sometimes in part only; and sometimes not, but the Incertainty may be holpen and made certain by Averment or other means. And this Incertainty is sometimes in persons, and sometimes in things; as in a Grant, in the person of the Grantor, or Grantee. In the thing granted, either in respect of the place where it is, the quantity or quality of the thing, or name whereby it is called; sometimes in the estate, sometimes in the time, sometimes in the manner. As if I. S. by the name of I. (without any Sir-name) do grant, or give, or take by this name; this is void by Incertainty: So if the party be named by his Sir-name only, without any Christian name. So if a Grant be, To the Church-wardens of S. without any more; or, to God, to Church, or Poor, or to three or four of a Parish, not naming them; or to one of the sons of I. S. and he hath many sons; or to him that shall be the first son of I. S. and he hath then no son; or to the Monks of such an Abbey; or to I. S. or I. D. in the disjunctive: All Grants made after this fashion are void for Incertainty, *Perk. sect. 39. &c. Plow. 6. Co. 8. 155. Perk. sect. 54. 55. 56. See Deed.*

If I grant to one so much Wood in such a place, as I can spare, or can be spared; or if I have a Wood of an hundred acres, and grant to one ten acres of it; and do not say where, or what part of the Wood: Or if I have a Manor, and grant the ten acres out of the Manor, but do not say where: Or if twenty Tenants hold of me by the Rent of twelve pence apeece, and I grant ten shillings to perceive out of their Tenements, or ten shillings parcel of the twenty shillings: Or if I grant a Corody or Estovers, and say not where, nor what in certain; or if I grant Land, and say not in what County nor Parish: In all these, and such like cases, the Grant will be void for Incertainty, *Dyer 91. 28. H. 6. 12. 9 Ed. 4. 11. Fiphol's Ley 13.*

If I give a Horse to I. D. being present, and say to him, I. S. take this, and his name is I. D. this is a good gift, notwithstanding this mistake and miscalling. But so it had not been; if I had delivered it to a stranger to the use of I. S. when I meant I. D. So if I say to I. S. Here I give you the Ring with the Ruby, and deliver it with my hand, and the Ring bear a Diamond, and no Ruby; this is a good gift. And so had it been by word or writing, without the delivery of the thing it self, if I give the Ring with the Ruby, and have none such, but one with a Diamond. But I doubt this last Case.

If I grant to two men & hereditaries, and do not say [to their heirs:] And if I be possessed of a Term of years, and grant all the residue of my Term which shall be come at my death: In all these cases it is void for Incertainty, *Co. 1. 55. Kely. 108. Plow. 520. Bro. 417.*

3. When not, but may be holpen by Averment or Election. It is not necessary one should set down the Certainty of a thing in pleading, when either it is not possible so to do, or it is a thing out of his knowledg, or unto which he is a stranger that doth plead it, or of which in common presumption he can have no certainty, *Plow. 128. Co. 4. 89.*

If a Fine be levied to I. S. the son of M. S. and he have two sons of that name; this may be holpen by Averment, and is good enough.

In Writings. If the King by his Letters Patents grant to another all the Manors and Advowsons that did belong to the Priory of H. or all the Manors and Advowsons that were I. S. which were attaint, &c. These be good Grants, although it be not set down in what County it lie, 32 H. 6. 20. Co. 9. 47.

If the Duke of Buckingham by that name be Grantor or Grantee in a Grant, this is good and certain enough, without any Christian or Surname, *Perk. sect. 36.*

If the name of the Father be I. S. and the name of the Son I. S. also, and one of them grant by the name of I. S. without any addition or distinction, this is good enough, *Perk. sect. 37.*

If an Abbot had granted by the name of his Foundation, this had been good.

If a Grant be to the Bishop of Worcester, without any more, this is good enough, *Perk. sect. 45.*

If one grant to the first son of *J. S.* without any more addition, and *J. S.* have two sons, this is good enough. *Perk. sect. 34.*

If an Estate be granted to *J. S.* the Remainder to him that shall come the next morning to *Pauls*: If *J. S.* the Grantee do live til then, and one do come there that is capable, this is a good Remainder, and certain enough. So if the Remainder hath been limited to him that *J. S.* shall name within three days, if he do name, this is made certain. *Perk. sect. 36.*

If a Lease be made to a husband and Wife for One and twenty years, the Remainder to the Survivor of them for One and twenty years: Or a Gift in Tail be made to the Husband and Wife, and the Heirs of the Survivor of them; this is good enough. *Co. 10. 51.*

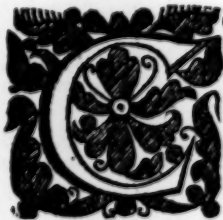
If one grant his Manors of *A.* and *B.* and say not in what County or Parish; or lease all his Land in the Parish of *A.* and say not in what County; or lease or grant all his Land descended to him from his Father, with more; or grant another a Robe, or a Rent of Twenty shillings, or one of his Horses in his Stable (having many there) or Twenty Loads of Ash, or of Oak in such a Wood; these Grants are good enough, and may be made certain by Election. So if one grant to another so many Trees in his Wood as *J. S.* shall say may be spared, *Co. 9. 47. Plow. 191. Co. 2. 37. Dyer 91.*

If I make a Lease to another for so many years as *J. S.* shall name, this is good, after he hath named. So if I make a Lease to begin after the Surrender, Forfeiture or other determination of a former Lease, this is certain enough. So if I make a Feoffment to one of Two acres of Land, *Habendum* the one for life, the other in tail, this is good enough. *Plow. 6. Co. 6. 36. 8. 56. Co. 2. 37.*

If one bind himself in an Obligation to pay me all such money as his Brother oweth me; this is certain enough, for that by Reference and Averment it may be made certain, *Morgan vers. Johnson, B. R. P. 39 Eliz. See Dred.*

CHAP. XLII.

Of the Chancery.



Conscience or Equity (as our Law takes it) is said to be *Tacitum animi infallibileque facti nostri iudicium, à communi iustitia formula quam Deus insculpsit omnibus hominibus productum, per quod accusatur res mala, & defenditur bona.* And this being a ded and assisted by the Laws of God, Nature, Nations, Reason, and our Country, is the Rule by which they go and proceed in their Courts of Equity, to allay, qualifie, and temper the rigor, severity and sharpness of the Common-Law in some special cases: Wherein, if it be strictly observed, it will fall out to be *summum jus*, and consequently *summa injuria*.

In these cases there are Courts of Equity appointed; and amongst these especially the Chancery, which is the chief Court, *West. Symb. lib. 2. Doct. & Stu. in toto.*

The Chancery is defined to be, A Court of Equity or Conscience, moderating the rigor of other Courts that are more strictly bound to the Letter of the Law, *3 Ed. 4. 15. 19 Ed. 4. 2.* In this Court the Lord Chancellor or Lord Keeper was, now the Commissioners of the Great Seal are chief Judges: And herein they,

Cc

sect. 1.
Conscience or
Equity, what
it is.

sect. 2.
Chancery, what
it is.

and

and in their absence, the Master of the Rolls, do make Orders and Decrees. And under these there are many other Officers belonging to this Court; as the twelve Masters in ordinary, which are Assistants, the six Clerks, Examiners, Serjeant at Arms, and others: These Commissioners keep the Great Seal, and seal all Writs and Patents, *Plowden, fol. 213. Crompton, Jurisdiction of Courts.*

Self. 3.
Of the power
of this Court
in the general.

This Court is said to have a twofold power. Ordinary, as in cases of Traverse, Endowment of a woman, *Scire facias*, to repeal Patents, and the like; and herein the Court is limited and confined to the Rules of the Common-Law, *Cary's Rep. 50. 71.* And Extraordinary and unlimited, which is in cases of Equity, wherein relief is to be had by a Suit here in a way of Bill and Answer: And it is by the power of this Court, that Commissions of Charitable Uses, Bankrupts, and Sewers are issued forth: Also here in some special cases, a *Superfedeas* or *Subpoena*, or Privilege is granted to discharge a man out of Prison: A *Subpoena* may be had to force Witnesses to appear in other Courts, that have no power to call them in to testify their knowledge; as in London, when the man lives within its Jurisdiction, *Car. Rep. 37. 43. 44.* So here sometimes, and in some cases, Commissions have been granted to examine Wastes; To prove a Child legitimate; To set out meet ways for passages; To prove Customs; To examine Witnesses *in perpetuum rei memoriam*, *Tot. in toto: Car. Rep. in toto.*

By way of Bill and Answer it will give relief in many cases against, besides, and beyond the Rules of the Common-Law, in such like cases as these: As to enforce others to contribute to a Charge by the Common-Law put upon one alone, to the which others ought in Equity to contribute a part, *Tot. 41.* To relieve one against a man that hath falsified and broken his Trust with him. To relieve one against a man that holds him to extremity, upon an Engagement: As when the Engagement is unreasonable, dishonest, impossible, discharged, voluntary, and without any consideration; gotten by practice, fraud or force, or the like. To relieve one against the extremity of a Forfeiture, *Tot. 26. 27.* To enforce the performance of an Agreement, to which by Law a man cannot be compelled, *Tot. 4. 69.* To have the Tuition of a Child that doth belong to him, *Car. Rep. 96. 97.* To force an Enrolment of a Deed, if need be, *Car. Rep. 97.* To recover a liberty of common Fishing, or the like; and upon every Interruption, and an Affidavit thereof, an Attachment may be had, *Car. Rep. 104.* To restrain other Courts that take upon them a greater Jurisdiction than they have, and to remove the Suit into this Court, which may be by a *Certiorari*, *Car. Rep. 60. 56. 48. 65. 68. 73. 74. 82. 84. 85. 89. 90. 92. 95. 96. 97. 99. 102. 109. 37.* To stay the proceedings of other Courts, when they are unjust, *Car. Rep. 73.* To enforce obedience to the Decrees of the Provincial Councils, Court of Requests, and some other Courts, when by contumacie they are disobeyed. To reduce the general Customs of a Manor to a certainty between the Lord and Tenants, or the Tenants themselves, *Car. Rep. 21.* To recover and settle Land or Money given to charitable or pious uses, and mis-employed, *Tot. 27. 28.* To force a man to give his wife Alimony, (i.) Maintenance, *Tot. 93. 94.* To force Creditors to take a reasonable Composition of their Debtor, he being disabled, *Tot. 47.* To ascertain and find Common, *Tot. 36. 37.* To ascertain and set out a way, *Tot. 23.* To ascertain, to distinguish a mans Land when it is compounded and confounded with another mans, *Car. Rep. 16.* especially when it is to pay Debts, or the like, *14 Jac.* So when Free-land or Copihold-land are confounded, it will distinguish; or if it be lost, give a recompence for it, *Pickering's Case, 5 Car.* To ascertain the Fines of Copiholders, *Tot. 49.* To force an Action to be tryed in any County, *Tot. 1.* To force Executors or others that have money in their hands, there to lie long to give security or interest for it, *Tot. 6.* To examine the Probate of a Will, especially if the Will concern Land, *Tot. 139.* To recover a Legacie, or force the performance of a Will, *Tot. 24.* To recover Tythes in Kind, or money for it in some cases, *Tot. 68. 184. 185.* To recover ones Land, Debt or Duty, although he have lost Conveyance or Writing, by which he should make his Title to it, or otherwise be without remedy at Law for it, *Tot. 81. 6.* To force a man that hath taken money for Land, assured by defective Conveyance, to make the same perfect and good, *Tot. 14. 3. 42.*

To

To force a Tenant to attorn to perfect an Assurance. To force a man to prove payment of money, agreed and acknowledged to be given upon a Sale of Land, *Tot. 15. Dyer 59.* And in these and such like cases this Court doth always, or for the most part give relief.

Also in some other special cases this Court doth exercise a power : As to prevent a Disinheritance of an Heir, or restore it, *Tot. 42. 81.* Avoid an Extinguishment or Suspension of Rent or Common, *Crompt. Jur. 49, 50. Tot. 42. 188. 137.* Prevent an Occupancy, *Hunts Case, 17 Jac. Tot. 187.* Avoid the Bar of an Action, by the Statute of 21 Jac. of Limitation, *Tot. 53. 179.* Order an Executor to pay a Debt out of course, *Tot. 53.* Make Inclosures of Land and Grounds that are common : Give relief against the turning of a Water-course from a Mill, so as there be any special circumstance in the case, otherwise it is very thie and tender of making Orders in them. But if the substance of the Suit by Bill and Answer, be to overthrow an Act of Parliament made for publique peace and repose ; or to overthrow a fundamental point of the Common-Law ; or to overthrow and take from other Courts their peculiar Jurisdiction, or the like : In such cases regularly this Court doth not give relief, *Tot. 47. Crompt. Jur. 45.* So likewise if it be such a case as wherein the Plaintiff hath his remedy at Common-Law for the very same thing, he shall not be relieved here. But if one promise to assure me Land for twenty pounds, I may either sue at Law for damages, or here for the Land it self So for a Nuisance, where the Law gives me damages, I may sue here to have the Nuisance removed, or the thing it self restored, *21 H. 7. 41. Cary's Case, 20. 53. 11.* And yet there may be some special circumstances in the case which may make the Court retain it, *Cary's Rep. 71.* If the Suit be grounded on a Will Nuncupative, Lease-parol, or long Lease, to avoid Wardship, or to establish Perpetuities, or to defeat Purchasers, or for Brokage or Rewards to make Marriages, or for Bargain at Play or Wagers, for Bargains for Offices against the Statute of 2 Ed. 6. or upon Contracts for Usury or Simony ; or if it be for Land not worth Forty shillings a year, or for any thing else under the value of Ten pounds ; these are regularly disallowed here : And sometimes upon notice taken hereof by the Court, upon Motion or upon Affidavit only, before the Cause comes to hearing, it is dismissed : But if not, when it comes to hearing it is dismissed, *Cary's Rep. 7. 8. 37. 24. 76.* Yet circumstances may make these retainable ; as if the Suit for so small a matter be for the Poor of a Parish, or the like, *Cary's Rep. 103.*

And in these cases the matter being heard upon the Bill and Answer, and the proofs of Witnesses, the Judges are (without any regard to form or mispleading, so as the truth *vis & modis* may be discovered) to sentence it according to Equity and Conscience. But we shall descend to particular illustrations hereof.

All persons able in Law to sue or be sued, may sue, or be sued here : And for this see Chap. 3.

Relief may be, and is often given against, or for an Infant in this Court. As touching which matter these things are to be known First, as to Suits against an Infant,

1. An Infant was compelled to answer to a Bill in this Court, *Hares Case H. 3 Jac. and Mores Case, 11 Car. Tot. 108, 109, 95, 97.* And being but twelve years old, was bound by a Decree here, *37 Eliz. Wadhams Case ;* and upon a Review decreed again, *Cromwells Case, M. 7 Car. Tot. 70.* And was committed to the Fleet for disobeying a Decree, *12 Eliz. Tot. 108. 139.*

2. The Court may also, if it pleaseth, appoint an Infant defendant a Guardian to defend his Suit, *Cary's Rep. 38.*

3. A Copihold was surrendered to the use of an Infant, to the Infant, to pay an Annuity to another at his full age, which he refused : It was decreed he should pay it and the arrears thereof, *Sawyers Case, 9 Eliz. Tot. 107.*

4. *Young* purchased Lands in the name of *Mason*, in trust for himself and his heirs, and dies, not declaring any determination of this Trust, procures *Mason* to convey it to him, being of Kin ; he conveys it to Infants ; *C.* sues here as next heir, and the Court agrees, that if the benefit of the Trust did belong to *C.* that it shall be decreed to him during the Minority, and then that the Infants shall convey it, *Cary's Rep. 30.*

Self. 4.
By and against
what persons,
and in what
Cases relief
may be had in
Equity, or not.
1. In respect of
the persons for
or against
whom it is to
be had.
Infant.

Tailed Land.

5. A mother conveyed her Lease to her son in trust, and after the son conveyed it to his children Infants; and it was decreed against the father and children, because done without any consideration, *Tothill* 98.

6. The Lord *Morley*, between the date and sealing of the Conveyance of Land sold, passed it to an Infant; and it was decreed against the Infant and him both, 36 *Eliz.* Lady *Russels* Case, *Cary* 30. 81.

7. The Father being Tenant in Tail, sells his intailed Land, and leaves as much Free land to descend to an Infant; the Court ordered, when he comes of age, to pay the money given for the Land, according to his Fathers Will, or else that the Purchaser shall have the Free-land, *Tothill* 184.

8. It seems he may be here compelled to give a Discharge of money due to, and received by him, *Rayners* Case, 13 *Car.* *Tothill* 109.

9. One made an Infant Executor, to prevent the payment of his Debts; and he was ordered by the Court to pay them notwithstanding, *M. 9 Jac.* *Tothill* 108.

Agreement.

10. An Infant in some special cases may here be concluded by his Agreement: But regularly, if an Infant be twenty years of age, and make a Contract never so much to his advantage, the Court will not conclude him; nor will the Court decree against him by his consent, or the consent of his Parents, but in some special cases upon the merit of the Cause, *M. 8 Car.* in *Chancery*, *Tothill* 109. 95. As a father was about to convey some of his Land to his younger son, and his eldest son promised to give the younger son an hundred pounds to forbear it; in this case the eldest son being an Infant, was ordered to stand to it. See *Stiles* Case, 2 *Car.* *Tothill* 95.

11. A Surrender was made of a Copihold by an Infant, to the use of *J. S.* for money paid, and no help could be had here, *Hughs* Case: *Tothill* 180.

12. If I take Bonds for my money in my childrens name that are Infants, I may release the Debts, and this Court will allow it, and forbid any Suit upon them, *Simonds* Case. *Tothill* 26.

For an Infant.

Secondly, As to Suits by or for an Infant. 1. He shall have the same Relief upon a Breach of Trust, Fraud, or the like, in this Court, as another man may have, notwithstanding his Minority, *Tothill* 108. 2. He may sue by himself, or by his Prochein-Amy or Guardian, as the Court will give leave and order, *Woods* Case, *Hil. 2 Car.* *Tothill* 9.

Husband and Wife, woman-covert.

Sect. 5.
Against her.
Answer.
Decree, Commitment.

Relief may be, and is often given here against, or for a woman that hath a husband, as touching which these things are to be known. First, as to Suits against her,

1. She shall be compelled to answer with, or without her husband. *Batsons* Case, 14 *Car.* *Mores* Case, 11 *Car.* and *M. 5 Car.* *Palmer's* Case, *Caryes* Rep 100. 101. *Tothill* 95, 96. especially if he be out of the Land, *Tothill* 97. 140. And she will be bound by the Decree of this Court, *West deans* Case, *Tothill* 93. and may be committed till she do obey it, *Stywards* Case, *Tothill* 92. *West-deans* Case, *Tothill* 93.

2. The husband sold Lands and Debts which were due to the wife before coverture, and took Wares for it; he dyed, she survived, and he released the Debts; it was ordered against her, *Tothill* 91.

3. The husband and wife were ordered to levy a Fine, and perfect Assurances, *Tobill* 93. 6. The husband was ordered to give security, that the wife should release her right to Land, *Tothill* 92.

Agreement.

4. An Agreement in some cases will here be ordered to conclude her, *Stiles* Case, *Hil. 2 Car.* *Tothill* 97. 95. where the merit of the cause requireth it. As if a man have two Tenements of his wives Land, and they agree with the Tenant, That if he will surrender one, he shall have three lives in the other; and he doth so, and the husband die; the wife was ordered to make it good, *Irelands* Case, 37 *Eliz.* *Tothill* 91. But regularly it is otherwise: And therefore where she hath Land with other Co-heirs, and she with the consent of her husband agree to take One thousand pounds to release her right; the Judges did certifie, she was not to be concluded, *Trin. 7 Jac.* *Dockwrays* Case, *Tothill* 98. Yet, 10 *Jac.* *Randals* Case was, That a single woman did agree, and after her marriage subscribed her name with her husband to a latter Agreement, and was concluded by this latter by the Courts Order, *Tothill* 96. But in *Slaters* Case, 37 *Eliz.* *Tothill* 92. she and her husband did article to forgo her

Jointure

Jointure for other recompence; and a Decree was made thereupon (but without her consent) in her husbands life-time; and after his death the Court would not bind her to this Agreement, *Totbill* 92.

5. A Lease of Land was made to friends to her use, to begin after her husbands, and they two levy a Fine of the Lands; this will bar them in Equity, *Trin. 15 Car. Lifters Case, Totbill* 84.9: *A.* made over his Lease for years to the use of *C.* his wife; after he and his wife sold the Land, and levied a Fine of it to *D.* The Court ordered, that the Purchasor should enjoy the Land against the wife after her husbands death, 2 *Car.* One was seised of Land to the use of a *Feme-sole*, who after took a husband, and the husband sold the Land; the wife had the money, and she and her husband desired the Feoffee in trust to convey it, and he doth so: Yet it seems this Court will not bar her of the Land after her husbands death. The Court ordered the husband and wife to levy a Fine of mortgaged Lands settled in her, *Lord Griffins Case, 4 Car.* To bring in Evidences, *Kings College Case, 4 Eliz.* Forbid her to make Waite, *Totbill* 92. 10. One did convey Land to the husband in trust, and he took the profit, and left it with his wife, and she marry again: They two were sued here, and yet neither as Executor nor Administrator to a first husband, *Arklands Case, Totbill* 106.

Trust barred.
Fine.

As to Suits by and for her,

1. In some cases she may sue her husband, as for Alimony and Maintenance, where they be parted: But ordinarily in other cases she may not sue her husband, nor her husband sue her, *Simpsons Case, Tot.* 94.97.

For a woman;
Alimony.

2. She hath been allowed to sue, without her husband, and without his privity, especially he being beyond the Sea, *Tot.* 95.94.97. The woman and her husband agreeing to part upon difference, and he giving her a sum of money for her livelihood, which was put into a friends hand for her; she was allowed to sue alone for this without her husband, *Cary's Rep.* 87.

3. She was admitted to sue here for a Duty released by her husband gone beyond Sea, *Farewells Case, 32 Eliz.* and *Bakers Case, 5 Car. Tot.* 95. As for her Jewels, 13. *Earl of Derby's Case, Tot.* 96. And yet she having goods she pretended to be her *Paraphernalia*, the husband devised them, and it was here allowed to be good, and she remediless, *Davenports Case, 5 Car. Tot.* 79.

Devise by her
husband.

4. If a woman had goods at the marriage, and the husband doth use and dispose them all his life-time, and then giveth them away, or make an Executor; this Court it seems will give her no relief, albeit he leave never so great an estate besides; unless they be goods set apart and preserved for her livelihood, by some agreement, or the like. *Totbil.* 55.

5. A woman divorced from her husband *Causa frigiditatis*, sued here for her portion her father being alive, and recovered it, *Barrows case Tot.* 81.

Devise by her

6. The wife being parted from the husband, and having an estate to her self, was allowed by the Court to devise it by her will, *M: 15: Car: Tot* 97. *Georges case.*

7. If a *feme sole*, being possessed of a term, granteth it over, or a term be granted by another to her own use, and then she taketh a husband, and dyeth; in this case the Court ruled it to go to the Executor or Administrator of the wife, and not to the surviving husband. *Pasch: 32 Eliz: Withnams case in Chancery, Coe: upon Litt: 351.* Where the case was, *A* being possessed of a term, granted upon a marriage to be had between him and *K S*, to *J. S* her brother, to her use; and after marriage *A* dyeth; and she marieth again, and then she dyed; *J. S* the brother took out Administration of her goods, and got the Lease, and the second husband sued him in this Court for the Lease, but the Court would not relieve him, *Withnam vers. Waterhouse.*

Trust how ordered between
husband and
wife.

8. *A.* being possessed of a Lease for years, granted it to *B.* and *C.* to the use of *A.* and his wife; and after *A.* granted away all his Interest to a stranger, and the Court would not order it against the wife, *Dyer* 369. *Crompt. Jur.* 65:

9. *A.* conveyed her Lease for years to Lessees in trust, to the use of her daughters and children lineally: *A.* had a daughter by one husband, who had issue, and it dyed, and the husband also; then she marries again; then the Lessees in trust convey the Lease to the mother and her second husband, and discharges the trust; she gives it to her

her husband, and the heir sued for it : It was ordered, that the husband, and not the heir should have it, *Baskervilles Case, Tot. 95.*

10. A widow being about to marry, to prevent her husbands disposal of the Land, conveys it to friends in trust, who with the husband do sell it for valuable consideration, and she sued here : Decreed that the Purchaser should reconvey it to her, but should first deduct all his disbursements, *Fitzjames Case, Tot. 43.*

A Feme-sole.

A single woman, widow or maid, may sue and be sued here as another body ; wherein take these Cases.

Dower.

1. A widow of a Tenant in capite sued here for her Dower, and had a Commission to set it out, *Wilds Case, 25 Eliz. Tot. 82.*

2. But no woman shall recover Dower of a Trust here, *M. 2 Car. Kemps Case, Tot. 99.*

3. When she cannot tell who is Tenant to the Land, she may sue, albeit her Writ of Dower lieth at Law to discover the Tenant, to know against whom to bring her Action, *Tot. 99.*

4. A convey Land to B. and his heirs, to the use of him and his heirs in trust, for C. and his heirs, (B. having then a wife) B. die, and his wife sued for Dower of the Land : C. sued against her for relief here, but it was denied ; yet the wife of C. should not have had Dower in this case, for a woman shall have no Dower of a Trust, *Herns Case, Tot. 99.* So A. delivers B. Five hundred pounds to put to use for him, and B. doth buy Land with it, and makes A. believe it is for him and in his name, but it was in his own name : A. it seems satisfied herewith, B. dieth, and his wife sueth to be endowed of the Land ; and the Court could give A. no relief against this Suit, *Trin. 6 Car.* In the Court of Requests, if a woman-Executrix subject to a *Devassavit*, marry a husband, if he have not to satisfy, he shall be imprisoned by order here, *Cary's Rep. 24.* A Copiholder, it seems, may not be sued for the Land without the Lord, *Cary's Rep. 57.*

Heir.

An heir also here in some cases shall sue and be sued further then the Law bindeth him ; as in these cases.

1. An heir of an Estate in Tail having Lands in Fee descended from the Ancestor, in lieu thereof is bound by Decree to repay the Purchase-money, or let the Purchaser have the Free-land, *Pierces Case, 8 Jac. Tot. 184.* The mother and son bought tailed Land of *Hearl*, Ancestor to the Plaintiff ; some of the money due on a Bond which is lost : The Court thought fit to charge the mother and the son, because of the Land in their possession, *Hil. 1 Jac. Cary's Rep. 25.*

2. A dumb man was ordered to answer here, *14 Car. Tot. 40.* And yet *22 Eliz.* a man both senseless and dumb, was ordered not to answer, *Tot. 92.* It is then to be ordered according to his capacity.

3. The father sold his intailed Land, and suffered a Recovery, but had little for them ; it seems the Heir may compel the Purchaser here to give the worth, *Tot. 182.*

Agreement.

4. The father articulated for Land, the son no party, but consented to it, and it was agreed against him, *Pools Case, Trin. 4 Jac. Tot. 69.*

5. A Deed not enrolled was decreed against the Heir of the Land, *Tot. 55.*

6. The father conceiving his Land to be Freehold, gave part of it to a younger son, and it fell out there was an old sleeping Deed of Intail ; and yet it was ordered the younger son should have it, *Pountneys Case, Tot. 54.*

Executors.

Executors may charge or be charged in Equity further than the Law doth charge : wherein first as to Suits or Acts by them, take these things.

For them.

1. Here they may sue one another, *Tot. 8.*

2. One of them may sue an Executor of an Executor, if he have gotten the Estate into his hands, *Breretons Case, 6 Jac. Tot. 87.*

3. Two Executors be, one doth disagree ; the act of the other shall bind in Equity, as it doth in Law, *Bacons Case, Tot. 87.*

Against them.

Secondly, as to Suits against them, take these things.

1. One Executor alone without the rest may be sued here ; but he shall be charged for no more then he hath, *Harbuge Case, 35 Eliz. Tot. 86.*

2. An Executor shall be bound by a Decree against the Testator, *Hil. 5 Car.* Decree.
3. He must pay Costs adjudged here against the Testator, if he have Assets. Costs.
4. He shall not be charged here for a Trespass done by the Testator, *Hollands* Trespas.

Cafe, Tot. 87.

5. Nor may he be compelled here to give Bond to perform the Will, without special cause be shewed; as that he is decayed in his Estate, or hath broken the Trust already in some particular, or the like, *Browns Cafe, 37 Eliz. Tot. 86.*

6. He may here be ordered to pay a Debt by Word, before a Debt due by Specialty, *Tot. 53.*

One Jointenant, or Tenant in common, may here have relief against another. See *Tenants in Common. Jointenants.*

The father may have relief against his own son, in case of breach of Trust for a Lease, *Pasch. 1597. Domers Cafe.* The Cases wherein relief is to be had in this Court, follow.

A Use or Trust was, and still is, either of Land, or of Goods; and both these are either exprefs or implied.

Self. 6.
Upon a Trust
or Confidence.
Of Lands.

A Use or Trust of Land, was a Trust reposed in another, that he should suffer him that did trust, to take the profit of it, and he that was trusted was to dispose the Land according to the direction of him that trusted him. As when a Feoffment was made to *J. S.* and his heirs, to the use of *W. S.* and his heirs; heretofore *J. S.* had the estate and property of the Land, but *W. S.* had, or was to have the profits in honesty and equity: So if one had agreed with *W. S.* for a piece of Land for twenty pounds paid, and had no assurance; yet the equity of the Land was in the Contractor.

The use of Goods is, when one man hath them in trust for another. The use of Goods or Lands expressed is, when the Trust or Use is expressed between the parties, upon the making of the Estate implied, when it is not declared upon the Agreement, but left to the construction of Law: As if I bargain and sell my Land, levy a Fine, make a Feoffment, or suffer a Recovery of my Land without money, and no Use expressed, this in Law is to my own use; but if it be for money, it shall be to the use of the Bargainee, Conusee, Recoverer or Feoffee: And if it be without consideration, that I conveyed my Land by Feoffment to *J. S.* to have and to hold to him and his heirs, to the use of his heirs; in this case *J. S.* and his heirs hath the Use in Law, *Co. 1. 121: super Lit. 271, 272. D. & St. 95. Co. 2. 58. 9. 11. Dyer 18. 146.*

A Use at the Common-Law, before the Statute was made, was, and where that Statute doth not take place, is nothing but a meer Confidence and Trust collateral to, and distinct from the Land annexed in privacy of Estate, and to the Person touching the Land to this purpose, that *Cestuy que use* should take the profit of the Land, and the Feoffee or Ter-tenant that was trusted should make Estates and otherwise dispose of the Land, as the *Cestuy que use* in his life or at his death by his last Will and Testament should direct and appoint: And if he made no disposition, then that it should go to the Heir. So that the Feoffee had the Freehold, or the sole property of the thing in him, and *Cestuy que use* had neither *jus in re*, nor *jus ad rem*; (for if he, against the will of the Feoffee, had entred into the Land, he had been a Trespasser) but a bare confidence or trust, for which the *Cestuy que use* had no remedy but in Chancery upon breach of the trust, and there to have the Feoffee imprisoned until he perform the trust according to the Order of the Court. And these Uses to some purposes were reputed in Law as Chattels, and therefore were devisable by Will; and to some purpose, as Hereditaments, and a kind of Inheritance, of which there was a *possessio fratris, &c.* And to some purposes neither Chattels nor Hereditaments, for they were not esteemed Assets in the Heir or Executor.

And to every of these Uses there were two inseparable incidents: Confidence in the Person, and Privacy in the Estate, expressed by the parties, or implied by the Law. And when either of these failed, the Use was either gone for ever, or suspended for a time at the least. And therefore if the Feoffee to Use upon good consideration had enfeoffed another of the Land that had notice of the Use, the Use had been gone for ever; because howsoever here was a Privacy of Estate, yet here was no Confidence in the Person. But if the Feoffment had been without Consideration to such a one; in

in this case the Use had remained still, because the Law did imply a notice. So also it seems the Law was, when it was made in consideration of Marriage only. And if a Disseisor, Abator, or Intruder had come to the possession of the Land whereof the Use was, albeit he had notice of the Use, yet the Use was suspended during their possession, and they should not have been seised to Use as the Feoffee was; for they come not to the Land in the *per*, but in the *post*. And if a Lord by Escheat, Lord of a Vilain, or one that had entred for Mortmain, or that had recovered in a *Cessavit*, &c. had come to such Land, and had notice of the Use, the Use had been gone for ever; for these came to the Land in the *post*, and above the Use: And the Tenant in Dower and by the Courtesie should not be seised to Uses in being; for all these wanted Privy of Estate. And if there had been Tenant for life, the Remainder in Fee to the use of another, and the Tenant for life had made a Feoffment in Fee to one that had notice of the Uses, this second Feoffee should not have stood seised to the first Uses. So if the Husband had made a Feoffment in Fee of the Land of his Wife upon Consideration, and without any Use expressed; the Wife should not have had a *Subpoena*, because the Feoffee was not in Privy of Estate of the Wife. And if *Cessuy que use* for life or in tail, the Remainder in Tail, with divers Remainders over in Use, had made a Feoffment to one that had Notice, he should not have been seised to the first Uses, *causa qua supra*.

But to open this a little further, we are to know, that by the Statute of 27 H. 8. 10. the Use or Trust, and the Possession of Lands for the most part, are now at this day united: And in all such cases where they are united, and the Use executed by that Statute, the Chancery doth not meddle, but send men to Law. And such is this, where one seised of Land in Fee, doth convey it to the use of one and his heirs, or heirs of his body, or for life, or to the use of one of his Executors and Administrators for years.

But there are some Uses and Trusts still that are not executed by the Statute; and these remain as they were before, and are in the consueance and order of the Chancery: As where Lands are conveyed without Consideration in Fee-simple, after this manner; That the Feoffee and his Heirs shall take the profits, and deliver them to the Feoffor and his Heirs; or that the Feoffee shall account and give the profits to the Feoffor; or that the Feoffee shall convey the Land to the Feoffor or to his Heir at his age of twenty one years: Or where it is conveyed to *J. S.* and his Heirs, on confidence that *J. S.* shall alien it to whom the Feoffor, or to whom *W. S.* shall appoint, or the like: Or where the Lands be conveyed to certain Uses expressed, and there to other secret Uses agreed upon between the parties: So where Land is conveyed without Consideration to one and his Heirs, without expressing any Use or Intent; this is to the use of the Feoffor, who may dispose of it as he pleaseth. But if it be to any intent certain, as to take back an Estate with Remainders to others, &c. here he cannot change it.

Where Leases for years in being before, are granted over in use or in trust: As a Lessee for years of Land grants it over to *A.* and *B.* and their Assigns, to the use of the Grantor and his Wife, for the term of their two lives; Or if one be seised of Land in Fee, and he bargain or sell it, or make a Lease of it to another in trust, and for the benefit of a third person: These and such like Uses and Trusts are not within, nor executed by the Statute, but they remain as they were before the Statute. For all the State is in the party trusted; and the Grantor, or he to whose use the Grant is, hath nothing but a Use, for which he hath his remedy only in Chancery, where all these matters are determinable. For it is a rule, That as the Questions of Uses and Trusts that are within the Statute, are to be decided and ruled by the Judges of the Common-Law; so all other Questions of Uses and Trusts that are out of the Statute, are to be ruled and decided by the Judges of the Chancery, *Co* 1. 138. *Dyer* 369, 356. *Crompt. Jur.* 65. 58, 59. And the Judges in Chancery, in ruling these Uses, do proceed much after the Rules they went by in the regulating of Uses at the Common-Law, before the Statute. It is needful then we give you a taste of these.

For this then, we are to know, that before the Statute these were the Laws of Uses.

1. The Feoffor was to take the profits of the Land; and he might have disposed it in his life time, or at his death to whomsoever he pleased; and his friends in trust were to settle it accordingly, or be enforced to it by *Subpoena* in this Court: And if he did not dispose it, the use was to go to his Heirs; and if he had died without Heir or disposition, it seems the Feoffees should have had the Land.

2. If the first Feoffee had conveyed it to a second Feoffee to the same use, or to a second Feoffee that had notice of the uses; in these cases the second Feoffee had it to the same uses. But if the Feoffee had sold it *bona fide*, or conveyed the Land to one that had no notice of the uses; in these cases the use had been gone, and he to whose use it was, remediless for the Land.

3. A Bruit of a trust, or ones saying there was a trust to another, I being about to buy the Land, because he would not have me buy it, it seems is not sufficient; But a Suit about it, and proof of it in *Chancery*, is sufficient notice to him that shall buy it.

4. If the *cestuy que use* had appointed the Land to be sold by his Feoffees, to pay his Debts, the Creditors might have compelled the Feoffee to sell it; If he in his life time, or by Will at his death, had appointed them to convey it to *J. S.*; *J. S.* might have compelled them to it, and so their Heirs.

5. The Feoffees (if any occasion had been) were to bring or defend any Action for the Land, and to plead such Pleas as the Feoffors should appoint, or be enforced in *Chancery* to it.

6. If the Feoffee die, and the Land descend to his heir, the party to whose use, as it seems, had no remedy against him.

7. If the Feoffee or Donee to use, sell to one that knows of the use, the *Subpoena* shall go against them both, otherwise against the party trusted onely, who must make a recompence for the breach of trust, if the Land be gone. And so where the party trusted had released to a Trespassor that knew of the trust; or a Statute or Bond was made to *A.* to the use of *B.* and *A.* release to the Obligor privy to the trust; the *Subpoena* shall be against them both, albeit some hold the contrary.

8. The Feoffor could not have disposed it, or medled with the profits in Law, without the Feoffees leave.

9. If *cestuy que use* had been attainted of Felony, the Lord could not have remedy by *Subpoena* for his Escheat.

10. If the *cestuy que use* had made no disposal, or had been barred by the corruption of Blood, it seems the Feoffee might have retained the Land for ever to his own use.

11. The Feoffees of the Feoffor, desired it were to do any Act with the Land for the good of the Feoffor, and if he require him to make any Estate to another, he must have done it: And if the Feoffor had appointed them to convey to *A.* for life, the Remainder to *B.*; if *A.* had refused, he must have conveyed to *B.* the Remainder, or *B.* might have compelled him thereunto in *Chancery*: But such Requests were to be made in writing, and could not be made by a Message, or upon desire by word onely.

12. If one had had four Feoffees of his Land in trust, and had sold it to *J. S.* and told two of them, that his Will was that all four of them should convey it to *J. S.* and they two notified his Will to the other two; the first two did Enfeoff *J. S.* the other two refused, as they might, without somewhat under his hand to prove his Will: The Feoffor after sold the Land to another, and required the other two Feoffees to Enfeoff it; it was said this second sale was the best. The Feoffees in trust might have given allowance to necessary Officers as Stewards, Bailiffs, and Receivers, and had allowance thereof upon their Account, but could not grant Annuities to their Council &c.

13. The Equity and use of the Land, being to go according to Conscience, the *Subpoena* for Relief herein in this Court is given accordingly.

These were the general Rules by which Uses at Common-Law were guided, and much after

after this are uses not executed by the Statute, and Trusts of Lands and Goods ordered and guided at this day, as may partly appear in the cases following.

1. Of Inheritance and Freehold.

2. Of Chattels.

3. Of Goods.

Of Inheritance and Freeholds.

2. In respect of the Case. Cases of Uses and Trusts out of the Statute of Uses, and otherwise under the Survey and Order of this Court only.

If I without consideration Enfeoff one, and his Heirs of Land, to the intent that he shall take the profits thereof and deliver to me and my Heirs: Or to the intent he shall account to me and my Heirs for the profit thereof; or to the intent he shall re-convey it to me and my Heirs; or to my Heir at Twenty one years old; or to the intent that he shall alienate it to *J. S.* and his Heirs, or to whom I shall appoint; or I convey it to certain uses expressed: But there are other secret uses agreed upon between us. In all these and such like cases, which are out of the Statute of Uses, this Court, if any complaint be, will order the parties trusted to perform the trust.

But for the opening hereof further, take these cases

Se⁸. 7. Of Estates of Freehold.

First, If I without any consideration bargain and sell my Land by Indenture to one and his Heirs, to the use of another and his Heirs (which is a use upon a use) it seems this Court will order this. But if it were in consideration of money by him paid; here it seems the express use is void, both in Law and Equity. And if a Woman in consideration of Four hundred pounds paid her by her son, bargain and sell her Land by Indenture to him and his Heirs, to the use of her self for life, and after of the Heirs of her son; in which case by Law, the Fee-simple is to the son presently, and the use for life to the Mother void; nor is there (as it seems) any relief for her in this Court in a way of Equity, because of the consideration paid: But if there were no consideration given, *Contra*, *Dyer* 169. 155. *Crompt. Jur.* 55. 155. *Totbil* 188. 99. And yet if I Enfeoff *A.* in Fee of my Land, without any consideration to the use of *A.* and his Heirs, upon trust that he shall alien it to whom I shall appoint, and I do make no appointment: In this case *A.* shall hold it to him and his Heirs for ever, discharged of trust, *Crompt. Jur.* 58. 59. And if I Enfeoff *B.* and his Heirs to the use of *B.* and his Heirs, in trust for *C.* and his Heirs; it seems *C.* may be relieved here.

Secondly, If I deliver one money to buy Land for me, and he buy it for himself; I shall here recover the Land bought, or the money I delivered to him, *Crompt. Jur.* 48. So if I deliver one money to put out for me, and he buy Land with it in his own name, and tells me it is for me, and in my name, and I agree to it; the Court will order me the Land. If I give one money to purchase Land therewith to him and his Heirs, and to suffer one to take the profits thereof during my life, and he keepeth the profits from me; I shall be relieved here.

Thirdly, If I purchase Land with my money, and buy it in mine own, and a friends name, to prevent my Wife of Dower out of it, and my friend being requested, refuseth to release his right in the Land to me; I may compel him to it in this Court, *Crompt. Jur.* 54. 55. *Castlings* case. *Fitz. Account* 23. *Yonges* case.

The Defendant confessed the trust was ordered upon notice to convey it accordingly at the Plaintiffs charge, *Caries* Rep. 67.

Sale to pay a mans debts:

Fourthly, A voluntary conveyance was made to friends in trust, to the use of the mans own children, with a Remainder over; the Feoffor being indebted much money, the Court enabled him to sell part of it to pay his Debts, *Grants* case, *Totbil* 42.

Jointenancy.

Fifthly, If Land be conveyed to *A.* and his Heirs, in trust for *B.* and *C.* and their Heirs, and *B.* by his will deviseth his part of it; in this case the Court would not decree this Devise; but held that the trust was to go jointly as the Interest in Law doth, *6 Car.* in *Chancery*.

So a man grants an Estate in trust to friends, to the use of three Daughters and their Heirs: The Court ordered all to the Survivor, *Barrows* case, *10 Car.* *Totbil* 84.

Sixthly,

Sixthly, *A.* enfeoffed *B.* in Trust, and after he by Deed in which *A.* is a party, *Imperfect Deed.* makes a bargain and sale to *J. S.* to the use of *A.* for life, the Remainder to *W. S.* in Tail, the Remainder to *J. S.* in Tail, but is not enrolled; *A.* dies, *W. S.* dieth without issue, *B.* giveth out Speeches to *J. S.* that he hath no estate in the Land, and that if he will have any made good, it must be by him; whereupon *J. S.* being afraid, accepted of an Estate for his own life onely from him; And after sued in Chancery to have the Estate in Tail, executed according to the Trust; and it was denied, and said he had concluded himself, and that otherwise *B.* should have been ordered to execute the State, *M. S. Car. Southwells case in Chancery.*

Seventhly, If one Enfeoff me of Land, to the end, that I shall Enfeoff *J. S.* thereof, and I convey it away to another without his privity; if he do afterwards agree to this, it seems he is remediless, *Totbil 186, 187.*

Eighthly, If one that hath Land in Trust, convey it to one that hath notice of it, and he convey it to one that had no notice of it: In this case it seems he that had no notice is seised to the first uses, *Totbil 186. Pills case.*

Ninthly, If one convey his Land to friends in Trust, and after sell the Inheritance, The Trust in Equity goes to the Purchaser, Decreed, *Totbil 44. 10. A.* intending to purchase a long Lease of *B.* and the Reversion of *C.* be, to avoid latter incumbrances, purchased the Lease in a friends name, and the Reversion in his own name, and after made a Feoffment of the Land, with Livery of Seisin, to the use of himself, for life, and after of his first son, and then he granted his term (which was in his friend) to a second son; in this case the Court would not settle the use of the Lease upon the second son; but seemed it should go with the Inheritance, otherwise Purchasers shall never be secured.

Tenthly, If a man had been Enfeoffed to the use of a woman sole, who taketh a husband, and they both for money had sold this Land to *B.* and the money had been paid to the wife, and she and her husband had prayed the Feoffee to make the Estate to *B.* after her husband died; the wife in this case had Relief here, for it was Decreed that all she did was for fear of her husband, *7 Ed. 4. 14. Fitz. Subpœna 6.* So then now, if a Feoffment be made to one and his Heirs, to the use of him and his Heirs, in Trust, for a woman sole; Equity it seems will rule it after the same Rule.

Eleventhly, If one sell his Land to *B.* for Twenty pound at this day, and this is with confidence that it shall be to the use of *A.*; in this case *A.* shall have no Remedy here, because there is an expresse consideration, *Dyer 109.* And yet if the Land be worth more then the money given by a great deal, it seems to me reasonable, that for the overplus the Chancery should order it according to the intent: But Regularly it seemeth such a consideration in an Indenture is not examinable, unless there be some fraud in it.

Twelfthly, If Land be mortgaged to *A.* and *B.* and *A.* onely pay the money, and the intention is, that *B.* shall take nothing; in this case *B.* shall be compelled to Release to *A.* *77 Eliz. in Caries Rep.*

Thirteenthly, If one purchase Land for me with my own money in his name in Trust, that I may enjoy it during my life, and after that it shall go to a charitable use, and I after Repeal it and give it by Will to another, the charitable use it seems, is gone in Equity, *Littletons case, Caries Rep. 29.* If I make a Feoffment to the use of my Will, I may dispose this at my pleasure afterwards: But if it be to uses according to Articles annexed, it is otherwise, *Caries Rep. 29.* A Copihold was surrendered to the use of *J. S.* to the intent, that he should pay an Annuity to a third person, the which he refused; the Court ordered him to pay it, with all the Arrears. *Totbil 107.* If I purchase Lands in the name of another and his Heirs, and die without declaring the use, and of my kin procure him to convey the Land to him and his heirs, and he convey it to others, and my next heir sue, and the benefit of the trust is made appear to belong to him; the Court will order it to him, *Caries Rep.*

If I be seized of Land in Fee, and convey it to *J. S.* and his heirs to the use of *W. S.* Of Chatter's his Executors and Administrators for Twenty years, or for any other number of real, and years; in this case the use will be executed within the Statute. But in case Terms of where years.

where I be possessed of a Term of years in being, and grant it to friends, to any uses and purposes in trust; this is out of the Statute of *Uses*, or orderable in *Chancery* onely: Where, if the trust be broken, I must have remedy. But for the further opening hereof, take these cases:

Intail.

First, One possessed of a Term in years, conveys it to Friends in trust, to the use *A.* for life, and after of the Heirs-males of his body; in this case, the Court Resolved and Ordered, That *A.* so long as he hath an Heir, may dispose it; and that an Intail of a trust of, or out of a Chattel, is not good: But a Remainder, in Tail of a Trust, may be ordered in Equity, the Judges agreeing to it, *Tattons Case*, 7 Jac. *Tothil* 83.

Executors.

The General Trust of an Executor, is to pay Debts and Legacies, and for the surplusage, to account to the ordinary *ad pios usus*: But if he have any special Gift in the Will, then he may have it to a special use. But for the trust of Executors, see in other Sections, *Caryes Rep.* 21. *Henry* Earl of *Darby* conveyed certain Leased Lands in trust to *Doughty* his Servant, for payment of his Debts; and upon mediation of an end of Controversies between the Daughter of *Ferdinand*, Eldest Son of *Henry* Earl, and *William* his Yonger Son, now Earl. It was Ordered and Agreed, That *William* the now Earl should pay all his Fathers Debts; whereupon *Doughty* conveyed these Leases to *William*, and after the Creditors sued him in *Chancery*, but had no relief, and were ordered to pursue their Remedy against Earl *William*, *Hill.* 1 Jac. *Caryes Rep.* 25. The Suit was to be relieved on a Lease made to the Defendant in trust, to the use of the Plaintiff; the which appearing, it was ordered, That the Plaintiff should enjoy the Land against the Defendant, and all claiming under him that had notice of the trust; and if the Lease were sold to such as had no notice of the trust, then that the Defendant shall pay to the Plaintiff so much money as the Lease was worth, *Rook v. Staples*, 21 *Eliz.* *Caryes Rep.* 76. The Plaintiffs wife conveyed away her Estate to the Defendant her Son, before marriage, and after the Defendant conveyed it to his children: In this case the Court conceiving it to be done without any consideration, did Decree it for the Plaintiff, against the Defendant and his Children, *Povyres Case*, *Tothil* 93. A Widow being about to marry, to prevent her Husbands disposal of her Leases, made them over to Friends in trust, after marriage he and they for good consideration sold them; his wife after his death sued here, and had relief for them against the Purchaser, but disbursements were allowed. *Fitz-James case*, *Tothil* 43. A Female was possessed of a Term to her use onely, and she took a husband, and then died; the Court ordered it to the Executor or Administrator of the wife against the husband, *Pasche*, 32 *Eliz.* *Withnams case*. So *A.* being possessed of a Lease for years granted it to *B.* and *C.* to the use of *A.* and his wife, and during the marriage *A.* granted away all the Interest to a stranger; the Court would not order it against the wife, *Dyer* 369. *Crompt.* Jur. 65. *A.* being possessed of a Term, granted it upon a marriage to be had between him and *K. S.* to *J. S.* her Brother, to her use, and after marriage *A.* dieth, and she marrieth again, and then she died, *J. S.* took out an Administration and got the Lease; the second husband sued for it here, but could not be relieved, *Co. upon Littl.* 351. See before *Self.* 5.

*Of Chattels
Personal or
Goods.*

If I deliver Money or Goods, or cause a Statute, Bond, or other Especialty, to be made to another, to my use, or to any purposes or intents in trust, and he perform not the trust: I may compel him to it, or to give me recompence for the breach of the trust here; and therefore if he dispose the Money or Goods to his own, or any other use then I appointed, or will not dispose it according to my minde, or release or discharge the duty; my remedy is by *Subpoena* in this Court: And if in these cases, the Goods or Money be taken from him, or he have any injury in them, he must sue for Remedy; and I may compel him to it here, 7 *Ed.* 4. 14, 29. 11 *Ed.* 4. 8. *Crompt.* Jur. 43. 62, 65. *Broo.* Feoffment 60. for the opening whereof, take these cases.

First, If I deliver Money or Goods upon any consideration to *B.* and *C.* for a marriage-portion for *K.* and to deliver to her at her day of marriage, and I do after countermand the Delivery, or *B.* and *C.* will not deliver them to her; it seems they may enforce them to it here: But if the Delivery be voluntary and without any inducement and consideration, *Contra*, *Dyer* 44. *Crompt.* Jur. 54. *Dyer* 49:

Secondly,

Secondly, Two hundred marks were delivered to *A.* to keep, and to deliver to *B.* to keep, and to be delivered to *A.* when he shall require it, and after the death of the owner, to deliver it to his Executors or Administrators: *A.* delivers it to *B.* and takes Bond for it, and then he makes an Executor, and dieth: In this case the Executor may in this Court compel *A.* to sue *B.* for this Money, if he refuse to do it.

Thirdly, If an Obligation be made to another to my use, and it be forfeit, and he will not sue; I or my Executor may compel him to it in this Court, *Broo. Conscience* 10. 2 *Ed. 4.* 2.

Fourthly, If a Statute be made to *A.* and *B.* to the use of *A.* alone, and the Conusor get a Release of it from *B.* alone; in this case *A.* shall have Remedy here against them both, as some say against *B.* only, and not against the Conusor, as others say, 11 *Ed. 4.* 8. 5 *Ed. 4.* 7. *Caryes Rep.* 14, 15.

There is now by the new Ordinance for the Regulation of the Chancery, Provided, That no Relief be given here upon any Trust or Agreement, made or declared after the Five and twentieth of March, 1655. Concerning Lands, or any other thing in the Realty, unless it be contained in writing, and so averred in the Bill, save in cases where the possession hath gone along with the party claiming the Trust.

Article 44.

One may here have Relief against a man upon his Promise and Agreement, further then by the law he can have: For opening whereof, know these things.

First, If I for Money purchase and contract for Land, with, or without writing, and have paid all, or any considerable part of the Money, or have given security for it, or am any way engaged to pay the money, or it be by way of Exchange for other Land, the which he hath entred upon; but I have no assurance of the Land: I may here compel the seller, or if he be dead, his Heir, or Executor, or Devisee, if he did devise it, that hath the Land, to assure the Land according to Agreement. And if the seller sell away the Land to another, that had notice of the first Contract with me, I may have my *Subpoena* against them both, 24 *H. 7.* 41. *Crompt. Jur.* 44, 45. *Toshil* 24.

Upon a Bargain, Agreement or Promise; and how it shall be taken and performed.

See §. 8. About Land.

Secondly, Articles of Agreement were briefly drawn between two, and their hands to it, for the sale and assurance of Land for Money; the seller refused, and upon complaint here, was ordered to make the Assurance according to the Agreement; the manner of the Assurance referred to a Master of the Chancery, *Chivars* case. *Hill. 4 Car.*

Thirdly, A Suit was here upon a Parol-Agreement, to execute an Assurance of Land upon a Marriage-Agreement, the case being thus: *A.* suitor to *B.* the Brother of *A.* comes to *B.* and tells her, That if she will marry his Brother, he will assure her of Twenty pounds a year Land for her Joynture, and she did marry him, and after he refused: It was Decreed in this Court and the Court of Requests both, That he shall be compelled to it.

Fourthly, It was said by *Glanville*, that heretofore the Chancery did not use to Decree Parol-Agreements for Assurance of Land; but it is now otherwise, for where there is any execution of it by payment of all, or any considerable part of the Money for the Land, there it doth Decree it: And where the Agreement is for selling Land by writing, albeit it be not sealed, or any earnest given, or money paid; yet this Court doth use to Order the Parry to assure the Land accordingly. Otherwise it is where the Agreement is for any other thing but Land. And in 19 *Jac.* in *Briggs* case, *B. R.* a Prohibition in this case was denied to the Council of the Marches of *Wales*, upon a Suit there to have Land assured upon an Agreement, because however it be, he hath Remedy at Law by Action of the Case; yet this is for damages only, and cannot force him to assure the Land: And in all cases Regularly, where Articles are under Hand and Seal, for the assuring of Land for Money, the Court here doth use to Order it to be done according to the Agreement.

Fifthly, But it seems the Law is not in all points, as Master *Glanville* before said; for in *Hill. 9 Car.* In the *Exchequer*, one sued by English Bill upon a Parol-Agreement, to have Land assured, and shewed, That he had provided Two thousand

thousand pounds, the purchase Money, to his great loss, &c. and the other refused it, and to assure the Land; in this case, the Court would not Decree the Assurance of the Land, but Decreed he should pay the Plaintiff damages for his loss. So in 13 *Car. Olivers* case, The Agreement was to convey the Land as Council should advise, the Paper-book drawn, agreed, and to be ingrossed, and then the seller refused to proceed; in this case, the Court would not Decree it to be done, because no Articles nor Money paid, but a bare Parol-Agreement. And yet some special circumstance may make this binding; and therefore a Verbal-Agreement between Lord and Tenant, because the Tenant was an Ancient Tenant, and hath been at charge in building, was Decreed, *Kings and Hunts* cases, *Tothil* 65, 66.

Sixthly, A. Covenant with B. upon the marriage of his Daughter, to levy a Fine of the Land to D. and the Daughter being dead, and some Money unpaid, A. sold away the Land to others; in this case, he was Ordered for a Hundred Marks, to make the Estate good, *Tothil* 47, 48. *Mich. 8 Car. Pages* case.

Notice.

Seventhly, A Suit was in this Court upon a Parol-Agreement to assure Land, and the Agreement was Eighteen years before, and the Suit was against Purchasers that came in upon valuable consideration (to wit) the buying in of Mortgages, and paying of Debts and Fines and Proclamations, and Five years time without Claim were past; in this case, albeit it did appear, that the Purchaser had notice of the Agreement, yet it was dismissed by the Court to the Law; and in these and such like cases, where an Action lieth at Law, the Purchaser, or Party to whom the Promise is made, may use that and waive his Remedy in *Chancery*, 21 *H. 7.* 43.

Nudum pactum:

Eightly, If I and another man make an Agreement about any thing by word onely, and it hath *quid pro quo* in it, and I have no witness to prove it, I may sue him here, and put him to answer it upon his Oath: But upon a *nudum pactum* there is no more Remedy to be had in *Chancery*, then is at the Common-Law, 8 *Ed. 4.* 4; *D. & St.* 12. 154.

Ninthly, If it be agreed by Indenture of Feoffment of Land between me and another, That the Feoffee shall pay Ten pounds to a stranger by a day, or Ten pound a year; otherwise, that the stranger and his Heir shall enter on the Land; or that the Land shall be conveyed to a stranger, or the like: in these cases the stranger for not payment, cannot enter by Law. But some say the Feoffee may be compelled in this Court to execute the Estate according to the Agreement, *D. & St.* 94. But if by Agreement there be a condition to give a Re-entry to a stranger; this is not good in Law, nor will this Court execute it, for it is against a principle of Law, *Crompt. Jur.* 50. *D. & St.* 100, 101. *Crompt. Jur.* 49. Nor is the Feoffor when he doth enter, bound in conscience to give the Land to the stranger.

Tenthly, If I by Deed poll, and not by Indenture, make a Feoffment in Fee, Gift in Tail, or Lease for life, the Remainder over in Fee rendring a Rent; this Reservation is not good in Law: But I shall have Remedy upon the Equity of my case in this Court, *D. & St.* 2. 19.

Eleventhly, A Bill was preferred here, supposing Ten shillings paid, and Two thousand pounds to be paid for Land, to have the Lands assured, and upon a Demurrer it was over-ruled, because it may be to prepare for an Action of the Case: But it seems in this Case the Court would not decree the Assurance, *Trin.* 38 *Elizabeth Williams* case, *Tothil* 72.

Twelfthly, If any Agreement have been made by writing for the assuring of Land, or any thing else, and the writings are lost; the party grieved must have his Remedy in this Court.

Thirteenthly, If I make a Lease of Mills for years, excepting the profits thereof for my life; this exception is not held good in Law; yet it is thought I may have it allowed in Equity, because of the intent, *Crompt. Jur.* 64.

Fourteenthly, If a woman sole take a consideration for a Lease of Twenty one years, and then marry, and she and the husband make the Lease promised; after the Lessee doth surrender, and take a new Lease for another Twenty one years; the husband dies: In this case the wife is not to enjoy the rest of the first Lease, because

cause the Surrender was voluntary, *Caries Rep.* 21.

Fifteenthly, One for Seven thousand pounds, whereof not a peny was paid, and yet an acquittance given thereof by the Feoffor, enfeoffed one in Fee of his Land, but took the profits thereof all his life; in this case the Feoffee shall not have this Land in Equity; and if he do go about to take it, the Feoffor shall be relieved here against him, *Dyer* 169. *Crompt.* 7^{ur}. 153.

Sixteenthly, The Customs of a Mannor were in question between Lord and Tenants, and Tenant and Tenant, and a general Agreement made by Deed indented and enrolled here, and a Bill to establish it, and nothing could be found but the Deed: And yet the Court would not alter it, albe it was objected the Lord was at the time of Agreement Tenant in Tail, and some of the Tenants Infants and *Feme-coverts*, *Caries Rep.* 22.

Seventeenthly, If one enter into a Statute to *J. S.* who doth afterwards by Indenture of Agreement, promise and agree with the Conufee, that in case the Conufor did fail of payment, execution should be done upon some certain Land onely: In this case, if after it he shall sue execution upon any other Lands, the party grieved may have relief here, and compel him to perform his Agreement, and have an Injunction also if he desire it, *Polvertofts Case*, *Caries Reports* 37. Injunction.

Eighteenthly, The Plaintiff sued to be relieved on a promise for a Lease of Lands and to stop a way; and exception was taken to the Bill because the Defendant had Remedy at Law and not allowed. So to remove a Nulance or the like; for at Common Law nothing can be recovered but damages; but this Court may order the thing it self to be done, *Caries Rep.* 20. 53.

Nineteenthly, The Plaintiffs Bill was, that he leased a house to the Defendant, and did Covenant to repair it, and then the Defendant did Covenant to keep it so, and that the Defendant, as well to make the Plaintiff break his Covenant, as to free himself from his Covenant, did interrupt and threaten the workmen so, that they durst not go on, and so the houses are decayed, and the Plaintiff without remedy; the Defendant demurred, pretending the Plaintiff had remedy by Law; but was overruled and put to answer, *Caries Rep.* 59.

Twentiethly, A Bill was brought upon a Promise by word, for leave to dry clothes in a Garden, and was dismissed for the smallness of the thing, 21 *Eliz.* *Hambies Case*, *Caries Rep.* 76.

One and twentiethly, The Bill prayed Relief against the Defendant as Brother and Heir, for that the Plaintiff had paid to his deceased Brother Thirty four pounds for a Lease, and he died before it was made, and therefore desired his Lease or the money, and was Relieved, *Caries Rep.* 77.

Two and twentiethly, One Joyn-tenant promised the other, lying on his death-bed, he would not take advantage of the survivorship, but suffer him to dispose of it by his Will, by which he devised part for the payment of his Debts, and the Survivor was ordered to make the Estate accordingly, *Caries Report* 81. Jointenant;

Twentieththirdly, The Plaintiff bought of the Defendant the Reversion of a Copihold, which he could not enjoy, as was confessed by the Defendants Answer; Ordered by the Court to shew cause why he should not repay the money back again, which he had received on the bargain, *Caries Rep.* 93.

Twentifourthly, Upon the hearing of the Cause, it appeared that the Suit was to be relieved upon a Promise made by the Defendant to the Plaintiff, to surrender a Lease upon the payment of a hundred marks; and because the matter was meet for the Common-Law, it was dismissed, *Caries Rep.* 95. 97.

Twentifistly, Bailiffs of a Town promised a Lease; the Court upon this, would not give Relief against any of their Successors, but against the same persons, as common persons, upon the promise, *Caries Rep.* 103.

What Agreement made by an Infant, or a Woman-covert will binde here. See before *Sect.* 4.

If

Sett. 9.
Upon a Mis-
prision in a
Conveyance of
Land or other
Deed.

If any mistake be in a Deed, that it be not made according to the intent and agreement of the party; it may be holpen here. For the opening whereof take these Cases.

1. If part of the Land bought and sold, be left out of the Deed, or the word Heirs, being in Fee-simple, or the like, be omitted; and the conveyance be made upon good consideration; this Court will rectifie it. See after for this, *Caries Rep. 16.* 17. Dean and Chapter of *Bristol* made a Lease, mistaking the name of the Corporation; and the Court held that for Leases made for reasonable time, and upon good consideration, there should Relief be given here, *Caries Rep. 32.* The Lessee in the Lease, was not named in the Premises of the Lease, but in the *Habendum* onely; Decreed to be good: And being referred to the two chief Justices and chief Baron, was by them certified to be good in Law, *Butlers case, 22 Eliz. Caries Rep. 88.*

2. A man by Bill here supposed; that he had conveyed more Land by the Deed, then was intended and agreed; in this case, because it appeared the Defendant was a Purchaser upon unvaluable consideration, the Court would not relieve the Plaintiff, *Cliffords case, 4 Jac. in Chancery.* And yet see a case where more Lands passed by a Fine, then was intended, and the party relieved here by the Judges consent, *Caries Rep. 20.*

Grant of a
Term.

3. But if one possessed of a Term, grant it to one for life or in tail, and after to another for life or in tail; in these cases, where by Law it seems the first will take all, no relief shall be neither in Law, nor in Equity to him in Remainder: But if it were a Devise, after this manner it would go in Law and Equity according to the intent, *Crompt. Jur. 64. Plow. 520. 539. Dyer 74. 253. 277. Co. 8. 95. 10. 47.* So if I have a Term of years and grant so much thereof as shall be to come at my death; it seems this grant is void in Law and Equity. But if it had been by Will thus devised, relief might have been in Equity at the least, *Crompt. Jur. 63.*

Intail of a
Term.

Devise.

4. Mistakes in the making of a Bond, in either of the parties names, may be holpen here, *Colstons case, Totbil 27.*

Power to
make Leases.

5. If a Power be reserved to make Leases by a Covenant without a Transmutation of possession; no help can be here, because it is void in Law: And if it be upon Change of possession, and the Power be not precisely followed; that is doubtful, and rather more strong against help; for then the Estate works, and the power gone, and upon Wills no help, *Caries Rep.*

6. If one be bound to me for money, and the same day after the sealing of the Bond, I give him a Release for other things, and by mistake, whereby this Bond also is released: In this case I may be relieved here, and shall recover the money notwithstanding, *Tops case, Totbil 27.*

7. *Haddon* the Husband was ordered to procure his Wife to levy a Fine, and to enter into a new Bond of Five hundred pounds, because the old Bond was worth nothing, by the mistake of the Writer, 10 Jac. *Totbil 140.* See more *Section 8.* before.

But now by the new Ordinance for the Regulation of the *Chancery*, it is provided, That no Relief shall be there upon any Averment of any other intention of the Parties, to a Deed made after the Five and twentieth day of *March, 1635.* other then what doth appear in the Deed it self. *Article 45.*

Sett. 10.
Upon a Defective Assu-
rance of Land
to enforce the
perfecting of
it.

If a Conveyance for Land be defective, and the Estate not well executed to the Purchaser, according to the intent of the Parties, for lack of words sufficient in the Deed, or for lack of Livery of Seisin, Attornment, Inrollment, or the like; and there were a good consideration given for the Land: In these cases the Purchaser may compel the party, in whose power it is to perfect the Estate, to do it; and this he must do in this Court, *D. & St. 85. Plow. 302. Totbil 44. 48. 182, 183. 138.*

For the further opening whereof, take these Cases.

1. If I for money sell Land to one, and the word Heirs is left out in the *Habendum*, I shall be compelled to amend it; and so when less is granted then was intended; and so for any other mistakes, *Caries Rep. 16, 17.* A Messuage was demised

(*con*)

cum pertinentiis only: And because sundry Lands had been occupied therewith for the same Rent, and by Lease of the same words; the Lord Chancellor *Bromley* and the Judges ordered it should all pass, though perhaps they will not pass in Law by these words. But it seems in such like cases it is very considerable in Equity, what the value of the Land is, and what money is given: For if the House with the Appurtenances be sufficient for the money, unless the intent of the parties were to grant the whole, it seems to me reasonable that no Extent should be made further then the Law makes.

2. The Ancestor takes money for a Lease, and dies before it is made; the Heir must make it good, or repay the money, *Car. Rep. 77.*

3. If I buy a Rent *de novo* for money, and take a Grant of it by Word without Deed, (which is not good) I may compel him here to make me a Deed of it, *Doct. & Stu. 86.*

4. If one for money sell me Land by Deed, but Livery of Seisin is omitted; I may compel him afterwards to do it by the help of this Court. And if one for money sell me Land in two Counties, and have given me Livery only of the Land in one County; this Court will order him to make Livery in the Land in the other County, or pay back part of the money, *Crompt. Jur. 49. D. & St. 37. Car. Rep. 17.*

5. So regularly, if a Conveyance be imperfect for lack of Attornment of the Tenant, the Tenant shall be compelled to attorn by the power of this Court. And so it was in *H. 3 Car. A.* was Lessee for twenty one years, and leased to *B.* for ten years, rendering Rent: *A.* without the privity of *B.* did grant the Reversion to *C.* and *B.* refused to attorn, and *C.* thereupon sued *B.* in Chancery, to compel him to attorn; and in this case it was decreed by the Master of the Rolls, with the assent of the Masters of the Chancery, That he should attorn and pay the arrearages; Justice *Whitlock*, then Assistant, being utterly against it; and of his opinion were the two Chief Justices, Chief Baron, and Justice *Dodridge*: But they all agreed, the parties themselves to the Assurance may be compelled to make Livery. And it hath been often denied here to compel him to attorn, who is at liberty by Law; especially where the party quarrelleth at the Tenants Estate, or entreth into part of the Land, or hath covenanted for recompence in case of Not-attornment, *Car. Rep. 4. Higham contra Lad.* The party before Livery of Seisin, and before Assurance perfected, ordered to be perfected, *Pash. 7 Car. Tot. 129.*

6. But in all these cases, if the Conveyance be made without any good consideration, this Court will not give relief. And therefore if a Rent be granted without Deed, and nothing is given for it; or a Reversion is granted, and nothing is given for it; the Grantor cannot be enforced to perfect it, *Crompt. Jur. 49. Doct. & Stu. 37.*

7. An Estate was made by Covenant, not good by Law, and ordered here to be made good, *Princes Case, 40 Eliz. Tot. 85.*

8. A Deed not enrolled was decreed against the Heir of the Land, but agreed it should not bind any other Estate challenged by Survivorship or otherwise, *Pawles Case, 14 Car. Tot. 55.*

9. The Defendant would have avoided an Estate for lack of Livery of Seisin, and the party grieved complained here; and it appearing he had quietly enjoyed it twenty five years, it was decreed he should quietly enjoy it without Livery of Seisin, *Bydens Case, 17 Jac. Tot. 34.*

10. *A.* demised a Manor, excepting the Court-Baron and Perquisites, &c. which Exception in Law is void. If the Lessee in this case refuse to do suit to the Court, the Chancery will compel it, because of the intent, *Car. Rep.*

If I contract for goods, and have any wrong in it, that the party doth not perform with me; if I give *quid pro quo*, that there be a good consideration in it, I may have remedy here: But if there be no consideration in it, *contra.* Wherein take these Cases.

1. If one promise me Ten pounds for a Trespass he hath done to me, no remedy is given me for this in Law, nor here in Equity, *D. & St. l. 2. c. 24.*

Upon a Promise about Goods or Debts.

Nudum pactum;

2. So if one promise, without good consideration, to make me a Watch, I cannot compel him to it here, *Crompt. Jur. 49.*

3. The son made a general and voluntary promise, without any consideration, no advancement coming to him by his father, to pay his fathers Debts; and upon a Suit here it was dismissed, *Alexanders Case, 7 Car.*

4. The Obligee agreed with the Obligor to give him day for the Debt, and he sue him or a Surety before the day; in this case he may be relieved here, and it seems by Injunction, 9 Ed. 4. 41.

Injunction.

Sett. 11.
Upon an extremity used on a Mortgage or Statute, Bond or other Engagement. In a forfeiture of Land, Mortgage.

If one that hath any Engagement of me by Feoffment, Mortgage, Statute, Obligation or otherwise, take me upon any advantage upon any strict condition or agreement, and use extremity towards me; I may be relieved in this Court, where he will be compelled to accept of Reason. For the opening whereof take these Cases following.

1. If I make a Feoffment to another, upon a Condition to be done by me, and I do not perform it, and thereby lose the Land, I am remediless in Chancery, *D. & St. L. 3. ch. 33.* But if I convey Land to another only as a Mortgage, and for a Security for money he doth lend me; in this case, albeit the time of Redemption be past, yet upon the paying of the money, interest and damage, I may have my Land again, at any time, by Decree of this Court, *D. & St. L. 3. ch. 33.* And in 8 *Car.* in Chancery, between *Coxwell and Gardner*, Sir Robert Rich said, that it was the constant course of this Court, That if *A.* mortgage Land to *B.* for a Hundred pounds, and the Land is more worth, and it be forfeit; that *A.* notwithstanding this may assign it to *C.* to satisfy this debt, or mortgage it to another to satisfy this debt, or devise it to his children: And in these cases *C.* the second Mortgagee, or children, shall by Order here, upon payment of the money, interest and charge to *B.* his Executor, &c. have it decreed against them. *Experientia, Higates Case, 14 Car. Tot. 78:*

2. And yet when it hath continued long, as twenty years or upwards, this Court will not easily give back the Land. And if the Mortgager make a Feoffment of it to a stranger, and so extinguish the Condition, unless it be to the end to pay the debt, the Feoffee perhaps may not have this advantage, *Car. Rep. 53.* And in 39 *Elizabeth Crowthers Case, Tot. 79.* the Plaintiff being Heir to Lands in Tail, and likewise devised to him by his mothers father, and these being mortgaged, and redeemed by a stranger, having sold it again, with the consent of the father and mother, could not be relieved here.

Heir to Land entailed.

But now by the new Ordinance for the Regulating of the Chancery, there are some Alterations made: For thereby it is provided, (i.) from and after the said five and twentieth day of *March*, One thousand six hundred fifty and five, no Relief shall be given in Chancery on a Mortgage after three years forfeiture, or unless the Suit be commenced within one year after the Entry and possession of the Mortgagee continued, except upon some new Agreement between the parties themselves in Writing, and except in cases of Infancy, Coverture, *Non sane memoria*, or beyond Seas: In which cases the persons concerned shall commence their Suits within two years after the Disability removed, or in default thereof shall be debarred from any Relief afterwards. And in case of such new Agreement, the like Rule to be observed, after the time by such new Agreement limited shall be expired, *Art. 49.*

In case of Mortgages to be made from and after the five and twentieth day of *March* aforesaid, where the Mortgagee is in possession by Recovery at Law or otherwise, he shall not (except by special Agreement in writing) be put to account for the yearly profits accrued after such his Entry, before the Suit for Redemption be commenced; but the same shall belong to, and be retained by him without account, if by his Answer, or at the Hearing, he shall elect to take the same in satisfaction of the Interest of his money whiles he had the possession, except the Mortgager shall rather elect to be concluded by the Mortgagees Examinations upon Interrogatories concerning the profits by him received, *Art. 50.*

That such Mortgagee, before the Mortgager be admitted to redeem, shall be paid his whole Principal money with damages, and his full Costs incurred before his

his entry, and also after the Suit commenced, to be taxed by the chief Clerks upon a Bill of Costs; wherein, and in all other cases of Mortgages to be made from and after the time aforesaid, the Mortgagee shall be charged (in case the Lands be let to Tenants) with no more than what he did, or might fairly have received without fraud or his own wilful default: And where the Lands are unlet, and kept in his own hands, with no more than four fifth parts of the true yearly value. But if after such Entry any casual profits by Fines upon Copiholds, Wood-sales, or otherwise shall be received by the Mortgagee above the yearly Revenue of the Lands mortgaged, then the same shall go in abatement of Principal and Interest due before such Entry. Provided, that where in the cases aforesaid an Account shall be, all lawful Taxes and necessary Disbursements and Allowance shall be allowed to the Mortgagee, *Art. 51.*

That where upon a Bill exhibited by a Mortgagee to enforce Redemption, or to have the Estate absolute, a Decree passeth, and is signed and enrolled, the time thereby limited for the payment of the Mortgage-money with damages shall not be enlarged without consent of parties in writing, *Art. 52.*

That no Injunction be granted to stay the Mortgagee from his Suit at Law till the final hearing of the Cause, except it be only to restrain the Mortgagee from the making of Waste upon the mortgaged Land, *Art. 30.*

3. A Purchasor of Land, *bona fide*, subject to a Recognizance, and the Heirs of the Recognizor or Obligor shall have relief against a Penalty also.

4. A Copiholder in Fee surrendered to the use of one and his heirs, upon condition of Redemption; after this he writes down his Debts, and doth will part of his Land shall be sold to pay his Debts: After his death one of the Creditors doth pay the money at the day of Mortgage; yet the Surrender was enrolled, and another Creditor sued him and the Heir here, and had a Decree that the Land should be sold to pay the Debts, and if any remained it should go to the Heir, *4 Eliz. Car. Rep. 7.*

5. A sold Land to B. that was his Heirs, and mortgaged other Land, to the end the Heir should assure it when he came of age, before when B. dyed without any Heir known: In this case the Mortgager, to avoid danger, had relief here; where it was ordered, the Heir should convey the Land to two of the Six Clerks, there to remain till the Heir be known, *Cuttings Case, Car. Rep. 29.*

So Lessee for years rendring Rent, and two men strive for the Reversion; upon a Bill against them, and payment of his money Court according to his Lease, he had an Injunction to forbid them both to trouble him, *Car. Rep. 46, 47.* But regularly this Court doth give relief against them that take advantage upon any strict Condition, for undoing the Estate of another in Lands, upon a small or trifling default.

6. If the Conusee of a Statute extend the Land in the hands of one of the Purchasors, and spare all the rest, he may be compelled to do it on all, *Car. Rep. III, 112.*

7. If one grant a Rent-charge out of all his Land, and after sell it by parcels to divers persons, and the Grantee force one only to pay it; he may here be relieved, and force the rest to contribute, and the Grantee to take no more of him than his proportion: But then he must make all that are chargeable with the Rent Defendants, and put them to shew cause, if they can, why they should not contribute, *Car. Rep. 223, 92.*

8. When the Conusee upon a Statute, or Plaintiff on a Judgment, hath received satisfaction; the Plaintiff or Conusor, his Heirs, Executors or Administrators, or a Purchasor charged or chargeable by it, may force him, his Executors or Administrators, if he be dead, to acknowledge satisfaction on the Judgment, or to deliver it up. And if Statutes be very ancient, this Court will force the Owners of them to deliver them up without satisfaction. And so the Court will force the delivery up of old Bonds, *Fet. 178, 179. Car. Rep. 45, 46.*

9. If a man have received the money due from me upon a Statute, and yet the Statute lies against me; in this case it hath been said, I shall not have remedy here,

Be 2

because

Contribution.

Statutes.
Judgment.

Obligations.
Bills.

because it is a Record against which no Averment lieth. But it seems the practice is otherwise, and there is as much Equity for this as in case of another Engagement, *Crompt. Jur. 43. 22 Ed. 4. 6. D. & St. 23. l. 1. c. 12.*

The Plaintiff had an Execution for Three hundred pounds, and was ordered here to take it out only for One hundred pounds, *Car. Rep. 51.*

If I have paid my money on an Obligation with a Condition after the day, or a single Obligation at the day and according to Law, and have no Acquittance for it; or have at or after the day, or otherwise satisfied it, and he hath accepted it and is satisfied, and yet he keeps the Bond, &c. and refuseth to give me a Discharge: In these cases I, or my Executors &c. after my death, may enforce him, his Executors &c. after his death, in this Court to discharge it, and deliver up the Engagement, *22 Ed. 4. 6. 7 H. 7. 11. Cargies Rep. 74. 11 H. 7. 14. Tot. bill 26, 27.*

10. If I have forfeited a Bond, and am in danger to have a great Penalty recovered of me thereby, I shall have relief here: As in case where one doth his best to pay money at the day, and by being robbed, or some other mischance is let, and he tenders it in a short time after: So where part of the money is paid, and yet the whole Engagement lieth, and the party that hath it doth refuse to deliver it up, or to receive the rest of his money, being tendred shortly after the day, or acknowledg what is paid, &c. *Car. Rep. 1. 22 Ed. 4. 6. D. & St. 23. Crompt. Jur. 43.* So where the Bond is to do any thing else, and the thing is done, and Condition performed, *Car. Rep. 45. 46.* So where one hath a double Security of me for a single Debt, as a Bond and Goods in pawn, or the like; I shall here force him that hath it to deliver up one of them, *Crompt. Jur. 43. 16 Ed. 4. 9. Tot. 26, 27.*

11. If I be bound as a Surety with another for a Debt, the which he hath paid, or he hath paid part of it, and hath a further day given him for the rest, or by agreement hath a further day, or he is released of the Debt, or the Creditor hath agreed with him to take some other satisfaction: In all these and such like cases I may have advantage of this, and be relieved in Chancery, *6 Ed. 4. 41. Crompt. Jur. 44.*

12. If my Scrivener that doth use to put out and receive my money, receive my money at the day, I having the Bond, and will not deliver it up, I may compel him in this Court, *Hunt's Case, Hil. 22 Jac. Tot. 175.*

13. If one enter into a Bond, or any other Engagement for money unlawfully gotten, as at Dice or Cards, or to procure a Marriage, or on a Simoniackal Contract, or upon a Cheating Contract, or the like; here is the place to be relieved against it, and have it took up or cancelled, *Tot. 24. 23.*

So if I have given an Engagement for that which is nothing worth, neither gain to me, or loss to him; as for Debts, things in Action not recoverable, or the like, *Crompt. Jur. 45. 44. Car. Rep. 17. 37 H. 6. 12. Tot. 23. 26. 27.*

A. had a son he intended to present to the Church of *Dale*, and he being sickly presented *C.* for the present, taking Bond of him of Six hundred pounds to resign upon request: *C.* is instituted and inducted; after the son of *A.* becomes healthy; and *C.* is required to resign; he refused; his Bond is sued, and coming into this Court for relief, it was denied to him, and the Bond agreed to be good in Law and Equity, *Trin. 6 Car. Wood and Berries Case in Chancery, Tot. 26, 27.* But if one make a Bond not to marry without consent of his friends, it seems this is not good, and the Obligor will be relieved here, *Tot. 26, 27.*

14. One *Harris* and *J. S.* two young men, needing money, came to one *King* to borrow One hundred pounds of him; who would not lend them money, but told them he had a Cabinet which he would lend them, and this cost him but One hundred and eleven pounds; and this he lent them, and took a Bond of them to pay him Four hundred pounds for it five years after, if *King* did live so long: *Harris* died, *King* died; the Executor of *King* sued the Bond against the other young man, who complained here, and it was decreed that the Executor should recover but One hundred and eleven pounds upon this Bond, and no Costs nor Damages, that the Suits

Suits in Law should be stayed, and the Bond delivered up to be cancelled, 6 *Car.* in Chancery.

15. If I have entred into an Engagement, and had a Release of it upon good cause, and have lost it, I shall have remedy here: But it seemeth otherwise, if the Debt be by matter of Record, 22 *Ed.* 4.6. *D. & St.* l. 1. c. 12.

It hath been said, if money be paid on a single Obligation, and the Obligor hath no Acquittance for his money, that he shall not be relieved here, *Car. Rep.* 17. But I take it, the use of the Court is otherwise at this day, and that the Obligee shall be here forced to deliver up the Bill.

16. If money be paid upon the Redemption of a Mortgage by Indenture without taking any Acquittance, it seems the Mortgagee must bring in the Indenture to be cancelled here, *Car. Rep.* 17.

17. The Plaintiff and his Father were bound to the Defendant in Five hundred pounds, to stand to the Award of the Lord Chief Justice; who ordered, That the Plaintiff who had the Reversion in fee, and the Father who had the Estate for life, should make such Assurance as the Defendant should reasonably devise: The Defendant tendred an Assurance to the Father to be sealed, who being old and blind desired time to advise with his friend: The Plaintiff sealed, and his Father afterwards did offer to seal; and then the Defendant said he did not care for his seal, but he put the Bond in suit upon the Fathers refusal, and it was staid by Order of this Court, *Car. Rep.* 105.

But it is now provided by the new Ordinance for the regulating of this Court, That no Relief shall be here against a Bond for payment of money only, and entred into after the Five and twentieth day of *March*, One thousand six hundred fifty five, *Art.* 43.

Nor may any Injunction be had in any case, but by Motion in open Court, and upon the merits of the cause. But the Defendants taking of a Commission, or sitting of an Attachment, is not sufficient ground for an Injunction, *Art.* 27.

And if in any of these cases, the party to whom such Engagement is made, make use of it in any Court by way of Suit against him that entred into it, he may in this Court by Injunction stay his Suit there, and shall have the matter ordered here as in Equity is fit to be done, *Tothill* 23. *Sucklins Case*, 11 *Car.* 24.

For the clearing of this Point, see it in these following Cases.

1. If there be Tenant for life, the Remainder over, and the Tenant for life doth give way to the suffering of a Common-Recovery, which *rigore juris* is a Forfeiture of his Estate; in this case he may be relieved here, as was done in *Staffords Case*, 10 *Car. Tot.* 184.

2. If I convey my Land on Condition to be done by me, unless it be in the case of a Mortgage before, and I fail, I am remediless. So if I be a Lessee for life or years, and make a Feoffment of the Land, and forfeit it; in these cases if the Lord take advantage of it, there is no help for me in Chancery. So if I do commit Waste, and the Land be recovered from me, *D. & St.* 176. 20 *H.* 6. 3. 21 *H.* 7. 7. 10 *Ed.* 4.6. 4 *H.* 6. 24.

3. *Hil.* 9 *Car.* In *Sir Edward Hungerfords* and *Wilsons Case* in Chancery, it was held, That a Lessee shall have relief in Equity, or the Grantee of the Reversion against the Lessor that doth enter for a Forfeiture on the Land for not payment of the Rent: And yet if the Lease whereby the Rent is reserved be a dishonest Lease, as gotten of the King by a false Surmise, or the like, *contra.* *Car. Rep.* 32.

4. If a Lessee for years of Land, upon a Condition of Forfeiture for not payment of Rent, make divers Under-Leases, and after by Agreement between him and the Lessor he makes a Forfeiture, and the Lessor enter, and then makes a new Lease to the Lessee for years; in this case the Under-Lessees and Tenants may have relief here against the Lessor and Lessee upon this practice, *Crompt. Jur.* 64.65.

5. If a Lord enter upon a Copholder for a Forfeiture by the Copholder,

Injunction;

Señ. 12.
Against the
extremity of a
Forfeiture in
other cases.

Of Lands.

it seems the Copiholder is remediless in Law and Equity both, *Co. 4. 24.*

And yet a Copiholder within age was admitted, and his custody committed to the Mother; and her Under-tenant did waste, and being presented, the Lord seised it for the forfeiture, and held it many years, and died, and his Heir held it; and yet the Copiholder had an Order for it here till it were recovered by Law, *Lissons Case, M. 41. 42. 42 Eliz. Car. Rep. 6.*

And so where a Copiholder took Timber without leave of the Lord, and imployed it upon the Copihold, albeit this *rigore juris* be a forfeiture, yet the Copiholder was holpen in this Court, *Tot. 46.*

The Father committed a Forfeiture, the Son was admitted; this was not allowed as a dispensation with the Forfeiture, in Equity, as was said; and yet agreed, That if the Lord had seised a Heriot after the Fathers death, that this had been a dispensation with the Forfeiture in Equity. *Smiths Case, Clarks Case, Tot. 45.*

6. An Estate in Tail was here ordered to be cut off, contrary to a Proviso in a Deed, only to make a Jointure, and then the Remainder to be settled as before, and that no forfeiture should be hereby, *Baylies Case, 38 Eliz. Tot. 83.*

Of Goods.

7. If my goods be taken as Felons goods, upon a forfeiture for Felony, or as a Waif, Estray, Deodand or Wreck; or be forfeit upon an Attachment, by my not appearing in a Court; in these cases there is no relief to be had in Equity for me. So upon an Outdawy in any Action, albeit it be upon an unjust cause, and I have no notice of it, yet I am remediless: But if there be any undue practice in it, haply I may have some remedy against the Plaintiff in this Court, *D. & St. 4. 2. c. 3. 20 H. 6. 3. 21 H. 7. 7. 35 H. 6. 27.*

Seff. 13.
Against the
injuries of o-
ther Courts of
Justice.

If any other Courts of Justice, by their over-nice and strict observation of the Rules of Law, do me injury, I shall have relief here. For which know these things.

Judgment.

1. If there be any extremity used upon a Judgment had against me in another Court for money or Land, this Court may not vacate the Judgment, but may order the Persons as it shall see cause in Equity. And so was it resolved notwithstanding the Statute of 4 H. 4. 23. upon a special Debate by the Kings command, 14 Jac. But in cases tending to overthrow of Judgments had in other Courts, this Court neither may, nor will examine or revoke them: For if so, there will be no end, and this will render them invalid, 37 Ed. 3. 14. *Dyer 20. 27 H. 8. 15. D. & St. lib. 1. ch. 18. Car. Rep. 74. 75.*

2. If one make an Obligation in one County, and the Obligee sue in another, and there recover it; it is said the Defendant may have the Plaintiff here, and shew that by that he lost the advantage of pleading some truth, by which he might have avoided the suit, 9 Ed. 4. 15. *Crompt. Jur. 42.*

3. If two Copartners bring a *Quimpedit*, and one count false, by Covin between him and the Defendant; I having damage thereby, may sue them both here, 6 Ed. 4. 10. *Crompt. Jur. 43.*

4. If a Fine be reversed in a Court, by inspection and proof of Witnesses, for Nonage, and in truth he is of full age, it seems relief may be here: And if the Conusor after Reversal sell the Land to another, the *Subpœna* will lie against Buyer and Seller both, *Dyer 261. 301. Crompt. Jur. 66.*

5. If one have Land in antient Demesne in execution upon a Statute, and do after recover it there by a failed Recovery, the party grieved that cannot falsifie them, may be relieved here, *Crompt. Jur. 45. 6.*

6. If a Suit be against me in any other Court, upon an unreasonable Engagement, I may have relief here by Injunction. See *Seff. 12.* before, and *Injunction* at *Seff.*

7. If a Fine or a Recovery be passed in the proper Court, and thereby a just Claim pass, little hope of Relief is here, unless there be some notorious practice in it; for in these cases the Court is very tender.

8. If another Court entertain a Suit for Tythes not tytheable, Prohibition lieth here, *F. N. B. 41.*

The

The Heir entering into his Fathers house had of his goods worth five shillings, and the Defendant sued a Bond of Five hundred pounds against the Heir, as Executor of his own wrong: And proving he sold or gave away the goods, a Verdict passed for the whole Five hundred pounds; which appearing by the Certificate of the Justices of Assize, an Injunction was granted to stay all Proceedings in this Action, and to forbid any new Action, till the Court have determined the matter, *Car. Rep. 49.*

The Plaintiff had a Judgment for Three hundred pounds, and was ordered to take Execution but for Two hundred pounds, *Car. Rep. 52.* A Debt upon a single Bill satisfied, and the Bill not delivered, was sued, and Execution gotten, and the party relieved here, *21 Eliz. Owens Case, Car. Rep. 74.*

If one sue here to be discharged of a Legacie, and after the Defendant did sue for it in the Spiritual Court, this Court granted an Injunction, *Car. Rep. 73.*

If one man do unduly get a Judgment in the name of another, Relief may be had here, *Car. Rep. 76.* And so in all such like cases, where any considerable circumstance of Equity is in the case, otherwise it will be dismissed, *Car. Rep. 76.*

The Plaintiff desired relief against an Obligation of One hundred pounds, with an insensible Condition put in Suit; for that the Plaintiff being desired by the Defendant to seal a Release, he desired time only to be advised thereof, which the Defendant would not yield to, but hath put the Bond in suit, though no ways damaged, and now is ready to seal it, and an Injunction was granted, *Car. Rep. 78.*

Injunction.

If one sue for Tythes of Land not rytheable, it seems relief may be had here, *Car. Rep. 79.*

A drunken man sued for words spoken in his drink, fought for remedy here, but could have none: *Qui peccat ebrius, inas sobrius. Car. Rep. 93.*

The Plaintiff sought to be relieved upon an Obligation of Three hundred pounds, which he entred into to make a Jointure to his wife, in consideration of One hundred seventy four pounds promised to him by the Defendant in marriage, which was never paid to him: In this case an Injunction was ordered, *Car. Rep. 112.*

The Defendant pleaded *Non est factum* to a Bond of Four hundred pounds, and it passed with the Defendant. The Plaintiff preferred his Bill, supposed he had promised payment after the Verdict, and it was received, *35 Eliz. Suttons Case, Tot. 137.*

But now by the new Ordinance, no Injunction is to be granted in any of these cases before the Hearing of the Cause, to stay any Suit at Law; but upon matter confessed in the Defendants Answer, matter of Record, or in Writing under hand and seal produced in Court, *Art. 18.* Nor may any Injunction be granted after Plea pleaded at Law, or Rules given, to stop a Trial at Law, or any Pleadings or Proceedings preparatory to a Trial, *Art. 29.*

If the Lord of a Copihold-Manor deny to do right to his Tenant a Copiholder, according to the custom of the Mannor; the Tenant may compel him to it by the help of this Court. Wherein take these things.

Sec. 14.
Upon the hard dealing of the Landlord against the Tenant a Copyholder.

1. If the Copiholder will put out his Tenant, that payeth and doth his services; or if he surrender in Court to the use of another, and the Lord refuse to admit him to whose use the surrender was made; or will not keep Court for the benefit of his Copiholder; or exact uncertain Fines, they being certain; a *Subpana* lieth.

2. So if he will not admit him upon a Descent.

3. So if he be ousted of his Copihold, and the Lord will not hold a Court whereat he may sue for his Right.

4. So in case of a false Judgment, upon a Position to the Lord to redress it.

5. So to compel him to grant a Licence to let it.

6. A woman Copiholder for life, the Reversion is granted to two for their lives, *cum post mortem vel forisfacturam* of the woman it shall happen, and she take a husband that doth surrender to the first in Reversion, who is admitted and dieth; and after the next desireth admittance, and could not have it, but the Lord entreth as an Occupant, as he might, and the husband and wife were willing to surrender to him in Reversion for life; and the Lord refusing to keep a Court, or leave the possession, was ordered to do both in this Court, *Tot. 3. 44. 45. Car. 3. Dyer 264. Fitz. Subpans 21. Kitch. 82. 89. F. N. B. 12. Cromp. Jur. 51. 53.*

7. Lands that had gone for Copihold of Inheritance, allowed here till they be recovered by Law, *Tot. 44, 45.*

8. A Copihold granted by the Lord at a Court held out of the Manor, made good against the Lord by Decree of this Court, *Tot. 45. Marks Case.*

9. *Mich. Eliz.* in Chancery, the Defendant would not admit the Plaintiff this Copihold, under pretence that he had forfeited it by cutting Trees; but he was ordered to do it, because he could not prove the cutting was by his directions, *Tailors Case, Tot. 140.*

10. The reasonableness of a Fine upon a Surrender shall be judged here; a year's value of the Land was allowed good, *Car. Rep. 54.*

11. The Court compelled the Lord to admit his Tenant, a Copiholder, to sue at Law without any forfeiture, *Tot. 3.* And yet see before *Set. 12.*

12. But if the Lord enter upon a Copiholder for a Forfeiture by breach of the Custom, no relief is to be had here in this case, *Co. 4. 24. F.N.B. 12.*

13. *Stone vers. Whitmore, Hen. 6. 49.* The Plaintiff sued the Defendant to compel him, being Lord, to take the Plaintiff's Fine, which he pretended was certain, and to admit him; the Defendant demurred, because it did belong to Law; but it was overruled, and the Lord ordered to keep Court and set the Fine, and then that a Trial be at Law, but the Costs suspended till the Trial were past: For the Plaintiff had no means in Law to compel the Lord to keep Court, &c.

14. A custom to pay an uncertain Fine at every alienation of the Lord, will not be admitted here; otherwise it may be to pay it at the death of the Lord. But a custom to pay Fine uncertain at the death or alienation of a Copiholder, may be good, and will be allowed here, *Car. Rep. 7.*

15. But this Court doth not order for all Tenants in general, nor for any longer time than the present, except it be by agreement between the Lord and Tenants, which if reasonable is here decreed, *Car. Rep. 27.*

Set. 14.
For the Surety
against the
principal Debt,
or or Creditor.

For this, take these Cases.

1. If I be Surety for another to pay money, or to do any other thing, and he doth it not, but suffer me to be damnified by it: In this case I may here, if I have no remedy at Law, compel him to discharge me, *D. & St. lib. 1.*

2. If I be bound with A. B. to pay money at a day, and he is bound to save me harmless, and at the day I pay the money, and then sue my Counterbond, he may avoid this suit at Common-Law; but in this Court I may compel him to pay me the money again, *M. 31; 32 Eliz. Cromp. 43, 44.* in Chancery.

3. If the principal Debtor and the Creditor will by agreement without my privity that am the surety, continue the Debt after the first day of payment, when I do suppose it to be paid; in this case the Court will compel the Creditor to take his relief of him, and discharge me, my Heirs, Executors, &c. *Miles Case, 5 Car. Harri Case, 10 Jac. Sanders Case, 10 Jac. Tot. 181.*

4. If the principal Debtor have Lands descended, and his Heir have conveyed them in trust, I may here compel the sale of them to pay the Debts, *Tot. 182.*

5. If he assign Debts, which be things in Action, to me, I may recover them here, *Tot. 182.*

Set. 16.
Upon a De-
teiner of my
Lands, Deeds
or Goods, to
discover and
recover them.

If a man hold my Land from me, I may sue him here, and suppose he doth keep my Bvidences from me also, and put him to set forth by what title he doth claim it; wherein are these things.

1. If I have occasion to bring an Action for the Land, and cannot tell the Tenant, I may sue the Occupier here, and he must shew what he or any other claimeth to his knowledge; that I may know who to sue; yet some doubt of this. The Defendant held over his Term; the Court put him to shew what time his Lease was, *M. 6 Car. Tot. 183.*

2. So the Confess of a Statute did here force the Lessee for years to set down all the particulars of his Lease, to see whether it were extendible or not, *11 Car. Tot. 183. Tot. 20. Criswells Case, Tot. 99. Car. Rep. 16.*

3. If one detain from me my Evidences, and they be not in any Box or Chest locked, and I know not the certain Contents of them, so as to bring an Action at Law for them,

them, I may recover them here. For explanation, take these Cases.

1. *Wrights Case, circa 28 Eliz.* in Chancery one did exhibit his Bill for Evidences of Land, and made himself a title to the Land, and the Defendant made himself a title also, and justified the detaining of them; and it was referred to a Tryal at Law for the title, and ordered, That he should have the Evidences with whom the Verdict passed, *Crompt. Jur. 44. Caries Rep. 16.*

2. If the Heir happen to get Writings, that by Law do belong to him, but in Interest to the Executor; or the Executor get writings that by Law do belong to him, but in Interest to the Heir, as Bonds or Statutes for the securing of the Land of the Heir, or the like: In these cases they may enforce the delivery of them here, *Broo. Oblig. 18. 68. Chattel 6.*

3. If one be bound in a Bond to me for money, and he hath gotten the Bond; I may sue here for the Bond, and for the money without the Bond, *West.*

If one have any other goods of mine, and I cannot tell what they be, I may sue for them, to Discover and Recover them in this Court, *39 H. 6. 16.* And if I have lost my goods, and cannot tell who hath them, I may here suppose any man to have them, and put him to discover on his Oath, whether they have or know of them; and albeit the case be such that I may by a Suit at Common Law recover them, yet I may here in this Court, for preparation to that Suit, force the possessor to make, and set down an Inventory of them, *Crompt. Jur. 45.* If Lands be given by one Deed severally to two men, he that hath the Deed shall be compelled here to shew it, for the defence of the others Title, *9 Ed. 4. 41.* If the King had granted to me all the goods of A attainted by Felony, and I know not the certainty of them; yet I may compel any man that hath them, to make an Inventory of them in this Court, *36 H. 6. 26.* where Deeds do concern as well the Defence of the Title of the Tenant for life, as of him that possesseth the Deeds, being to him in Reversion or Remainder; in this case it is usual for this Court to order them to be brought into the Court, *Caries Rep. 19.* So in such like cases, where the Land is yet in question, or the Court hath not determined who shall have it, *Caries Rep. 52, 18 Eliz.* The Plaintiff sued for Tokens he had delivered to the Defendant, when he was a Suitor to her; she confessed part of the in her hand, which the Court forced her to deliver forthwith; and for the rest, that the Plaintiff left them against her will, and she delivered them to a friend of the Plaintiffs that dealt between them; and for that, ordered that he take his Remedy against the friend, *Caries Rep. 55.* Where the Court doth see cause, it will force the Defendant to bring the Writings in Court, by a *Ducens tecum*, *Caries Reports 67. 43. 52. 53.*

For this, take these cases.

1. This Court would not change an Estate in Fee, depending on an Estate in Tail, *Totbil 84.*

2. An Estate in Tail was Ordered to be cut off, against the Proviso of a Deed, onely to make a Wife a Joynture, and to settle the rest as it was before, *Bailies case, 38 Eliz. Totbil 82.*

A. deceased, late Father to the Plaintiff, did give the Land Intailed to the Father of the Defendant, reserving forty pound Rent to him and his Heirs, after granted twenty five pound, part of the Rent, to the Plaintiffs for their lives; the Defendants Father did Avorn and pay the Rent to the Plaintiffs, till two years before his death, after the Issue in Tail refused, but was ordered here, *Caries Rep. 92.*

A Father being Tenant in Tail of Land, sells this Land, and leaves as much free Land to descend to his Heir in Tail; in this case it was ordered, that the Heir shall repay the money paid by the Purchasor, according to the Fathers Will, or else the Plaintiff shall have the Fee-simple, Ruled, *Pearces case, Totbil 183, 184.*

In this Court a man shall have Relief for the recovery of his Land, Debt, or Duty, where by Law he hath none. For the knowledge whereof take these things.

1. If I have a good Title to Land, but have lost my conveyance, I may recover my Land in this Court, *Caries Rep. 24. Gosless case.* The Plaintiff sued to have his

*See 17.
About an E-
state in Tail.*

*See 18.
About the way
of Recovery of
Land, a Debt, &
or Duty.*

- his Lease, and supposed it to end at *Lady-day*, 1604. had it Decreed; and after, finding the Lease, it did not end till 1605. after he moved he might continue the Land till 1605; but it would not be granted without a new Bill, *Caries Rep.* 25.
- Rent.** 2. If I have a good title to Rent, but no means to gain it, as if it be a Seck; and I have had no Seisin of it, or another Rent, and I have not had any Attornment of the Tenant, or the Rent is by some accident without any recompence for it discharged, or the like, I may recover it here. So if it hath been usually paid, but I can shew no Deed of it, *Tothil* 171, 172. 77. 173. And yet some say in the case of lack of Seisin of a Rent, I shall have no remedy here, *Co. upon Littl.* 159. So the Lord Keeper and Judges, *M.* 1596. *Caries Rep.* 5. But a man possessed of a Lease for years Devised a Rent out of it, without clause of distress, and made his Wife Executrix, she married, and she and her Husband sold the Lease; in this case the Court Ordered the Recompence to be made by the Executor, and would not charge the Land, 9 *Jac. War case, Tothil* 77.
- Executor.** 3. If one owe me money on an Especialty, and I have lost it, or cannot come at it, yet if I can prove it, I may recover my money here, *Caries Rep.* 15.
- Especialty lost.** 4. If I sue for, and recover a Debt at Common-Law, and for Error it is Reversed in the Exchequer chamber, I may after notwithstanding recover it here. *Cuttings case, 40 Eliz. Caries Rep.* 8.
- Limitation.** 5. In some cases, albeit I be gone in point of time by the Statute of Limitation, 21 *Jac.* by not suing for it in time; yet I shall have relief here, especially when it hath been demanded within the time; or when it is given and directed to be paid by Will, *Tothil* 178. 179. 53.
6. An Elegit being returned and filed, and the time thereof elapsed, and yet the Plaintiff unsatisfied his Debt; he was relieved here, and the Elegit revived, *Tothil* 179.
7. This Court will order the Lands extended to be delivered to the Plaintiff in execution, and at the value it is found, *Tothil* 178.
8. If the King had given Forfeiture-goods to A. he might have recovered it here, 39 *H. 6.* 26.
9. But if Lands be extended by a Jury much under value. and there be no practice in the case, it seems no remedy is to be had here; for the Debtor may help himself by payment of the money, *Crompt. Jur.* 35. 15 *H. 7.* *Dupleys case.* And if a Defendant hath waged his Law in an Action, and thereby the Plaintiff is barred, or a Grand Jury in an Assize do finde with the Petit Jury, though never so much against Truth, and a man have twenty witnesses to disprove it, this Court will not give Relief, *D. & Sr.* 31. *Crompt. Jur.* 49.
- For this observe these cases.
- Bar in Action Final.** 1. The meaning of a Will is to be performed, and will be ordered here, *Cob case, Tothil* 141.
- Self. 19. About a Devise and how it shall be taken and performed in Equity.** 2. An Averment of a Will not allowed by Law, will be received here, to have the intent performed, *Tothil* 178, 189.
3. Lands Devised to two, to be equally divided betwixt them and their Heirs, Agreed and Ordered here to be a Tenancy in Common, and the Survivor denied to have all, *Tothil* 79.
4. Doctor Ford, by his Will devised his Land to his Wife in these words; (*Non per viam fidei Comissa*) for which his son might sue her; but hoping that if his Son grew christy, that at her death she would leave the Remnant of these Leases to him; she married *Grey*, and before marriage he did write to her that she should dispose these Leases at her death, after marriage he sells the Leases; the Son sues here, but had no relief, *Caries Rep.* 22, 23.
- The Plaintiffs Father, seised of Land in Fee, by a *Nuncupative* Will devised three hundred pound out of his Land, to be paid to false portions, two hours before his death, and because the Father had dis-inherited him of other Land, the Court freed him of this payment, 13 *Jac. Samburns case, Tothil* 184.
- The Plaintiffs Father did fully resolve that he should have the Lease, make a kinde of Devise of it to him, divers times say that he had given it to him, the Defendant that

that had the Lease, say and protest, as he was a Christian man, he should have it, offered an Agreement, and to give him two hundred pound for the Lease; it was Decreed he should have it; *Redmans case*, 28 *Eliz. Tothil* 69. A Devise void in Law, by reason of a mis-recital of a Grant, and lack of Attornment, Decreed here to be good, *Bacons case*, *Tothil* 79. A breach of a condition upon a Devise, was here holpen against the Heir, *Serjeants case*, 39 *Eliz. Tothil* 77. If there be a great overplus of Estate, and no disposal thereof by the Will; this Court doth Order it to the Testator's Kinsfolk, and to charitable uses, *Breretons case*, 6 *Jac. Tothil* 87. A Devise of money to a woman, if she would be divorced from her husband, was decreed good, without Divorce, *Tenants case*, 6 *Jac. Tothil* 78. If one possessed of a term, Devise it to another besides the Executor, and he have not Assets to pay debts and sell it, there's no relief to be had here: But if he have enough besides, and yet sell it, the Legatee shall have relief here against him; and if the buyer did know of the Devise, the *Subpoena* shall go against them both, but the Court will not avoid the sale; before the sale haply the Court will not avoid the sale: but before the sale happily the Court will prohibit it, *Plow* 539. 519. See more in *Section* nine before. If *A.* and *B.* be bound jointly and severally to *C.* in a Bond of a hundred pound, and *C.* gives to *A.* all the debts he owed him; *C.* died, and his Executor sued *A.* for the debts. *A.* complained for relief here; in this case the Lord Keeper doubted upon the manner of the Devise onely, being clear, that if the debt had been from *A.* alone, he would have relieved him, 6 *Car. in Chancery*. If one give his Leases to his wife, thus hoping that if his Son be towardsly she will leave them to him, but not that he may sue her, and before her second marriage he promised to leave them to him; yet after the marriage he sold them, and no remedy could be had here, *Caries Rep.* 23.

A Legacy was recoverable here; but by the new *Ordinance* it is provided, it shall be tried for at Common Law. Enquire how and where, and what the practice and experience is.

On this, observe these cases.

First, If Lessee for years Demiseth parcel of the term to another, and after, covinously, forfeit his Lease for a condition broken, and then take back the Land or Lease again; in this case the Lessee of parcel shall be relieved here, 1 *Ed. 4. 4. Crompt.* 64, 65. *Caries Rep.* 18. See *Section* 12. before.

Upon a Fraudulent practice to avoid a Lease.

Secondly, If one enter into a Statute in my name, it seems I cannot avoid it here, but I shall have remedy by a Writ of *Deceit*; but if he be of my name also, I may against this avoid it by Plea, *Caries Rep.* 22.

If, before the Statutes of *Fraud*, the Debtor had made a Deed of Gift of his Goods, to defraud his Creditors, and continued the possession of them, and took Sanctuary and died there, his Executors having the Goods might be chargeable here, 16 *Ed. 4. 9. Caries Rep.* 18.

To avoid a Debt.

If one buy Goods of me for money, and after, being a begger, and purposing to defeat me of my Debt, gives the Goods to one *J. S.* but useth them all his life time and dies, and then his wife kept them; she married, and her husband kept them; in this case *J.* it seems may here sue the husband and wife upon this Covin: For they cannot be charged by Law as Executors of their own wrong, because the Goods were the Goods of *J. S.* in Law, 16 *Ed. 4. 9. Crompt. Jur.* 62, 63.

1. If one sue for Land, and the Defendant, hanging the Suit, make secret conveyances of the Land; this Court will order him to discharge the Land thereof, *Tothil* 108.

3. If a Scrivener appointed to draw a Deed of a Farm, and all the Land belonging to it, makes it of purpose of the Farm *cum pertinentiis*, and after gets a Grant of it himself, to avoid the Deed; this Court will avoid this, *Harbins case*, *Tothil* 99.

To avoid a Conveyance.

4. If I be a simple man, and another cunningly procures me to convey my Land to him for nothing; albeit he sell it to Purchasers, and a discent be call; yet this Court will order the reassuring of the Land, *Lewis case*, *Tothil* 42, 43.

To get a mans Land from him.

5. If Goods be given to defraud Creditors, in such a case as the gift be not avoidable

avoidable by the Statutes, possibly the Party may be relieved here, 16 *Edw.* 4. 9.

Fraud upon
Fraud.

6. If a Debtor will colude with some of his friends to deceive his Creditors, and his Friends break their trust with him; it seems this Court will not give relief in this case, *Fallere fallentem non est fraus*; and yet sometimes the Court, in this case hath ordered the Goods, so conveyed by Fraud to the Creditors, *Caries Rep.* 13.

7. If a copy of Court-Roll be indirectly entred, the party wronged may have Relief here; and albeit the Homage finde the Copy true, yet this will not hinder Relief, *Caries Rep.* 55. If one sell Land, and before the Assurance made, convey it to another that knoweth of the sale, it will be holpen here. So if he convey it to another that hath notice, *Caries Rep.* 82. So if he convey it to any of his children, *Totbil* 107.

Upon falsehood
in Fellowship.
See. 20.
Executor.
Use.

If two Executors be, and one of them release the Debts (as he may) and there be not enough besides to perform the Will; in this case the other Executor may sue him in Chancery; and if there be *covin* between him and the Debtor, the *Subpana* may be had against them both, 4 *H.* 7. 4. *Crompt. Jur.* 106. 11 *Ed.* 4. 2. And if one be bound to two in an Obligation, to the use of one of the two onely, and the other release the Debt (as he may by Law) he to whose use it is, may have relief here, and against them both; if the Debtor were privy to it, 7 *H.* 7. 11. If two have any Commodity of Land or Goods together as Jointenants, or the like, and one of them take, or sell all from the other: In this case, if it be in case where he hath no remedy by Law, as in some cases of Merchants that are Partners, and in some others; the party grieved may have remedy here, *D. & St.* 12. 175. *Crompt. Jur.* 49. And yet in *Caries Rep.* 21. it is said, That if one Jointenant take all the profits, the other shall have no remedy, except there be an Agreement or Promise of Account. If two Copartners or Jointenants joyn in a *Q. Impedit*, and the one of them plead *convincously*; this Court will compel him to joyn with the other in the Plea or Presentment. So if Lands be given severally, by one Deed to two men; he which hath the Deed, shall be compelled to shew it for the defence of the others title, 9 *Ed.* 4. 41. *Caries Rep.* 15.

Executors.

One Executor sued another, supposing that divers Goods were left with them to be delivered to children at their full age; and the trust and charge being joyn, which may survive, he desires they may give Bond one to the other, that they, or if they die, their Executors shall pay the children their Portions when they come of age; and it was thought fit to be decreed, *Caries Rep.* 79. Two are made Executors to the use of children, one of them gets the Estate into his hands, makes a Testament, and gives in Legacies as much as this, and all the rest of his Estate, and dies; his Executor was ordered here, first of all, out of all the Estate, to satisfy this Estate of the first Testator, *Wray* Chief Justice case, *Caries Rep.* 86, 87.

See. 21.
To have Pro-
hibition to
stop an injury.
Waste.

In some cases where an injury is done to me, the which is continued and increased, I may stay it here by a prohibition; as in case of some Wastes, by cutting down of Woods, or ploughing up of Grounds; wherein take these things.

First, A Prohibition was granted here to stay the ploughing of ancient Pastures by the Tenant thereof, *Totbil* 52.

Lease without
impachment
of Waste.

Secondly, The Lessee of an Estate dispunishable of Waste, was here prohibited to destroy the houses, *Morgans* case, *Totbil* 92. At another time to do Waste in Woods and Houses, *Kings* case, 4 *Car.* *Totbil* 82. And the Lessee of such a Tenant was here forbidden to do Waste, 11 *Jac.* *Totbil* 83. And a Bishop made a Lease before the first of Queen *Elizabeth*, without impachment of Waste, which was confirmed by the Dean and Chapter. And the Lessee cut Timber, and it being moved here, the Lord Keeper said, because the Bishop was punishable for Waste; therefore he would forbid it, otherwise not. But he did not forbid the sale of what was cut, *Trin.* 6 *Car.* The Bishop of *Sarums* case.

Timber.

Thirdly, Lessee for life the Remainder for life, the Remainder in Fee and the first Lessee for life doth Waste; in this case, albeit he in Remainder in Fee hath no remedy by the Common-Law; yet he shall have a Prohibition to restrain him from doing more Waste, *Crompt. Jur.* 48, 49. *Caries Rep.* 20, 26. Tenant in Tail
after

after possibility of Issue extinct, shall not be restrained, *Doff. & Stud. Lib. 2. chap. 3.*

Fourthly, Birch-Trees in some Countries agreed to be Timber-Trees, and here forbidden to be cut down, 8 Jac. *Totbil* 88.

Fifthly, If the Lessee of a Copiholder dig Gravel, or cut Trees, or the like, which is not Waste in the Copiholder; yet he may be restrained, *Caries Rep.* 63.

Sixthly, Two houses-adjoyning being upheld by one main Wall standing upon the Freehold of either party, and one of them hath necessary Rooms standing upon the others Kitchen, and he went about to pull down his under Rooms, which would be the ruine of the upper Rooms; an Injunction was granted to stay it till examination of the matter, *Caries Rep.* 90.

This Court doth order Inclosures of Common Grounds, when it is for common good; wherein take these cases.

Self. 22.
About an Inclosure.

1. It hath ordered Colledges, and the Person of a Church to agree hereunto, *Totbil.*

2. Because Lands have been inclosed thirty years together by consent of most of the Parish; it was ordered so to continue, *Pigott case*, 4 Jac. And yet in *2 Car.* in *Ingrams case*, the Court would not binde a man that did not agree to it.

3. *M. 22 Jac. Trigs case.* The Court would not decree an Inclosure, because it was a Depopulation, and the Plaintiff refused to give the Defendant amends for his common.

4. If any prejudice be to the High-ways, or any conversion of Tillage into Pasture, or such like publick prejudice by the Inclosure; this Court will not order it, *Totbil* 109, 110, 111.

5. The Defendant once agreeing after disagreed, was ordered to stand to his first Agreement, *Foxes case*, 13 Car.

A Release was pretended to be lost, and it was deposed it had been seen; but this not allowed for proof, unless he would swear, that he had seen it sealed and delivered; it is not sufficient to say he saw it after it was a Deed: And no Deed is to be allowed here, unless it be produced, or the Execution thereof proved, *Caries Rep.* 31.

Deeds how to be proved here.

A Bill was brought against Executors to the Father, who was Guardian in Socage for the profits of the Land which he had received of his Wives Childes Land, and the Plaintiff did aver they had Assets, and the Defendants demurred, because they were not privy to the Account, but were ordered to answer, *Caries Rep.* 54. The Suit was for certain Rents, Fines, and Woodsales, received by the Defendants Testator during the Plaintiffs minority, and it appeared, That if the Plaintiff had made good proof he had been relieved: A Commission was therefore awarded by consent, *Caries Rep.* 114. And yet in the case of *Fleetwood*, 21 Eliz. it was ordered, That if the Plaintiff did charge the Defendant by the Bill, for the Issues and Profits meerly by way of Account, then that the Defendants should not answer: But if they were charged by way of promise, then that they should answer, *Caries Rep.* 114. But it

Self. 23.
Accomp.

seems the practice is otherwise. This Court regularly will not make a void Award good: But some use it will make of it for Evidence and Advice, especially when an Award is final and reasonable, as to all the matters in difference between them; and sometimes it will Decree the very things themselves contained in the Award; and then especially, when the parties hands are to it, shewing their Agreement to it, *Totbil* 16. And therefore a Suit being for Land about a Custom, and both parties agreeing, that the Judges of Assize had made an Award in it; it was decreed, that both parties should perform it, and that either party shall have Injunctions one against the other, *Burters case*, 2 Eliz. *Caries Rep.* 47. and 19 Eliz. The Plaintiff sued to have an Award made by certain Arbitrators indifferently chosen to be performed; for performance whereof, both parties were bound one to other: One part whereof was, That if any difference should after arise, the same Arbitrators should end it; and the Court ordered the Bill should be retained, *Barkers case*, *Caries Rep.* 57. And 19 Eliz. there was a Suit to have an Award in writing, made by the Lord Chief Justice, and under his hand, and the hands of the parties decreed; and the party was called by Proces, to shew why it should not be so, *Wakefields case*, *Caries Rep.* 64.

Award.

And

And where an Award is good, there this Court will order the performance of it, and grant Injunction as occasion shall be to stay Suits against the meaning thereof, *Caries Rep.* 106.

No Tenant by Elegit or Extent, shall be forced to account here for more then the extended value upon any Statute, Recognisance, or Judgment, unless the Suit be begun within a year after the Extent be executed, and possession delivered, and enjoyment thereupon accordingly, except in case of Infancy Coverture, *Non sane memorie*, or being beyond Sea; and in these cases within a year after the impediment removed, *Ordinance for Regulating the Chancery, Art. 53.*

Under value.

A Suit was brought here, and because it was for six pounds onely, it was dismissed, *Marbers case, 21 Eliz. Caries Rep.* 83.

Another in the same year being for five pounds for Fish, was dismissed, *Richards case, Caries Rep.* 100.

So another being for a Rent of ten shillings by the year onely, was dismissed, *Knights case, 21 Eliz. Caries Rep.* 80.

So also another the same year was dismissed; because the Land sued for, was not worth forty shillings a year, *Townlies case, Caries Rep.* 74.

So another was discharged the same year, because it appeared to be for nothing but a liberty to dry Cloaths upon a Parol-Agreement onely, *Hambies case, Caries Rep.* 76.

And in that year also was another Suit in this Court for a Hawk and certain Evidences, supposed to be in the hands of the Defendant, and the Court observing that the Evidences were put in for a colour onely, dismissed it, *Glassers case, Caries Rep.* 82. And yet if it be under value, and for the poor of a Parish, the Court will hear it, *Caries Rep.* 103.

Jointenants.

This Court will not order, That the Survivorship of Jointenants shall not hold place according to Law. And yet two Jointenants were, and one of them did promise the other upon his Death-Bed, not to take advantage of the Survivor, but to suffer it to go to the payment of the others Debts, and thereupon he Devised part of it to pay his Debts: And this was Decreed, and that the Survivor should make the Estate accordingly. *Springs case, 21 Eliz. Caries Rep.* 81.

And in *Mich. 7 Car.* Two Joint-Purchasers were, and one of them Devised his part for payment of his Debts, and it was ordered here, *Mathers case, Tothil* 79.

But if two Joyntenants be, and they cannot agree upon the Presentment to a Church, but suffer a Lapse; there is no remedy here, *D. & St. L. 2. ch. 33.*

Two Jointenants, Sisters, of a Lease for years, they marry, one of them dieth, the other claimeth the whole by Survivorship; and the Husband of her that is dead sued here, and pretended, That there was some secret Act done in her life, by which the Joynture was severed, but the Court would not order the Defendant to Answer it, *Caries Rep.* 9.

ex parte Regno.

If one have my money, and I perceive him going out of the Land, I may by Suit stay him here till he have given me security to pay me, upon the

the Statute of the Fifth of Richard the Second, Ch. 2. *Crompt. Jur. 641 Tohil*
136.

This Court doth not give Remedy in Criminal things, nor in case of Misdemean- For Misdemeanor, or, as for Perjury, Forgery, or the like; and yet for Misdemeanors done in this Court, it will give relief, and punish the offenders, as in case of Perjury in this Court, mis-carriage of a Commissioner in examination of witnesses, or any practice here by a Suit, examination of witnesses or otherwise, *Caries Rep. 56, 63, 68, 74, 75, 90, 99. 56. 68.*

This Court is the proper place for a Woman being turned off by her Husband, to recover Alimony against her Husband, and it can be done no where else. But a Legacy by the new Ordinance is not to be sued for here, but at the Common Law. See the *Ordinance for the Regulation of the Chancery*. But enquire the practice, and what Action at Law shall be framed for a Legacy, and how.

Also Relief lieth here in divers other cases, As

If I be Lessee for life or years, and a stranger do waste against my will, whereby I am liable to a Suit and loss of treble damages therein, and I bring my Action of Trespass, and recover treble damages against him, as I may, and after it hapneth that he in Reversion, before he sueth me, dieth, so that now the Action against me is gone; in this case the Trespasser shall have Relief here, to have again his treble damages, *D. & St. 34. Crompt. Jur. 49 Caries Rep. 2.*

If Tenant for life, or in the right of his Wife, forfeit Issues which come upon the Land after his death; the owner of the Land it seems will not be relieved here in Equity; for this is for advancement of execution of Justice, *D. & St. 38. Crompt. Jur. 49.*

So, if one sued for Land here, and it appeared the Defendant had been in possession a hundred year, and it was dismissed, *Caries Rep. 110.*

A Man married a Co-heir, and had children by her that are dead, and he sued here to be Tenant by the Courtesie, the Land being conveyed to them and their Heirs jointly, and the Court refused to Decree it here, *Cowleys case, 2 Jac.* So the continued possession of the Bastard *signe* shall prevail in Conscience, as well as in Law, against the *Mulier puisne*, *D. & St. 154. Caries Rep. 5.* So, if one have waged his Law to my Action of Debt against him, though never so falsely, I can have no remedy in this Court.

A Lease is made of a House and Wood, wherein it is covenanted that the Lessee shall have Houf-boot and Fire-boot, by which is understood, that he is not to have to any other purpose, but that they belong to the Lessor; and in this case the Chancery doth usually help him to it, leaving sufficient for the Lessor, *Caries Rep. 18.*

One Pool was bound to C. a Merchant, in a Statute; after B. lent Pool five hundred pound to buy a Mannor, the which he did with this money; and within four days after the Purchase, made it over to B. for the security of his five hundred pound. After C. sued Execution of the Statute, and had the Mannor in Execution: B. sued here to be relieved in Equity but was denied, *Crompt. Jur. 63.*

If one was seised of Copihold Land in Fee, and had two Daughters, by two Ventrers; the Daughters entred and took the profits divers years together, without doing Fealties or paying Fine, or any admittance by the Court, and the eldest dieth without issue: But it was here Decreed, upon this possession, That the Collateral Heirs of the eldest, and not the sister of the half blood, should have the Land and it was said, That the possession was Seisin sufficient without admittance, to make the Heir inheritable. *Dyer 292. Crompt. Jur. 53.* The Copi-holder had a Daughter by one Woman, and a Son by another Woman, and he died, his Son within age, who by the Lord was committed to the Mother, who entred, and then the Son died before his admittance, by paying Fine or Fealty. and the Daughter sued in Chancery to be admitted, but was denied; for it was said the Mothers possession was his possession, *Dyer 242.*

A Man may at this Court recover damages for the profits of his Land kept away, *Damages.*
in

in some special cases, and for ploughing up his Grounds, cutting down his Trees and other Wastes, in many cases where none may be recovered by Law, *Tosbil* 6. 51, 52. But where one hath Right or Title to Land, for which he can recover no damages for the mean occupation thereof, albeit he may Recover the Land there; Regularly, no Remedy can be had here, *D. & St. Lib. 1. ch. 19.*

Sett. 25.
Release with
Warranty to
Bar a Disseisor.

If the Collateral Ancestor of the Devisee do release to the Disseissor, by his procurement, and die; this Warranty will Bar, albeit they know right to be in the Disseisee, and intend to Bar it, and this is remediless, *Crompt. Jur. 55. D. & St. 154.*

And if I have two Sons, and the eldest go beyond Sea, and is supposed to be dead, and I die, and the younger Brother entrench and alieneth the Land with Warranty, and die without Issue of his body, leaving no Assets to his elder Brother, who is his Heir, and he do after return, he shall have no Remedy here, he is barred in Law and Equity, *Dolt. & Stud. chap. 39. Littl. Sett. 704, 705, 707.*

Waste.

If one hold my Land by Covenant, and do make Waste in it, I may be relieved against him here, *Tosbil* 188.

Highway A-
warded.

If there be two voluntary Deeds, usually the Court doth Decree the first; but if the last be for payment of Debts, it doth Decree that Deed, *Tosbil* 54.

One sold a piece of ground, wherein was a High-way, and did not except it; but it was ordered here to continue as before, *Nowels case, M. 3 Car. Woollens case, 10 Car. Tosbil* 70.

Parcel.

The Contents of a Mannor being in question, it was referred to a Jury to finde as it had gone by usual reputation sixty years past, *Caries Rep. 24.*

Parcel or not Parcel was Decreed here, and the Land lying intermixt, and not to be distinguished, Ordered to be set out, notwithstanding the Defendant under the general words of his Deed, had long enjoyed it, *Dean of Windsor case.*

Estoppel.

Every Estoppel in Law, is not an Estoppel in Conscience. For, if a lawful Heir and her sister, a Bastard, had sued out Livery together, the lawful Heir might have had Remedy here, *D. & St. 34.*

In these and such other like cases, where no ordinary Remedy is given by the Common Law, Relief may be had here, and no where else, by way of Bill and Answer: But in cases where there is an ordinary and clear Remedy for any injury by the Common Law, this Court will not meddle with it, *39 H. 6. 26. 7 H. 7. 11.* as in divers of the cases before.

Ways:
Commons:

And therefore in cases of Titles of Commons, Ways, or upon Customs, Prescriptions or the like, no Relief is to be had here. And yet in *Wentworths case, 2 Eliz.* A Fold, Course, or Common of Pasture, was Decreed, *Caries Rep. 46.*

Also in this Court one sued for Common of Turbery and Pasture, and the Defendant Demurred, and was over-ruled, *Caries Rep. 64.*

Also in this Court one may set out or ascertain a Common, or set out the Bounds of a Way, *Caries Rep. 83. Tosbil* 48, 49.

Sett. 26.
Customs.

A Bill allowed for a Title of Common, to examine Witnesses, and upon Publication to go to Law, *39 Eliz. Throckmortons case.*

Nor can one sue in this Court for Debt upon a Bond or Bill, Trespass, Slander, or the like, or to avoid a fraudulent Deed made to deceive Purchasers or Creditors; nor sue to prevent a Woman of her Dower, because her Husband was *de non sans memorie* at the time of the marriage; for in these cases the Common Law giveth Remedy: Nor to have the penalty upon a Penal-Statute, by way of Information, *39 Eliz. Cowards case. Tosbil* 18. *Caries Rep. 57.* And yet some circumstances, as lack of Witnesses, or the like, may make these cases fit for the Chancery, *Tosbil* 10. *39 H. 6. 26. 7 H. 7. 11. Crompt. Jur. 63. 44. Tosbil* 189.

And this Court hath sometimes Decreed these things, as *6 Eliz.* there was a Decree that the Tenant should pay his Rent, and do his service, and the Arrears thereof, *Caries Rep. 53.*

And

And in cases tending to overthrow a Maxim or Fundamental point of the Common-Law, this Court is tender, and will not admit any suit in it. And therefore if a man *de non sane memorie* make a Deed, he himself shall not be received here to avoid his own Deed, *Co. 4. 127.*

And yet a man may have relief here against his own Deed, be it Fine, Feoffment, Release or otherwise, in case where it was unduly procured by practice, fraud or force, or without any consideration at all, *Tot. 42, 43. Cromp. Jur. 53. Dyer 169.* See *Sess. 8.* before, *Tot. 170, 171, 78.*

If a man do a personal wrong, and die, the party wronged is remediless both in Law and Equity, *Co. 4. 127.* And hence it is, that if my Goods be sold in a Market overt, and the Property altered, I shall have no remedy in Equity, *D. & St. 40. 7 H. 7. 12.*

If a woman levy a Fine with fear, and by a kind of compulsion, and so is barred, she hath no remedy in Law or Conscience, *D. & St. 5.*

If a Lease be made rendring Rent with a clause of Re-entry, the Rent is behind, and the Lessor die before any demand made thereof; in this case his Heir may not enter in Law, nor will this Court enable him so to do, *D. & St. c. 20. l. 1.* And hence it is, that if a Tenant in tail after possibility of issue extinct commit waste, no remedy can be had against him here, no more than in Law, *D. & St. 2. ch. 3.* If a man have a Wife an Inheretrix, and her Father dyeth, and he maketh all the speed he can to make his Entry, but his Wife dyeth before he can do it; in this case he cannot be Tenant by the courtlesie, but for this he is remediless in Law and Equity both, *D. & St. l. 2. c. 15.*

If a father leave his son and heir a great Debt, and Assets in Land to pay it; he cannot avoid it in Law nor Equity, *D. & St. l. 2. 49.* And if a man make a Lease of Land to a man and his wife, rendring a greater Rent then the Land is worth, and the husband die, the wife may choose whether she will meddle with the Land. So if it come to Executors, they may refuse it if they have not Assets besides; and this Court will not compel them to occupy the Land and pay the Rent, *D. & St. 121, 122.* And yet in some of the cases of this nature, sometimes some circumstances make it properly examinable in this Court.

So also it is in cases tending to overthrow Acts of Parliament made for the public good and general Repose of the People: In these cases this Court will not easily admit of a complaint. And hence it is, that regularly it doth not give relief to a man that is barred by a Fine with Proclamation, and no Claim or Common-Recovery, *D. & St. 40. 155. 33.* So that a woman that was a Feme-covert when she levied the Fine, cannot come here and say she did it for fear, *D. & St. 155. Car. Rep. 8.* And in this case also the case may be fit for Equity in some cases, as of a Fine levied by an Infant, or the like.

By the new Ordinance for Regulating of the Chancery, it is provided,

1. That no Decree be made here against an Act of Parliament. *Art. 47.*
2. That none shall sue here for a Legacie, *Art. 48.*
3. That no Relief be given here for that which a man may recover at Common-Law, unless it be to have the thing in kinde; where it cannot be had in Law, *Art. 46.*
4. Nor may any Injunction be had now of course, but upon the merits of the cause, *Art. 27.*

A Devise was of the Heirs third part of Lands *in capite*, and the Court decreed it against the Heir: But it was afterward reversed as an erroneous Decree for the cause aforesaid, the Case appearing in the Decree it self, *Pasch. 16 Jac. Sir Henry Roswells Case.*

And in the cases of this nature also there do fall out some circumstances also which make them fit to be examinable in Equity, and in such cases they are received here. And therefore where an Act of Parliament hath been taken one way for a time, and after is taken another way, Relief may be in Equity for cases arising before the alteration.

To avoid a mans own Deed.

Adio personalis.

Sale of goods in a Market.

Fine by a Feme-covert.

Sess. 27.
To have a Re-entry.

Waste.

Tenant by the Courtlesie.

Heir.

Husband and Wife.

Executors.

Sess. 18:
Fine.

Recovery.

And in all these, when a Plaintiff doth exhibit a Bill tending to any such purpose as before, if it appear to be so in the Bill exhibited, the Defendant may demur to it and cast it out of Court by dismissal; if it appear to be so in the end of the Case when it comes to Trial, then the Court will cast it out. And if in the interpleading by Bill and Answer they fall upon an Issue in Law, as Will or no Will, or the like, the Court doth usually send it to Law to be tried.

The manner
and method
of proceeding
in suits by Bill
and Answer in
this Court.

In the Courts of the Common-Law, the Judges do proceed *secundum potestatem ordinariam*; but in this Court the Judges do proceed *secundum potestatem absolutam*. And yet in this Court there is a twofold Power: First, ordinary, which is in cases of Traverse, Recognizances, Partition, *Scire facias*, to repeal Patents, Extents, and the like; in all which they are to proceed according to the Rules of the Common-Law, and so it is a Court and Law. Secondly, They have another power that is more arbitrary and unlimited; and this is used by Bill and Answer: And in the exercise of this last power, the common method and process is, first of all to call the Defendant in by a *Subpoena*, which is the first Writ, and is to require the Defendants appearance in this Court by a day, and under a pain, to make answer to the Complaint of the Plaintiff.

But for this and the Proceeding in this Court, See my First Part of the *Marrow of the Law*, in fol. 656. unto the end of the Book. And see the new Ordinance of the Lord Protector and his Council, made the 22 of August 1654. and what Alterations be made thereby in the Proceedings and the Fees.

CHAP. XLIII.

Of Charge and Discharge.



IT is an Act done by a man, binding him, or that which is his to the performance thereof, and making him, or it, or both subject thereunto. See *Rent charge*.

Note, that Lands may be charged divers ways, as by Grants of Rent out of it, by Statutes, Judgments, Conditions, Warranties, and the like; and may be divers ways discharged again, For all which see much in other Titles. *Lit. sect. 648. & Co. super Cro.*

And it is a Principle, That every Land in Fee-simple may be charged in Fee by one way or other, *Lit. sect. 648.*

Where a Grant of Land will be good in respect of the parties, Grantor, Grantee, Thing granted, or the manner of the Grant, there a Charge upon the same Land will be good also: As if any Body Corporate or Politick, Dean and Chapter, Mayor or Commonalty, or the like, charge their Land by their Common-Seal, and common consent, it is good. So if the Patron, or Parson and Ordinary, or in time of Vacation the Patron and Ordinary charge the Land by their Grant, this would have bound the Land by the Common-Law: But in case where a Grant of the Land it self would be void or voidable in respect of the parties, Grantor, Grantee, or thing granted, or the manner of the Grant, there a Charge upon the same Land will be void also, and the Land shall never be subject to it. As if an Infant, Feme-covert, Dean without his Chapter, Mayor without his Commonalty, or the like, grant a Rent out of their Land, this is void: But a Dean or Mayor in such cases may charge their own persons, and their own Lands they have in their own right. So if one grant a Rent to a person incapable; or if one by his Deed grant a Rent out of Land to which he hath no right nor possession; or if he have the possession, yet hath no right; or if he have right, yet hath no possession, this will not charge the Land, albeit the party do alter get a Right to it, or the Possession and the Right come together, *Perk. tit. Grants, 14 H. 8. 10 & H. 5. 8.*

Where the right of Fee-simple is perpetually by Judgment of Law in Abeyance, without any expectation to come in *esse*, there he that hath this qualified Fee *concurrentibus his qua in jure requiruntur*, may charge the Land; and this Charge is good; as in the case of the Charge of Parson, Patron and ordinary before the Statute. But where the Fee is in Abeyance, and may come in *esse* every hour, there it cannot be charged till it come: As if a Lease be made for life, the Remainder to the right Heirs of *I. S.* the Fee-simple cannot be charged till *I. S.* be dead, *Co. super Lit. 343.*

Lands intailed also may be charged in Fee, if the Estate-tail be cut off by Fine or Recovery: For if a Tenant in tail grant a Rent-charge, and after suffer Recovery, levy a Fine, or make a Feoffment, this Charge shall be always good against the Recoverer, Conusee, or Feoffee: And so if he make a Lease. And so also in some cases where the Estate doth continue: As if a Disseisor make a Gift in tail, and the Donee in consideration of a Release by the Disseeisee of all his Right to the Donee, granteth a Rent-charge to the Disseeisee and his Heirs proportionable to the value of his Right, this will bind the Issue in tail. So if *A.* devise Land to *B.* and his Heirs of his body, the Remainder to *C.* on condition that *B.* shall grant a Rent-charge out of it to *D.* in Fee, and *B.* grant the Rent accordingly, this is good to bind the Estate-tail and the Remainder also, as was adjudged in *Duston & Ivianes Case, M. 15 Jac. B. R.*

If a man have a moveable Inheritance, as in a great Meadow, two Acres by division or election every year by Custom, so that one year he hath it in one place, and an-

1. Charges

Charge and Discharge.

2. Where and in what case a charge shall be good in its Creation, and by what means Lands may be charged, and what Estates sh^d be liable to charge, and how long, where not.

Sect. 1.

other in another; this may be charged well enough, and the Charge will follow the Land, *Co. super Lit. fol 4. a. 343. b.*

Mortgagor and
Mortgagee.

When all those that have Interest in the Land joyn in the Grant of a Rent, so that the Grant is made *Concurrentibus his qua in jure requiruntur*, the Grant is good for ever: As if at the Common-Law, Donor and Donee in tail had joyned in a Grant of a Rent, and the Donee die without Issue, the Donor shall hold the Land charged. So if the Mortgagor and Mortgagee join in the Grant of a Rent-charge, and after the Mortgagor enter for the Condition broken, yet the Rent doth continue. So if a Disfeisor or his Heir grant a Rent-charge, and the Disfeisee confirm it, this is now unavoidable when he doth recover the Land. So if Feoffee on Condition grant a Rent-charge in Fee, and the Feoffor confirm, and after the Condition is broken, and the Feoffor enter, he cannot avoid the Rent. So if Lessee for life charge the Land with a Rent in Fee, and the Lessor confirm it, this is a good Rent for ever, albeit the Confirmation be made after the Tenant for life. So if Tenant for life on Condition grant a Rent-charge in Fee, Lessor confirm the Grant, the Condition is broken, the Lessor doth enter, *Co. l. 147. 149. 10. 49. Co. super Lit. 300. 121. 301. 14 Aff. pl. 14. 14 Ed. 3. Aff. 109.*

If one have a Possession and an ancient Right, and he grant a Rent-charge, this shall issue out of both. And therefore if Tenant in tail lease to *A.* for life, and after he grant a Rent-charge to *B.* *A.* dies; he shall not avoid the Charge. So if *A.* Tenant in tail infeoff *B.* on Condition to the use of *A.* in Fee; *A.* acknowledg a Statute, which by the Statute of 1 R. 3. c. 5. is extended, (*A.* having then but a Rent and a Condition;) the Condition is broken, by which the Feoffment is avoided, and he seised of the Intail again, yet *A.* shall not avoid the Extent. And so if he had granted a Rent-charge, *Co. 2. 14. Co. l. 147. 148. 11 H. 7. 21.*

He that hath but a Remainder or Reversion of Land, may charge it, and the Charge is good in respect of the Possibility, and the Distress shall fasten on the Land when it comes in Possession, *Co. 5. 2. 1. 62.* and not before, *Bro. Charge, 11. 30.*

And therefore he in the Reversion expectant upon an Estate for life, may charge the Land. And if *A.* lease to *B.* for years, and after *A.* doth grant the Reversion to *C.* rendring Rent; *A.* cannot distrain during the Term *per Moyle*, but *per Danby & Nedham*. If the Beasts of *C.* come upon the Land, *A.* may distrain them; but *Moyle al contra*, but by him, if *C.* pay the Rent once to *A.* if it be a year after, *A.* may have an Assise, *Bro. Distress 48.* but after the Term is ended, *A.* may without question distrain for all the Arrearages, *Co. 5. 2.*

If *A.* lease to *B.* for life, and then grant a Rent-charge to *C.* *A.* die, *B.* being his heir, in this case *B.* shall hold the Land discharged during his life; but otherwise it is if he had purchased the Land; *Per Nedham, 9 Ed. 4. 18.*

Rent.

If *A.* lease to *B.* for life, *A.* charge the Land, *A.* doth disfeise *B.* in this case *A.* shall forthwith hold the Land charged, *5 H. 5. 10.*

If the Lessor grant a Rent-charge, and the Lessee surrender, the Lessor shall forthwith hold the Land charged, *Bro. Charge 10.*

If *A.* be Tenant by Elegit, and *B.* having the Reversion doth grant a Rent-charge out of it, and after *B.* doth release or confirm to *A.* for life; in this case *A.* shall hold it subject to this charge, *31 Aff. pl. 13.*

A. being Tenant for life, the Remainder to *B.* in fee, or the Reversion to him in fee, *A.* doth grant one Rent-charge out of the Land, and *B.* doth grant another Rent-charge. *A.* surrender: In this case *B.* shall hold the Land charged with both the Rents, *Co. 9. 107.*

SeB. 2.

If one have divers Estates in Land, he may charge or grant them, *Dyer 10.*

If a Lord grant a Rent out of his Manor in which are Copiholds, and after one of the Copihold-estates fall into the Lords hand, and after this is granted away again according to the custom; now it seems the Charge shall not light upon this which is so granted away, but upon the residue of the Manor. Yet see *Dyer 271. Co. 4. 24. 64.*

If one grant a Rent-charge out of Land that is in Lease for years or life, it will fasten

fasten upon the Land as soon as by any means it come into the hands of the Grantor, and not before. But it may be the person of the Grantor may be charged before: See before. And he that is in Possession, and he that is in Reversion or Remainder of the Land, may both charge the Land, but the charge of the Tenant in possession shall be preferred, 5 H. 5. 8. Co. 2. 137. Dyer 10.

If one Jointenant grant a Rent-charge out of his Land he holdeth in Jointenancie, the beasts of any of the other Jointenants shall not be distrained, neither shall they be charged hereby; but the beasts of the Grantor may be distrained upon the Land: But if the Grantor survive the rest of his companions, all the Land is chargeable; but if he die before the rest, all the Land is discharged. So if one Jointenant enter into a Statute, or suffer a Judgment, his part only shall be extended and subject to the charge whiles his companions live: But if he survive, then all shall be in Execution, unless his companions did sever the Jointure in their lifetime; and if he die before his companions, yet the Execution is not discharged of his part, 7 H. 6. 1. Perk. 183. 11 H. 6. 33. Bro. Charge 39. Execution 148. Co. super Lit. 184. 13 H. 7. 22. F. N. B. 20.

If a Mayor alone, or a Dean alone, will charge the Land they have in common with the Corporation, none of the Corporation shall be charged, nor the Land, but the person of the Dean or Mayor himself.

If four be bound in a Statute or Recognisance, and one die, the three that survive shall not be charged with all, but those three with the Heir of the fourth together equally, 29 Aff. f. 37.

If two be bound jointly in an Obligation, and one die, or be outlawed, it seems the other shall be charged with the whole. So if two be Accountants, and one die, or be outlawed: So if two warrant Land, and the one bath nothing to render in value, it seems the other must answer all. But if two men make a Feoffment in fee with Warranty, and the one die, the Feoffee cannot charge the Survivor only, but the Heir of him that is dead also, Bro. Joins. 5. 16. 21. 9 Ed. 4. 24. Co. super Lit. 386. 3. 14. 19 H. 6. 55.

If a man seised of Lands in fee, and possessed of a Term for many years, grant a Rent out of both for life in tail or in fee, with clause of Distress out of both, this Rent doth issue only out of the Freehold, and the Lands in Lease are only charged with a Distress: But if it had been granted only out of the Lands in Lease, then that Land had been charged during the Term, if the Grantee live so long, Co. super Lit. 147. Co. 7. 23.

If one have divers Estates in the Land, and grant or charge it, this shall go out of all his Estates. As if A. be Tenant for life, Remainder to B. in tail, Remainder to A. in fee, and A. grant a Rent-charge and die, B. dieth without issue, the Heir of A. shall be charged. So if A. be Tenant for life, Remainder to B. in tail, Remainder to A. in fee, and A. acknowledg a Statute and die, and B. die without issue, the Heir of A. shall be charged, as was held in Pethowse and Cranes Case, M. 36 Q. 37 Q. Co. B. So if A. be Tenant for life, Remainder to B. for life, Remainder to A. in fee, and A. makes a Feoffment; in this case all his Estates pass, 24 E. 3. 70. Bro. Dove 55. So if A. Tenant in tail, the Remainder to him in tail, levy a Fine, all his Estates pass and are barred, Co. super Lit. 372. So if A. be Tenant for life on condition to have fee, A. lease to B for years, A. perform the Condition, yet he shall not avoid the Lease for years. So of a Rent. But otherwise it is in case of the King, Co. 7: Parl. 2. 14.

A man makes a Lease for years rendring Rent, and after grants the Reversion for life, to which Grant the Lessee for years attorns; the Grantee acknowledgeth a Statute, and after surrenders his Estate; the Conusee extends the Statute, and distrains for the Rent, and it was adjudged good, Brownl. Rep. 3. par. 97.

Regularly, when the Estate is gone upon which the Charge is, the Charge is determined and defeated As for examples:

If one be seised of Land, and take a wife, and after grant a Rent or Common out of the Land, or enter into a Statute, and it be extended during the Husbands life, and after he die, and the wife is endowed of a third part of the Land charged by suit; now

3. Where and in what case a Charge good in its creation shall after be defeated and determined, and the Land discharged.

by

by this the Charge is determined as to that third part, and that part is discharged of it. But if one have three Manors, and charge them all, and die, and the accept of one of them, she shall hold two parts of it charged, *Co. super. Lit.* 349. *F.N.B.* 150. 4. 17 *Ed.* 2.

If a man have a Term of years in Land in the right of his wife, and he grant a Rent-charge out of this Land and die; now by his death the Charge is determined, and the wife shall hold it discharged. But if he survive his wife, the Charge is good during the Term, 9 *H.6.* 52. 7 *H.6.* 1. 9 *H.6.* 52.

By alteration
of the Tenant
of the Land to
be charged.

If a Tenant in tail grant a Rent-charge out of the entailed Land, (unless it be in such a special case as is above) and then die, the charge is determined, and the Issue shall hold it discharged. So shall the Donor also, if the Tenant die without issue, and the Land revert to him. And although the Issue after his entry make a Feoffment, and take back a new estate, yet the Charge doth not revive, 12 *H.4.* 7. 44 *Ed.* 3. 21. 14. *Aff. Brom. Charge* 20.

If one devise that his Executors shall sell his Land, and the Heir after his death enter and charge the Land, and then the Executors do sell it; now the Charge is defeated, and the Vendee shall hold it discharged, 14 *H.8.* 10.

If a Feoffee or Lessee on Condition charge the Land by a Grant or a Statute, and after the Condition is performed, and the Feoffor or Lessor re-enter; now he shall avoid this Charge, for the Land is discharged of it, *Perk. sett.* 840.

See. 3.

If a Disseisor charge the Land he hath by Disseison, and after the Disseisee re-enter or recover the Land; now the Disseisee shall hold it discharged, and is not subject to the Charge of the Disseisor, *Co.* 11.

If a Lessee for life or years make a Feoffment in fee, and so commit a forfeiture, and after the Feoffee charge the Land by Grant, Statute or otherwise; and then the Lessor enter for the forfeiture: Now in this case the Charge is gone, and the Lessor shall hold it discharged. So if a Lessee do waste and cause a forfeiture, and after the Waste and before the Recovery of the Land charge it, and after the Lessor recover it; the Lessor shall avoid his Charge, *Lit. sett.* 476. *Perk. sett.* 844.

If the Husband charge the Land he hath in fee in the right of his wife, and after he and his wife levy a Fine of this Land; now the Conusee of the Fine shall hold it discharged, and the Charge is determined, *Co.* 1. 66.

If there be Tenant in tail in possession, the Remainder in tail or in fee to *J.S.* and *J.S.* grant a Rent or otherwise do charge the Land, and after the Tenant in tail in possession suffer a Recovery of the Land; now hereby all the Charges by him in Remainder are defeated, *Co.* 1. 61.

By other mat-
ter *Ex post*
facto.

If one charge his Land with a Rent, or Statute, and after make a gift of it in Tail, and the Tenant in Tail make a Feoffment of the Land to the Grantee of the Rent, or him that hath the Statute extended, and the Issue recover the Land in a *Formedon*: Now it seems this Issue may avoid this charge, because it was once extinct. For the charge of Tenant in tail, See *Estat.* 19 *H.6.* 45.

By Remitter.

If a Tenant in Tail maketh a Feoffment to his Heir inheritable by the Tail, being within age, and after being of full age (living his Ancestor) he charge the Land, and after the Tenant in Tail dieth: Now the Land is hereby discharged, and he shall avoid his own Grant, because he is Remitted: So if the Heir of the Disseisee do Disseise the Disseisor, and grant a Rent charge, and then the disseised dieth; the Grantor shall avoid his own Grant for the same reason: So if the Father Disseise the Grandfather, and granteth a Rent charge, and dieth, now the Entry of the Grandfather is gone, if he die, the son shall avoid the charge by the Remitter. *Littl. Sett.* 660. *Co. super. Cro.*

4. Where and
in what case,
not but the
charge shall
remain not-
withstanding
the Alterati-
on of the
Tenant.

If a Tenant in Tail charge the Land, and after levy a Fine or suffer a Recovery of the Land to his own use; this doth confirm the charge, and it shall continue: But if he sell the Land away by Fine, or Recovery, it seems the Conusee or Recoveror shall hold it discharged, *Co.* 1. 61.

If Tenant for life charge the Land, and then Enfeoff him in Remainder; in this case he shall hold it charged during the life of the Tenant for life, and no longer; for this is a Surrender. *Brom. Charge* 6.

If a man have an Office of skill for his life, to which there is a house belonging, and he chargeth the house with a Rent during his life, and after he commit a forfeiture, yet the Charge shall continue during his life; for he that takes Land by advantage of a Condition in Law, must take it with his Charge, *Co. super Lit.* 234.

If one have a Lease for years or life, of Land, and grant a Rent out of the Land, and after surrender his Estate, and determine them; yet the Charge shall continue as long as the Estates should have endured, if they had not been surrendered, *Dyer* 10. *Perk. sect.* 844. *Co.* 1.67.8.145.

If one make a Lease for years or life, and after grant a Lease out of the Land, and after the Lessee for years surrender, the Lessor cannot avoid this Charge: But now it will take effect presently, otherwise it will not take effect until the Lease be determined, 5 *H.* 5.8. 38 *Ed.* 3.4.

If one Joint-tenant charge the Land, and after release to his companion and die, the Survivor shall hold it charged: But if it had come to him by Survivorship, *contra.* *Co.* 6.76.

If a man seised in Fee-simple that hath a wife, make a Feoffment in fee on condition and die, and the Feoffee on condition endow the wife of a third part, and she charge this, and after surrender or grant her Estate to the Feoffee on condition: Now he cannot avoid this, but must hold it charged during her life, *Perk. sect.* 823.

If there be Tenant for life, the Remainder in tail, Remainder in fee to the Tenant for life, and the Tenant for life charge the Land and die, and the Tenant in tail die without issue; now the Heir of the Tenant for life cannot avoid this Charge, but the Land will be charged, 5 *Ed.* 4.2.

If the Kings Tenant charge his Land, with or without the Kings licence, and after the Land come to the King by Attainder or Escheat, or the like: Now in this case the King must hold it charged, and cannot avoid the Charge, 3 *Aff.* p.1. *stat.* 2 *Eliz.* *P. & M.* cap.8.

If Tenant for life charge the Land, and after make a Feoffment to a stranger, or doth Waste whereby it is forfeit and recovered; here he in Reversion must hold it charged during his life. And if the Lessee grant one Rent, and he in Reversion another; now he must hold the Land subject to, and charged with both Rents, but the Grant of the Lessee for life shall be preferred, 50 *Ed.* 3.6. *Co.* 1.67. *Dyer* 10. *Co.* 9: 107. *Co.* 10.49.

If the Husband and Wife during the Coverture grant a Rent by Fine out of Land, and after his death she is endowed with part of it; now she must hold it charged with the Rent.

If there be Tenant in life, the Remainder in tail to B. the Remainder in tail to C. and Tenant for life, and B. levy a Fine *sur grant*, and render of Rent to the Tenant for life, and after B. the first Tenant in tail die without issue, and the Land go to C. he must be charged still with this Rent to the Tenant for life, *Co.* 1.76.

If Tenant in tail make a Lease for life, and he grant a Rent-charge out of the Reversion, and after Tenant for life dieth, whereby the Grantor becometh Tenant in tail again, and the Reversion defeated: Yet the Rent-charge is good and doth continue against him, but not against his issue, 11 *H.* 7. 21. *Co. super Lit.* 349.

If assent be issuing out of a Mill or House, and the Mill or House fall, yet the Charge doth continue upon the Soil, 9 *Ed.* 4.20. *Co.* 1.113. 10.48.

In all cases when any Executory thing is created by Deed, there something by consent of all persons, parties to the creation of it, may be by their Deed defeated and discharged: And therefore by a defeasance of all, the Covenant that doth create a future power of Revocation, as the power it self created may be defeated. And therefore Warranties, Rents, Charges, Recognizances, Annuities, Covenants, Leases for years, Uses at Common-Law, and such like things, may by mutual consent be avoided: And every right, title, and interest *in presenti* or *in futuro*, by the inquiry of all that have the right, may be barred and extinct. See *Cases*, *Co.* 10.49.

He that hath Land in extent upon an Execution upon a Statute-merchant or Judgment, assign over his interest, and after release to the Conusor, or to him against whom

See. 43

By other matters.

How a Charge
may be dis-
charged.

whom the Judgment is had, this doth discharge the Execution, 24 Co. B. *Moor & Moons Case*. So if he acknowledg satisfaction, *B. Weston & Eliners Case*; or in this case the party may have an *Andia Querela* against the Assignee, as was adjudg- ed in *Flower & Elgars Case*, *Pasch. 7 Car. B R.*

For the Discharge and Indempnity of those which served in the Wars, see *At* 19 *Septemb. 1650. May 21. 1647.*

Taxes and
Rates.

Taxes and Rates, are the appointing and setting down how much every one shall pay and be charged with, *Stat. 43 E. c. 3.*

Maimed Sol-
diers and
Mariners.

The Justices of the Peace at the Sessions must set a Rate or Sum upon every Parish to be paid weekly, towards the relief of sick, hurt and maimed Soldiers and Mariners; but no Parish must be rated above ten pence, nor under two pence weekly; and if there be fifty Parishes in the County, not above six pence a week: And this sum so taxed shall be yearly assessed by the agreement of the Parishioners within themselves, or in default thereof by the Churchwardens and Petty-Constables, or the more part of them, or in default thereof by the Justice of the Peace next to the Parish: And if the party taxed refuse to pay the money taxed, the Churchwardens and Petty-Constables, or either of them, or in default of them the said Justice may levy it by sale of his goods. See more in *Treasurer*:

The Churchwardens and Overseers of every Parish, or the greater part of them, may by advice of two Justices raise weekly, by Taxation of every mans Land within the Parish, money, and charge men towards the Relief of the Poor: And every man must pay according to that Rate, or complain at Sessions for relief, *St. 43 Eliz. c. 2.* See more in *Poor*.

Prisoners of
the Kings
Bench and
Marshalsey.

The Justices of the Peace at the Sessions must set down what must be paid by every County quarterly towards the Relief of the poor Prisoners in the *Kings-Bench* and *Marshalsey*, and such Hospitals and Alms-houses as shall be in the said *Kings-Bench* or *Marshalsey*, and in the same County; and it must not be less then twenty shillings out of every County yearly to each of the said Prisons. Which sums ratably to be assessed upon every Parish, the Churchwardens of every Parish must collect and pay to the High-Constable of the Division. So that it seems this Taxation must be made by agreement between the Parishioners amongst themselves; and that if any refuse to pay, that upon complaint the Justices of the Peace at their Quarter-Sessions may compel him: And if any be over-rated, that he must be relieved there, *Stat. 43 Eliz. cap. 2.*

Prisoners of
the Common-
Gaol.

The Justices of the Peace at their Quarter-Sessions may rate and tax every Parish in the County weekly as they think fit, so as it exceed not three pence a week every Parish, towards provision for the Relief of Prisoners in the Common-Gaol. And every Sunday the Churchwardens must levy it, and pay it quarterly to the Head-Officers of every Hundred or place, to be paid in at the Quarter-Sessions. And this also it seems must be taxed upon the Inhabitants by agreement amongst themselves, or else by Order of the Sessions, *St. 14 Eliz. c. 5.*

Chepstow-
Bridg.

Four Justices (whereof one of the *Quorum*) may tax the Counties of *Gloucester* and *Monmouth*, according to their discretion, for and towards the Reparations of *Chepstow* Bridg, and every Hundred must pay according to the Rate. But they must rate every man in particular by Agreement, or by Order of the Sessions, *St. 3 Jac. cap. 23.*

Church.

Such Justices also may rate the Inhabitants of any Towns or Villages neer unto any decayed Bridg on the High-ways, when it is not known who ought to repair it; and the persons so taxed must pay it accordingly. See *Stat. 22 H. 8. cap. 5.*

The Rates for the Church are to be made by the Churchwardens, and the greater part of the Parish present, after solemn notice given in the Church, upon every Inhabitant and Occupier of Lands in the Town or place, for money towards the Reparation of the Church, and other matters belonging thereunto, and according to that Rate men must pay, or they will be compelled to it. See *Churchwardens, Co. c. 67.*

Sewers.

How men shall be taxed and rated for the reparation of the Sea-banks, See *Commission of Sewers.*

The

The Rates of Subsidies and Fifteenths are to be made according to the Statutes whereby they are granted, if they set down any Order of Taxing; otherwise according to the ancient use. See *Subsidies, Stat. 9 H.4. cap.7. 1 Ed.3.6*: See more of this in my *Justice of Peace Book, chap.27*.

Subsidies and
Fifteens.

CHAP: XLIV.

Of Charters.



Charters are Writings, Deeds, Evidences and Instruments made from the King or any other man to another, upon some Estate passed or conveyed between them of Lands or Tenements: shewing the place, name, and quantity of Lands; the Estate, Time, and manner of doing of it; the Parties to the Estate delivered and taken; the Witness present at the same Time, with other Circumstances. The word *Charter* doth usually signifie the Kings Patent; which see in *Patents, Terms ley, Co.1.1. 34 H.6.1.*

And these are some of them called Principal, such as do concern the Title of the Land, and are the chief strength thereof; and others are said to be Accessary, (i.) such as concern the Possession only, as Court-Rolls, and such like, *Co.1.1.*

Charters are the sinews and strength of mens Inheritances: And therefore for the most part, he whose possession is made by them, shall have them; and they are as Incidents or Concomitants to the Land, to go and pass with it. As a man seised of Lands in Fee in Possession or Reversion, and hath divers Charters, Deeds and Evidences, some with Warranty, and some without, and maketh a Feoffment in Fee without Warranty: Now the Purchasor shall have all the Charters, Deeds and Evidences, as incident to the Land, and though they be not granted by the Deed; *Ratione Terra*, to the end he may the better defend the Land it self, having no Warranty to recover in value, and the Feoffor being not bound to warrant, hath no use of them: so if there be a Warranty in the Deed, if there the Feoffor grant the Deeds, there the Purchasor shall have them also. So also if the thing sold be such a thing as doth lie in Grant, as Common, Rent, &c. if the Sellor or Grantor doth never grant the Charters that do concern the Land, and although there be a Warranty in the Deed, yet the Purchasor shall have all the Deeds that do concern the Land.

To whom
they belong,
and what per-
sons shall have
them.

But if that a man be seised of Land in Possession or Reversion, and have divers Charters, some containing Warranty, and some not, and he make a Feoffment of this Land, and warrant it to the Feoffee and his Heirs, so that he is bound to render in value, and there are no words of Grant of the Charters in the Deed: Now in this case, forasmuch as the defence of the Title is at the Feoffors peril, therefore he shall keep all the principal Evidences that are material for the maintenance of the Title of the Land; as all the Deeds which comprehend Warranty, whereof he may take advantage; and such as may serve him to deraign the Warranty paramount, and such like. But such as are accessory only, which concern the Possession, and not the Title, those the Feoffee shall have: As if *A.* enfeoff *B.* with Warranty, and *B.* enfeoff *C.* with Warranty, though *C.* may vouch *A.* upon the first Warranty, yet he shall not have the first Deed; and yet if in this case a stranger have them, the Feoffee may recover them against him. So if *A.* enfeoff *B.* with Warranty, and *B.* enfeoff *C.* by the word *Deed*; (which implieth a Warranty for life of the Donor) *B.* shall keep the Charters during his life, but his Heir shall not keep them afterwards, *Co.1.144.3 Ed.3.11 Ed.3.17. 19 H.6.65. 34 H.6. Co.11.50. 10 Ed.4.9. 18 Ed.4.14. 6 H.7.3. 6 H.7.33. Co. on Lit. f.6.*

Hh

If

If a Lord come to Land by Escheat, he shall have all the Charters belonging to the Land so escheated to him, *Co. I. 1.* Such Charters as belong to the Ancestor, the Heir shall have, though he hath no Land by descent, *Co. I. 1.*

If one make a Feoffment to two, and the Heirs of one of them, and deliver all the Charters and Deeds to him that hath the Fee-simple of the Land, and he happen to die before his Companion; now his Heir shall keep all the rest of his Evidences, except the Deed of Feoffment, which the surviving Jointenant is to have, *Co. I. 2, 3: 4 H. 6. 1.*

If two Jointenants be in by a defeasible title, and a Release is made to them, and one of them die; now the Survivor shall have that Release, and all the rest of the Writings, *Co. I. 2. 21 H. 7. 33. 6 H. 7. 3.*

If a Feoffment be made to two without Deed, and the Writings be delivered to one of them, now the other shall not have them from him. So if I release to my two Joint-Feoffees, and I release to them both, and deliver the Deed to one, the other, though he survive, shall not have it.

If I release to two Disseisors, and deliver the Deed to one, the other surviving shall have it. If the Disseisor release to the Disseisor, and he make a Feoffment of the Land, the Feoffee shall have the Release. But if a Feoffment be made to two without Deed, and the Evidences that do concern the Land are delivered to one, the other shall not have them, *34 H. 6. 1. 6 H. 7. 3.*

CHAP. XLV.

Of Chattels.

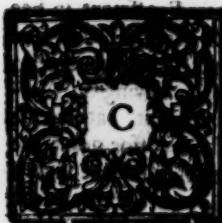
1. Chattels, what.

The kinds,

Sec. 1.

Personal Action, Devise. Executors.

Thing in Action.



Chattels or Cattals are all Possessions of Goods moveable and unmoveable, except such as are in nature of a Freehold, or parcel of it. And these are either Real or immoveable, which are such as do not immediately appertain to the Person, but either to some other thing by way of dependance, as a Box with Writings of Land, the Body of a Ward, the Fruit of a Tree, or the Tree it self upon the Land, or are issuing out of things immoveable, and of a more real nature; as Leases for years, at will, Wardships, the Estates of Gard-

eins in Chivalry, which hold the Land for the double or single value, the Estates of Tenants by Statute-Merchant, Staple or Elegit, and Grants of the next Advowson: Or else they are personal and moveable, (*i.*) such as are moved by others; as Money, Plate, Gold, Silver, Jewels, Utensils, Householdstuff, Debts, Wood cut, Corn Emblements, Hay, and the like: Or such as move themselves, as Cattel, and the like. And therefore called Personal, either because they are such as do immediately belong to the person of a man, as an Horse, &c. or because being detained from a man, he hath no means to recover them but a Personal Action. And therefore are said to be Moveable, because one may move them, and make them to follow a man from one place to another. And all these one may devise by Will; or if he die, they shall go to his Executors or Administrators.

Personal things also are either quick and living, as Beasts, Fowl, and the like; or dead, as Money, Gold, Silver, or the like: The living also are either tame, or wild. Both these kinds of Chattels also are either in Possession, as when one hath his Ward or his Goods in hand: Or in Action; which is, where one hath not the thing it self, but an Action to recover it; and then it is called a Chose in Action, *Terms ley, Stamford. cap. 16. Stat. 1 Eliz. cap. 1. Co. super Lit. f. 41. 118. Plow. 192. Dyer 277. 5. Co. 465. 3. 11. Park. f. 66. F. N. B. 128.*

Chattels

Chattels are not so much regarded in Law, as Inheritances and Freeholds; nor Chattels personal so much esteemed as Chattels real: And therefore it is they will so easily vest in a man, and devest again; and devest, and vest again: For, *De minimis non curat Lex*, (i.) The Law regardeth not small things. Hence it is that no *Precipe* will lie against a Lessee for years, that hath only a Chattel, for the baseness of his Estate, Co. 8. 95. *Dyer* 25. 163. 298. 30. Co. 8. 171. *Plow.* 418.

If a Lease for years be made on Condition, that if such an Act be done, it shall be void; it will be made void without Re-entry, 24 *Ed.* 3. 54. 8 *Ed.* 4. 3.

A Traitor or Felon, after the offence done, and before conviction, may sell any of his Chattels real or personal, *bona fide*, to maintain himself. And an Officer of the King that is an Accountant, may sell any of his Chattels *bona fide*, after he is become an Accountant and Debtor to the King, and the Kings debt will not reach it. They will vest in the King where they be forfeit, and the Kings Officer may seize them without any Office found.

If an Obligation be made to two, and one of them release the whole Debt to the Obligor, the other is without remedy: But in case of Inheritances and Freeholds, the Law is otherwise.

Chattels will easily vest and devest: As if one that doth hold Land *in capite* doth mortgage it, and the Mortgager die, his Heir being within age, and the King seise the Body and Land, and after the day the Mortgager redeem the Land and re-enter; now the Wardship is lost again. So if he make a Feoffment to the use of the Feoffee and his heirs, until the Feoffor shall pay to the Feoffee or his heirs an Hundred pounds; and that upon, and from the day of payment of the Hundred pounds, the Feoffee and his Heirs shall stand and be thereof seised to the use of the Feoffor and his heirs, and that then and thenceforth the Feoffor shall re-enter, &c. and the Feoffee die, his heir within age, and after the money is paid, the Kings title to the Wardship is defeated, *Dyer* 369. a. *Dyer* 298. b.

A Wardship happened to the Bishop of *Durham*, by a Tenure of him *in capite*; and before any seising by him of Body or Land, the Bishoprick became void, and a new Bishop is made: It is adjudged, that the Executors or Administrators of the Predecessor, as a Chattel-vest, and not the King nor the succeeding Bishop shall have this Wardship. But if a Bishop seise a Ward after it happen, and die, his Executor shall have him, *Dyer* 277. 2 *H.* 4. 19. 7 *H.* 4. 41. 44 *Ed.* 3. 41. *F. N. B.* 143. c.

If one give his goods to his daughter in marriage, and after they are divorced, the wife shall have again the goods that are not spent, *Dyer* 13. a.

If a Waste by a Guardian in Chivalry be found against him, whereby he lose the Custody of the Land by the Statute of *Marlb. cap. 4.* yet the Marriage is not devest, but he may still maintain a Forfeiture of Marriage. So if Entry be for *Mortmain*, a Ward vest shall not be devest, but the Abbot shall have the Marriage, &c. *Dyer* 25. b.

The husband and wife are Joint-tenants of a Term for years, and the husband kill himself; now in this case all doth survive unto the wife, until the Office be found for the King upon the forfeiture, and then it goeth all from her unto the King, *Plow.* 261.

If one recover by an erroneous Judgment, and present to a Benefice, or enter into the Perquisites of a Vilain, and after the Judgment is reversed by Writ of Error; these Collateral things that are executed, shall not be devested, Co. 8. 142. b.

If an erroneous Judgment be given in Debt, and the Sheriff by force of a *Fieri facias* sell a Lease for years of the Defendants, and after the Judgment is reversed for Error; now in this case the Term shall not be restored, but only the money made of it: But if the Execution be by *Elegit*, and upon it the Sheriff do by Inquisition extend a Term of the Defendants, and deliver to the Plaintiff in the suit, and after the Judgment is reversed, in this case he shall have restitution of the Term it self, Co. 8. 142, 143. a. Adjudged *Pa/ch.* 15 *Jac. B. R. Buckhurst* and *Mayo*.

And if a Sheriff by force of a special *Capias ut Lagatum*, seise Goods, or Chattels, and sell them, and after the Uthary is reversed; here the party also shall be restored to all his Goods and Chattels in kinde, Co. 8. 143.

If the King do Knight a Ward, that is in custody of his Guardian, by reason of a Tenure in *Capite*, or Knights service; now hereby the Wardship of the Body is Devested, but he shall hold his Lands, and have the value of the marriage, Co. 6. 74. 75.

If a man be Out-lawed, and the King give away some of his Goods, and after the King pardon him, and restore him to his Goods. Now the Goods given between the Out-lawry, and the Pardon shall not be Devested, nor that Gift avoided by the Pardon, *Broo. Restitutio* 18.

If a man die seized of *Capite* Land, and it descend to his Brother and Heir, an Infant, and the Lord seise the Ward, the Wife of the Tenant being privily with child of a Son, and after the Son is born. Now the Brother shall be out of Ward, but if the Son die, then he shall be in Ward again. *Broo. Gard.* 119.

If there be a Presentment to a Church, happen to a Tenant in Tail, and he die before he present; now his Executor, not the Issue in Tail shall present, for the Chattel is not Devested: So if a Farmer have a Presentment, which doth happen during the Term, though he doth not present, yet he shall have it. See more in the next *Questi.* following, and in divers other Titles: *F.N.B.* 34. a. *B. Perk.* 363. 97.

If a Parson, Vicar, Master of Hospital, or any Body Politick, be possessed of any Goods or Chattels, in their own right, and die, these are Chattels that shall go to their Executors or Administrators, not to their Successors, Co. 4. 65. *Perk.* 363. 98.

If a Lease be made for years, or a Wardship, or the new Advowson of a Church, or Covenant for payment of money, or the like be granted, or an Obligation made to me, and to my Heirs, yet in all these cases I have this as a Chattel, and it shall go to my Executor, and not to my Heir. So if any such thing be made, or granted to me and my Successors, my Executors shall have it, and if the Heir or Successor get the Deedy, the Executor may recover him for them, *Litt. 363.* 740. 14 H. 4. 34. 34 H. 6. 27. *F.N.B.* 120. *Broo. Oblig.* 18. 68. *Fitz. Accomp.* 16.

If I have a Box, or Chest, or Trunk full of Writings, at my death, and the same open, not sealed, or locked; Now this shall go as Goods to my Executor; but if it were sealed or locked, as incident to the Writings, it would be the Heirs, whose the Writings be, 22 Ed. 4. 7. 3 H. 7. 15.

If Charters be pledged to me for money, or granted to me, and I have no Land that they do concern, it freeth this in the nature of a Chattel, and my Executor, not my Heir, shall have them. But all such Charters as concern my Inheritance, shall go with my Heir, and the Land it self they do concern, 21 Ed. 4. 18. 19. 8 Ed. 4. 3. *F.N.B.* 137. *Broo. Chattels* 12.

If one seized of Land, make a Roffment of it to me (excepting the Trees) and after Grant or Lease the Trees to me for years; or if one make me a Lease of Land for ten years, and after make me a Lease of the Trees for twenty years, to begin when the ten years are ended: In both these cases, I have the Trees in the nature of a Chattel, and they shall go to my Executor after my death, 20. 4. 63.

If there be a Lessee for years, or life, of Land, whereon Timber doth grow, or Houses be, and the Lessee, Lessee, or a stranger cut down any of the Timber, unless it be where the Lessee doth not where the Law doth allow him; in this case the Lessor shall have this as a Chattel, which shall go to his Executor after his Death: So also if the Houses or Trees be prostrate by the act of God, and if the Lease for years, or life, be a lease made without impeachment of Waste, in which case the Lessee is to have the Timber and Trees in the cases before, the Lessee hath them as a Chattel, which shall go to his Executor, Co. 4. 63. 1181. 34.

If a man hath the Fee Simple of Ground, whereon be Trees growing, sell me all or some of the Trees, and I die, or he, and I before they be cut, or I sell the Land, excepting the Trees; in the first case my Executor, in the last case his Executor shall have them in the nature of Chattels, and they be not cut down, Co. 11. 361. *Perk.* 363. 58.

4. What things shall be reputed as Goods and Chattels, and the Executors shall have after the death of the Testator, and what Actions accrew to them for such things. Executors.

Charters.

Heir.

Trees.

Timber.

If one be possessed of a Term of Land, and Devise it to *A.* for life, the Remainder to *B.* for life, whereby *B.* hath only a possibility; now if *B.* die, his Executor shall have this possibility in the nature of a Chattel, *Co. 8. 55. 10. 47.* Possibility.

So much of my Wives Apparel, as is necessary and convenient for her condition, and state, as her Goods, she may dispose at her death, or take after my death; but the rest, as my Goods, shall go to my Executor, *33 H. 6. 31.* Wife.

If a Feoffment, Gift in Tail, or Lease for life be made, by one rendring Rent, and the Rent is behinde, and I die; or a Rent be granted out of Land to me, in Fee for life, or years, and it be not paid to me in my life time, it shall go to my Executors in the nature of a Chattel. *32 H. 8. 37. Dyer 375. Co. 4. 48. 49.* Rent. Sect. 3.

If a Rent be granted to me, my Heirs, and Executors, during the life of *J. S.* and for one half year after: Now this half years Rent, after my death, shall go as a Chattel to my Executor. *Curia, M. 7 Jac. Co. B. Walls case.*

If one seized in Fee, make a Lease for years, rendring Rent, and devise this Rent to a stranger by years, and the Devisee die; now it seems the Executors, and not the Heir of the Devisee shall have it as a Chattel, *Dyer 5. 6.*

If one possessed of a Term, devise the Land to *A.* for life, the Remainder to *B.* Now this is a Chattel (though it be but a possibility) in *B.* which if he die, his Executor shall have it; but if it be a remote possibility, where an estate is to be reduced to a certainty by a contingent precedent, and it doth not rest in the Testators life time, it is otherwise. *Co. 8. 51. 10. 47. Prices case, Trin. 10 Jac. B. R.* Possibility;

If any person that is Tenant for their own, on anothers life, make a Lease to me for one hundred years; this is a Chattel, which shall go to my Executors, and is in Judgment of Law, but a Lease for so many years, if be, for whose life it is held, do live so long, *Co. 7. 12.*

Where by the Statute of *Westm. 1.* the Lord shall have the Wardship of his Heir-Females being of the Age of fourteen years, at the time of the death of her Ancestress for two years, if he die within the same two years, his Executors shall have it, *27 H. 8. 3. Co. on Litt. 79.*

If a man make a Feoffment in Fee, upon condition, that the Feoffee shall pay an hundred pounds to the Feoffor, his Heirs, or Assigns (or his Heirs, Executors, or Administrators) at such a time: Now in these cases the Executor shall have this money as a Chattel, if it be paid by the Feoffee. *Co. 3. 96, 97. Fitz. Condition 8.*

If a man grant to me the two next presentations of the Church of *D.* these are Chattels; and if I die, my Executors shall have them, *34 Hen. 6. 27. Broo. Chanc.*

If a Parson have an Annuity in Fee, in the right of his Church, and it is behinde, and the Parson die, the Executors, and not the Successor, shall have these Arrearages as a Chattel. *H. N. B. 120. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.*

If a man seized of Land, and possessed of a flock of Cattle, Lease it to others for years, and the Lessees Covenant to pay an hundred pound by the year to the Lessor, or his Wife, their Heirs, or Assigns, during the Term, and an hundred pound at a day, for a marriage portion of his daughter, and die; now the Wife, and after her death, her Executor, not the Heir of the Lessor shall have this Rent, *Dyer 275. 276.*

If a man make a Lease for life, rendring Rent, and die; now the Executor, not the Heir shall have the Arrearages of Rent, due in the life time of the Testator, *Dyer 375. Co. 4. 50. Fitz. Executors 112. 98.*

If there be in a Chest, or Box, wherein are Writings (which appertain to the Heir, or *supra*) Plate, or any other Goods; these do belong, and shall go to the Executor, and not to the Heir. *Fitz. Execut. 111.*

If a man finde Treasure, the owner whereof is known, and he die before he have it, yet the Executor of him whose it is, shall have it. *Fitz. Corone 446.*

If I be Out-lawed, and my Goods forfeit, and die, and my Executor reverse the Outlawry for Broach, now he shall have all these Chattels, and Goods that were so forfeit. *Forfeiture.*

If

Sec. 4.

If I being Guardian, do indow a Woman that hath title of Dower out of the Land, and after I die, my Executor shall have the Service due from the Woman, during the minority of the Infant. *Fitz. Dower* 138.

Fine on a Copholder.

If I be Lord of a Mannor, and a Fine certain or uncertain be Assessed upon the admittance of a Tenant: This sum of money assessed (as it seems) is a Chattel to me, which shall go to my Executors if I die.

If a man have a Judgment for Land, in a real or mixt Action, or damages, and die; now the Heir shall have execution of the Land, and the Executors shall recover the damages: So if a man recover damages for detaining of Charters, and die, the Heir shall have the Charters, but the Executors the damages; but the Executor shall not have Execution for the damage, before the Heir hath sued a *Scire facias* for the Charters, *Fitz. Executor* 32. 139.

The Executors shall have a ravishment of Ward, for a Ward took away in the time of their Ancestor, *per Stat. of Ed. 3.* for Goods taken away in the life of the Testator, this is a Chattel therefore in them: So if the Testator had a Lease for years, or an Interest by Statute, or Elegit, and be ousted and die, the Executor may have an *Ejectione firme*: So if the Testator bring an accompt, and the Defendant say *Nennques son bailge*, and it be found against him, and after Judgment the Plaintiff doth die; this Action shall survive to the Executors: So if the Testator hath recovered any debt, or damages in any personal Action, this as a Chattel shall go to the Executor: So all causes of Action and Suits shall go to the Executor, and not to the Heir. Wherefore see more in *Executor*, the very same Question in effect with this. *Fitz. Execut.* 52, 53, 59, 84, 117. & *Accompt.* 56.

s. Where not, but the Heir or some other shall have them.

Heir.
Incidents.

Regularly all those things which shall not be forfeit by Uttery in a personal Action, nor be attached in an Assize, nor distrained for Rent, are not reputed Chattels, neither shall go to the Executor, but to some other.

Also whatsoever it will not be Felony to steal, as all the Incidents of an House, as Glass of the Windows annexed to the Windows by Nails, or otherwise; all the Wainscot about the House, fixed by Nails, Screws or Irons put through the Posts, or Walls, Tables Dormant, Furnaces of Lead and Brass, and Fats in a Brew-house or Dye-house, standing, and fastned to the Walls, or standing and fastned to the ground in the middle of the House (though fastned to no Wall) a Copper or Lead fixed to the House; all the Doors without and within, whether they be set up at the charge of the Lord or Tenant, shall go with the House to the Heir, or him that is to have the House, and not to the Executor of the Tenant, as a Chattel.

Trees.

Also Trees standing, and Grass growing, is parcel of the Inheritance, and not as Chattel to go to the Executor or Administrator; 20 H. 7. 13: *Kelw.* 118. Co. 4. 63, 64. 21 H. 7. 26. 4 H. 7. 10. *Kelw.* 86. *Dyer* 273. b. Co. 4. 65.

Game of Parks.

Also Pales, Walls, and Stakes, Deer, Conies, Pheasants, Partridges, and the rest of the Game of a Park, shall go with the rest of the Park, as parcel of the Freehold, and Incident, and Concomitant thereunto, and not as a Chattel to the Executor. Co. 7. 14. 22 Ed. 4. 7 Hen. 7. 15. 10 H. 7. 6.

Fish.
Pigeons.

Also the Fish in the Pond are not reputed as Chattels, neither shall go to the Executor, but shall go with the Pond: So also the Pigeons of an House shall go with the House, *Kelw.* 118. 18 Ed. 48. *Goldsb.* 129. pl. 24.

If Land or Rent be granted to one and his Heirs, during the life of another; now after the death of the Grantee, his Heirs shall have this estate, and not his Executors as a Chattel, *Littl. Sel.* 739.

If one seized of Land, wherein are Trees in Fee, and make a Feoffment of it (excepting the Trees) and after sell the Trees to the Feoffee absolutely, or grant them to him and his Heirs; in this case the Trees are reunited, and parcel of the Inheritance, and are no Chattels, nor shall go to the Executors. And if a man seized in Fee of such Land, make a Lease for life, or years (excepting the Trees) these Trees are no Chattels in the Lessor, neither shall go to his Executors, but to him that hath the Land, Co. 4. 63. & 11. 48.

If there be Tenant for life, the Remainder in Fee of a Tenancy, and the Lord grant his Seignior for life, and after he in Remainder in Fee of the Tenancy die, his

his Heir within age; and after the Lord die, and after the Tenant for life die: Now in this case the Heir of the Lord, and not his Executor shall have the Wardship, *Co.*

2. 97.

If the Kings Tenant by Knights service in *capite*, be seized of a Mannor whereunto an Advowson is appendant, and the Church become void, and the Tenant dieth, his Heir within age, the King that hath the Wardship, shall have the Presentment, and not the Executor as a Chattel: But if the Land were holden of a common person, the Executor and not the Guardian should have it, *Co. upon Littl.* 388.

If a Lease be made for years, rendring Rent at *Michaelmas*, or within ten days after, and the Lessor, during the Term, happen to die after *Michaelmas*, before the ten days expired. Now in this case the Heir of the Lessor, and not his Executor, shall have this last years Rent due at *Michaelmas*. *Hil.* 7 Jac. *per totum curiam in B.R.* & *H.* 9 Jac.

See. 5.

If any Office of Trust, Judicial, or Ministerial, being for the Administration of Justice, or the like, be granted to me for years, or to me, my Executors, and Administrators for years; yet this is no Chattel, which my Executor, or Administrator, shall have after my death; for it is Personal, and dies with the person, *Co.* 96. 97.

Office Judicial,
Ministerial.

Personal.

If one have a Wardship, as Guardian in Socage, and die, his Executors shall not have it, for it is personal, *Plow.* 293. *Co.* 3. 39.

If the Father have the Wardship of his Son, and Heir Apparent, *Jure natura*, this is no Chattel in him which his Executor shall have after his death; for the Custody is inseparably annexed to the person: As if there be Lord, and a Woman-Tenant by Knights service, and the Tenant doth make a Lease for life, and after the Lord and Tenant do enter marry, and have Issue, between them a Son, and the Wife die, and after the Father doth die, the Son within age, his Executors shall not have this Ward by reason of the Seigniorie, 33 *H. 6.* 55. *Co.* 3. 39.

In some cases things that are in their nature but Chattels, yet shall not go to the Executors, as certain Jewels, &c. of the Kings of England, that shall not go to the Executors of the King, but succeeding Kings: So also if a King hath the Temporalities of a Bishop, all Wardships, and present Actions, hapning by reason thereof, shall go to the succeeding King, not to the Executor: Also by the Custom of certain places, Heirbomes, and a reasonable part of the Goods may go to others from the Executors, 11 *Hen.* 4. 5. *Broo.* Chattels 2. *F. N. B.* 122. *Fitz.* Debit 51, 52. 38. 60.

If a Major and Commonalty, Dean, and Chapter, or any other Corporation, have Goods, or Chattels, in the Right of their Corporation; though they change not their nature thereby, yet they shall not go to the Executors, but to the Successors in the Corporation: But if a Lease be made to a Bishop, and his Successors for years, his Executors, or Administrators, shall have it as a Chattel, but in *ante deus*; for Regularly no Chattel can go in succession, in case of a sole Corporation, *Co.* 4. 65. *Co. upon Littl.* 46. b.

Corporation.

If Goods be given to a Woman in marriage, and the Husband and the Wife, be after divorced; now in this case, though these Goods change not their nature; yet they, at least those that remain, shall come back to the Wife, and shall not be the Husbands any longer, or go to his Executor after his death. See *Divorce*, 26 *H. 6.* 7. *Broo.* Chattels 2.

Husband and
Wife.

If a man grant a Rent in Fee, and grant over that if the Rent be behinde, &c. That he shall forfeit twenty shillings *nomine penae* to the Grantee, and his Heirs; now if this Rent be behinde, and he die, the Heir, not the Executor shall have and recover this Rent, and Penalty, and he may have an Action of Debt for it; but if an Annuity or Rent be granted to one for his life or years, and he die; his Executor shall have and sue for them, and Arrearages incurred in his life time, *F. N. B.* 120. *M. Fitz.* Covenants 17. *Fitz.* Executors 99.

Rent.

Penalty.

If a man make a Feoffment in Fee of Land, and the Feoffee Covenant to do something to the Feoffor and his Heirs, *Et quousque defecit fuerit*, &c. That he shall forfeit so much, and his Heirs, five pound. Now upon default, the Heir, and not

not

Relief.

not the Executor shall recover this penalty. *Dyer fol. 24. a.*

If a man seized of a Mannor in Fee, and have a Relief due to him upon the death of a Tenant, and he die before it be had, it seems the Heir, not the Executor shall have it; but if the Lord were onely seized of an estate for life, or had a Lease for years of the Mannor, *Contra*, see somewhat more in the *Question* following, where Estate if *Freehold*, may be of a Chattel presently. *Dyer fol. 24:*

6. Emblements,
to whom they
shall apper-
tain, and who
shall have
them,

Emblements strictly are the profits of Land which hath been sowed (which in some cases, he that soweth the Land shall have, and in some cases not) but the word is sometimes used more largely for any profits that arise, and accrew naturally from the ground, as Grass, Fruits of Trees, Hemp, Flax, and the like. *Terms Ley. Kelm. 125. Co. upon Littl. 55.*

If a Tenant in Fee-simple, or Fee-tail, sow the Land, their Executors after their death, if they die before cutting, not their Heir shall have the Emblements. *Merton, cap. 2. 37 H. 6. 25.*

Husband and
Wife.

If one have Land in Fee-simple, or otherwise in his own or Wives right; or be estated in Land for years in the right of his Wife, and he sow it with Corn, and die before it be reaped; in this case the Executor of the Husband, not the Wife, or Heir shall have it.

Señ. 6.

And so it seems of Planted Hops, Saffron, and Hemp, *Quicquid plantatur soli, solo cedit.* But Grass, Apples, Pears, and other fruit upon the Trees, though ripe, and ready to be cut shall go to the Heir with the Land: But all these of both sorts, if the Land in which they grow, be sold away, and not excepted pass with the Land. The Roots of Carrets, Turneps, Parsnips, and Skirrets, are disputable. *New Book of Executors.*

Trespas.

If a Disseisor, or a Disseisor of a Disseisor, or a Feoffee, Donee, or Lessee, of the first, or second Disseisor, sow the Land, and cut and carry the Corn away, or cut and carry away the Grass, or Trees, or gather, and carry away the Fruit as Apples, Nuts, or the like; or give, or sell away any of this, (unless it be in a Market or Fair, &c.) yet when the Disseisee doth re-enter, he shall have it all again, and may take it wheresoever he doth finde it; for the property of it is still in him, and if he die, his Executor may do the like; and if they be gone, or spent, the Disseisee may have an Action of Trespas for them, against the Disseisor, but not against his Lessee, Feoffee, or Donee, which come in by Title. *Co. 11. 51. Dyer 31. 173. 12 H. 7. 25. Perk. Sect. 519. Co. 5. 85.*

If a Tenant for his own or anothers life, sow the Land, and after die, his Executors, and not him in Reversion, shall have the Emblements: And so is the Law for any particular Tenant that hath an estate uncertain; but if a Tenant for years sow the Land, and before that he hath cut, and severed the Emblements from the Land, his Term expieth, there the Lessor, or he in Reversion, and not the Lessee, or his Executors shall have the Emblements: But if Lessee for years of the Tenant for life, sow the Land, and the Lessee for life die before he can Reap, yet the Lessee for years shall have the Crop. So if a man seized of Lands, in Fee hath Issue a Daughter, and dieth, his Wife being *enservis*, or with childe of a Son, and the Daughter soweth the grounds, and after the Son is born, yet the Daughter shall have the Emblements, *10 Aff. p. 6. Littl. Sect. 68. 7 H. 4. 13. Co. 5. 106. 7 Aff. p. 19. Dyer 310. 16 H. 6. 6.*

If Tenant for life be disseised, and the Disseisor sow the Land, and the Tenant for life die; in this case the Executors of the Tenant for life, and not the Disseisor, nor him in Reversion, shall have the Corn, Lessee for life, the Remainder for life, and the first Lessee for life, make a Lease for years, and this Lessee was put out of possession by a stranger, who soweth the Land, and the first Lessee for life died, and he in Remainder for life entred into the Land, and leased it to Sir H. R. In this case it seems not he, but the Lessee for years of the first Lessee for life must have the Corn. *Goldsb. 143. pl. 60.*

Husband and
Wife.

If a Woman Copiholder, during her Widowhood, according to the Custom of the Mannor, soweth the Land, and before the severance of the Emblements, she taketh an Husband, the Lord shall have the Emblements: So if she make a Lease for years,

years, and the Lessee sow the Land, and then she take an Husband, there the Lord, not the Lessee, shall have the Emblements, though the Lessee's estate be determined by the act of a stranger, *Co. 5. 106.* and upon *Littl. 55. b. Goldsb. 189. pl. 136.*

If the Wife have a Lease for years of Land, as Executor to a former Husband, and her present Husband sow it, and die; in this case, the Corn, at least, so much as is more then the value of the Land, shall go to the Wife, not to the Executor of the Husband. *New Book of the Executors.*

If a Lease be made to the Husband and Wife, during the Coverture, and the Husband soweth the Land, and after they are divorced, *causa præcontractus*, the Husband not the Lessee shall have the Emblements.

If one seized of Land, in the right of his Wife, in Fee, or for life be, and he, or his Lessee for years sow the Land; and before the Corn be cut, the Wife die, or the Husband die; now in the first case, the Husband, or his Executors, and the last the Lessee, or his Executors, if he die, shall have the Emblements (a) But if the Husband and Wife be Joint-tenants of Land, and the Husband soweth the ground, and the Land doth survive to the Wife; here it seems he shall have the Corn, and not the Executors of the Husband, but the Husband might have given or disposed them, *7 Hen. 4. 17. 7 Aff. p. 19. Broo. Embl. 6. Co. upon Littl. 55. (a) Aff. 21. Dyer 316.*

Where one doth enter into Land by a right Paramount, or the Lease, or Estate, doth determine by the act of the Lessee, or by his means that did sow the Land, or by the means of him, under whom he claims; in this case, though the estate of the Lessee be uncertain, yet he shall not have the Emblements: As if one enter upon, or recover Land, saved by virtue of a condition in Law, or in Deed, as if the Lessee for life, or years, do alien in Fee, or commit Waste, and he recover the Land, or a Feoffment, or Lease be made on Condition, and the Condition be broken; or the Lord of a Copiholder enter for a forfeiture of the Tenant, or a Lord enter on his Villains Land, or the King, or Lord enter upon the Land of his Tenant after a Felony done for a forfeiture: In these and such like cases, he that entreteth upon, or recovereth the Land, shall have all the Emblements that are there growing, and not cut upon the Land at the time of his Entry, or Recovery. So if a man recover Land by a Suit upon a Right, and be put in possession by an *Habere facias Scisnam*, or *Habere facias Possessionem*, he shall have all the Emblements that shall be then growing upon the Land. *Fitz. Trespass 254. 44 Ed. 3. 25. Co. 5. 106. and upon Littl. 55. b. Co. 4. 21. Perk. Setf. 5. 15. 40 Ed. 3. 5. 19 H. 9. 45. Stamf. lib 3: 301. Co. 5. 111. Broo. Embl. 8.*

And yet if a Feoffment be made upon Condition, and the Condition is broken, and the Feoffee before the entry of the Feoffor, cut the Corn sowed on the ground, and after such severance Feoffor re-enter; in this case, not he but the Feoffee shall have the Emblements, but if he had entred before, he should have had it: So if a Copiholder after forfeiture, and before entry of the Lord, cut the Corn, he shall have that which is cut, *5 H. 7. 17. Broo. Embl. 4.*

If a man Lease Land at Will, and the Lessee doth sow the Land with Corn, or set Roots, or sow Hemp, or Flax, or any yearly profit, and the Lessor determined the Will, before it be ripe, and oust the Lessee: Now in this case, the Lessee shall have the Corn, and if he die, his Executor shall have it; but if the Lessee himself determine the Will, he shall not have the Emblements, but the Lessor: And if such a Tenant at Will, plant yong Fruit Trees, or yong Oaks, Ashes, Elms, &c. or sow the grounds with Acorns, &c. he shall have no profits of these; for this doth not bring any yearly profit: So if he, or any other Tenant that shall have Emblements, do onely Ear and Dung the Land, they shall have no benefit by this, *Co. 5. 116. and upon Littl. 55. 18 Ed. 4. 18: Littl. Setf. 68. Co. 5. 116.*

If a Tenant by Statute-Merchant, soweth the ground, and then a sudden, and casual profit hapneth, by which he is satisfied, yet he shall have the Emblements, *44 Ed. 3. 15. Co. on Littl. f. 55. b.*

If a Tenant at Sufferance be discharged, and notwithstanding he continue in possession,

possession, and sow the Land, and the Lords Baily take the Rent at our Lady-day after, and payeth it to the Lord in a gross sum with other monies: Now it seems in this case the Tenant, and not the Lord shall have the Corn at Harvest, *Crompt. Jur. 215*:

If a man under colour of a Feoffment or Lease, presuming he hath a good estate, when in truth he hath none, sow the Land; now in this case, neither he nor his Executor, but the Feoffor or Lessor shall have the Emblements, *Less Case, 9 Jac.*

Tenants in
Common.

If two be Tenants in Common, and one die, and his wife hold in Common, and sow the Land, and die; the other Tenant in Common, or the Heir shall not have it, but the Executor of the woman, *Perk. sect. 523*.

If a Lease be made to an Husband and Wife at will, and they be afterward divorced *causa pracontractus*, and the Land be sowed before; now in this case the Husband, and not the Lessor shall have the Emblements, *Co. 5. 116*.

Husband and
Wife.

If a Tenant in Dower sow her Land, and die before severance of the Corn, the Heir shall not have it, but the Executor of the Wife: And if after the sowing she take an Husband, and he die before it be cut, his Executors shall not have it, but the Wife shall have it. If a Feme-sole sow her Land, and after marry, and he die before severance, the Wife, not the Executor of the Husband shall have it, *Bro. Embl. 26. St. 20 H. 3. c. 2. Perk. sect. 522*.

Parson.

If a Parson die before the first day of May, when the Land is sowed, and another Parson is made, the Successor shall not have the Tenth, but the Executors or Administrators of the first Parson: But if he die before the Conception of the Virgin Mary, the Successor shall have the Tenth of the Emblements. But now by the Statute of 28 H. 8. the Profits are to be sequestered from the death of the Parson, and to be delivered all to the Successor; only the Corn sowed upon the Glebe-land by the Predecessor, which he may dispose by Will; and if he do not, it seems his Executor shall have it, *Stat. 21 H. 6. cap. 30. 34 H. 6. 33. 35 H. 6. 39. 28 H. 8. 11*.

Stat. 8.
Forfeiture.

If a man be outlawed in a Personal Action, the King, not the party or his Executors, if he die, shall have all the Emblements on his ground at the time of his Outlawry: So if a man forfeit his Goods in case of Felony by flight, though he be after acquitted, or being convicted, the King will have all the Emblements at the time of the flight in the first case, and Felony done in the second case, or at any time after (as it seems) until Conviction, or Acquittal, *5 H. 7. 16. Fitz. f. Corone, 344*.

Tythe.

If Corn be reaped, and the Tythe not set out, and the Inheritor of the Tythe die; it seems the Executor, not the Heir of the Inheritor shall have the Tythe, *New Book of Executors*.

Note.
7. The remedy
to recover the
Emblements.

But note, That in all these cases where a man hath right to Emblements, and dies, if he make any Devise of them, then they shall go according to his will and disposing. See *Testament. Dyer 316*.

Action.

And in all these cases before, he to whom the Law doth give the Emblements, may lawfully enter into and upon the Land or ground where they grow, and cut and carry them; and he is not put to his Action for them, nor bound to take them ere they be ready, or at one time; but the Law doth give him convenient entry of Ingress, Egress and Regress; and if he be disturbed in this way, he may have his Action of the Case, and shall recover as much as he is damaged. *Quando Lex aliquid alicui concedit, concedere videtur, & id sine quo res ipsa esse non potest*. And if a man that hath right to these Emblements have any Trespass done to him in them, he may have an Action of Trespass for it, *Co. super Lit. 56. Kelm. 125. Kelm. 160. a*

If a man be possessed of a Term or Lease for years, and do by Will devise it to one for life, and after to another for life, or for the residue of the years; these Devises are good, and the Devisees shall have it accordingly, and the Executor of him in Remainder after his death shall have this possibility as a Chattel; and he that hath the first Estate cannot bar him of the next, but not as a Freehold, for the quality of the Estate is not hereby changed. But if such a Conveyance were by Deed, in this case

case he to whom the first Estate were limited, would have all the whole Term; and they that are to come in the Remainder, would have nothing. So also such a Devise by Will of a Chattel personal, will (as it seems) be void to him in Remainder. But *Quare* of this; and see *Fitz. Devise contra*, Co. 8. 95. 10. 47. *Plow. 525. Dyer 358. Bro. Chat. 23.*

But if a man be possessed of a Term, and do devise it to one and the heirs of his body, the Remainder to another; this Devise is void to him in Remainder, and the first Devisee and his Executors shall have it all the time: And if he devise to one of his Heirs, the Devisee hath no Freehold, but it shall go to his Executors as a Chattel, Co. 10. 87. *Watts and Gouldstons Case, M. 19 Jac. Co. B.*

If a man be possessed of a Term or Lease for years of Land, and grant a Rent-charge out of it to *J. S.* for his life, or in fee, this is a good Grant, and the Land shall be charged during the Term only, *Co. super Lit. 147. b.*

If one that hath a Lease for years enter into a Statute, and Execution be sued thereupon, and the Sheriff extend the Lease, and deliver it to the Conusee at a yearly value, as he may either sell it outright, or extend it at a yearly value, which he will; this is no frank Tenement in the Conusee, but a Chattel still.

If a Termor grant all his Estate to *A.* to the use of himself and his wife for their lives; in this case neither the Termor or his wife hath any Freehold; for the Statute of 27. doth not execute the Possession to this use: And therefore if he or his wife grant this to another, their Grant is void, for the whole interest in Law is in *A.* *Dyer 369 a.*

If a Lease be made to *J. S.* for Forty years, if he live so long; and if he shall die within the said term, that his wife shall have the Residue of the term: Now this is no Freehold, and by the death of *J. S.* the Lease is ended, and therefore the Remainder to his wife is void, *Dyer 253. b.*

A man may have an Estate of Freehold or Inheritance in other things as well as Lands, Rents, Commons, and such like; as in a Robe or Garment, Bread or Drink, or the like. See *Corody*, and *Fitz. in Affise.*

If Land or Rent be granted to one and his heirs during the life of *J. S.* in this case, after the death of the Grantee, his Heir, not his Executor shall have it, *Lit. sect. 739.*

And regularly all other things which are not forfeited by an Outlary in a Personal Action, nor attachable in Affise, nor distrainable for Rent, nor the taking away whereof will be no Felony; they are not to be reckoned Chattels that shall go to the Executor, 20 *H. 7. 13. Kelm. 118.*

A Thing in Action, is, when a man hath Cause, or may bring an Action, or have other Remedy for something due, or some wrong done to him. As a Right or Title of Entry into Land, which another hath; an Action of Debt upon an Obligation, or Annuity, or Rent, or Action of Covenant; or an Affise upon a Disseison, *Ejectione firme* upon an Ejectment; a Ravishment of Ward, upon the detaining of a Ward; Trespas of Goods taken away, Beating, or the like. And because they are things whereof a man is not possessed, but for recovery of them is driven to his Action, they are called things in Action, or the Possibility of a thing. And this is either certain, (*i.*) when the demand is certain, as in case of Debt; or uncertain, (*i.*) when the demand is of a thing uncertain, as in Actions of Trespas, and the like. And these Choses in Action also are some of them Personal, as Debt, Damages, and the like; and some of them are mixt, as Wardships; and some are real, as Rights, Titles of Entry or Action, and the like, *Terms ley, Finches ley, f. 25. Bro. Pat. 98.*

These things in Action, or Causes of Suits, as Entries to continue ones Right, or upon a Title Possibilities, and the like, or of that nature, as that regularly they cannot be given nor granted, nor yet transferred from one Subject to another, by act of Law; as a Right of Action will not come to the Lord by Escheat. And if an Obligation had been made to a Villain, and the Lord seize him, he shall not have, nor can recover this Debt, but in the Villains name; nor yet be given or granted by act of the party from one man to another. And therefore if a man hath a Debt due by Especialty or otherwise, he cannot grant or assign it to another, save only in some special cases;

SoH. 9.

8. Thing in Action, what.

The kinds.

9. The nature of it.

Grant.

Extinguish-
ment.

cases; but he may depute another to sue it for him, and in his name, or by Agreement promise it to another when it is recovered; or he may grant, give, or assign the Especialty it self, and so deprive himself of the means to recover it, as hath been often adjudged. But such things may be extinct by Release, or Confirmation, &c. But this must be always between the parties themselves: For, no strangers, but parties themselves and privies, (i.) Heirs, Successors, Executors and Administrators can take advantage of them, unless it be in special cases: As where a man is Executor, or where is a Grant of a Reversion, (for which see the Statute 32 H.8. cap.8. & vide infra.) And this the Law doth provide to avoid multiplicity of Suits, and subversion of Justice, which would follow, if these things were grantable one from another, 1 H. 6. 4. Co. 10. 48. 22 Aff. p. 37. Dyer 30. b. 39 H. 6. 26. 34 H. 6. 30. Fitz. Maint. 14: Plow. 185. b.

10. Where, and
what things
shall be repu-
red in the na-
ture of things
in Action, and
not grantable.

Whatsoever comes under the definition of Action, (for which see Action) or is a Chattel only in Action, (for which see above) as all Causes of Suit for any Debt or Duty, Trespas or Wrong, are to be accounted Choses in Action. Also if I have a Judgment against another man for money, or a Statute for money; these are Choses or Things in Action. So also if I have an Annuity to me in Fee, for life or years, it seems this is in nature of a Chose in Action, and not grantable. But *Quare*. See Fitz. Grant 45. For it seems, an Annuity in Fee to me and my heirs, is grantable, Bro. Adjudg. 16. Co. 5. 89, 90.

If a man have an Advowson, and the Church be void, the Presentation to it is in the nature of a Chose in Action, and cannot be granted by a common person, but might be in the case of the King. But in this case, if the Patron grant the next Presentation when it shall be next void, the Grantee it seems shall have the next Avoidance after this, Bro. Chose in Action. Dyer 296. Fitz. Grant 50. Dyer 26. a.

Grant.

Also a Possibility of an Interest, or an Estate in a Term of years, is somewhat near in its nature to a Chose in Action, and therefore is not grantable from one Subject to another; but this may be released to Privies and Parties in the Estate, Co. 4: 66. a. b. But if one sell to me and my Assigns an hundred Load of wood in his Wood, to be taken by my Assignment; this is more then a thing in Action, for it is an Interest which I may grant over, and if he refuse to assign it, I or my Assigns may take it without him. So if one sell me his wood in such a Wood, (except twenty of the best Trees) and that I shall cut it within two years; this is an Interest in me grantable over; and if he refuse to choose his twenty Trees in reasonable time after I have requested him, I may cut down the Wood, and leave him twenty Trees. So if one grant me reasonable Estovers in his Wood, to be taken by the view and delivery of his Bailiff, this is an Interest; and if his Bailiff will not deliver it after request, I may take it without him, Co. 5. 25. 5 Ed. 3. 64.

Self 10.
11. When, and
what right of
Title, Debt,
Duty, or thing
in Action, may
be given or
granted over

All Choses in Action personal that are certain, that were the Kings originally, or that did come to him by Forfeiture from others, as Annuity, Debt, Ward, or the like, might have been by special and apt words by his Prerogative granted to any Subject; and the Grantee might have sued for the same in his own name, albeit there had been no words in the Patent to enable him so to do: And the course is to sue for them in the Exchequer. Also the King might have granted the Presentation of a Church, when it was void, Dyer 30. Fitz. Grant 16. Bro. Ch. in Aff. 1, 33 H. 8. 39. The King might have granted his Obligations made to him, to his Heir or Executor, at his pleasure. Also the King (as it seems) might have granted over his Rent, and his Condition of Re-entry for non payment, or any other real or mixt Chose in Action, which another may not do, but where a Reversion is granted within the Statute of 32 H. 8. And if the King be indebted to others, he might have assigned over all, or part of a Tenth, for the payment of it to those he did owe it, or appoint it to be paid by his Customers, 2 H. 7. 8. per Hussy. 1 H. 7. 8. Bro. Pat. 98. 5 Ed. 4. 8. Det. 38. 43. 62.

By a common
person.

But a Common person regularly cannot give or grant any such Chose in Action, (unless it be to the King, which he may do by Deed not inrolled) and if he do, such Gifts and Grants will be void. As if an Obligee give or grant his Debt and Obligation to another man; in this case he to whom it is given or granted, cannot have

nor

nor recover the Debt in his own name, but he may cancel the Obligation or deliver it up to the Obligor. So if a man hath a Right or Title of Entry into Land, he cannot give or grant this over to a stranger. As if a man disseise me of Land in Possession or Reversion, and I grant my Right of Entry into this Land to a stranger: Or if I make a Feoffment in Fee on Condition, that if I do such a thing, I shall re-enter; this Condition or Title of Entry in the nature of a Chose in Action, is not grantable over; but sometimes a Condition incident to a Reversion is grantable by the Statute of 32 H. 8. Co. 10. 48. Co. 5. 89. 90. 21 H. 7. 15. Fitz. Prerog. 10. 2 H. 7. 8. Perk; 1st. 86. 280. Co. 2. 56. a. 3. 4. a.

If a man have the Wardship of an Infant, and he is contracted to another in his minority, and then he grant the Wardship, and after the Infant is married: Now in this case the Grantee shall have the Writ of *Ravishment of Guard*; for this Grant was good, *Fitz. Guard.* 94.

If a man take away any of my Goods and Chattels from me as a Trespassor; now it seems I cannot give or grant these Goods or Chattels to another, until I have de-vested the Property of them again in me by seizure, &c. 2 Ed. 4. f. 15. 10 H. 7. 27.

The things in Action sometimes are extinct and gone by the act of the party that hath right to them; and sometimes they are only suspended, and shall be again revived: As if the Ordinary commit the Administration of the Goods of the Debtee to the Debtor, the Debt is only suspended. And therefore if the Administration be unduly granted, and after revoked and granted to another, the second Administrator may recover this Debt of the first: And if there be not Assets besides, this should be accounted Assets in the hands of the first Administrator, whiles it doth continue. So if a Feme-sole Executrix of a Debtee, take the Debtor to husband, this doth only suspend the Debt; and if he die, the wife may sue the Executors or Administrators of her husband, as she might before, and that Debt also shall still be reputed Assets in her hands. So if the Debtor makes the Debtee, or the Debtee the Debtor his Executor, and he do legally refuse it, or if he make him and others Executors, and they all refuse, then the Debt is revived again, Co. 3. 136. Plow. 185. Co. 8. 136. 9. 37.

But if a Feme-sole Debtee take her Debtor to husband, or if there be two Obligor's in an Obligation, and the Obligees take one of them to husband; or if one be bound to a Feme-sole and another in an Obligation, and she take the Obligor to husband; or if the Debtor make the Debtee his Executor, or the Debtee and another his Executors, and they do take the Executorship upon them; or if the Debtee make the Debtor his Executor, or him and another his Executors, and the Debtor die before he take upon him the Executorship: In all these cases the Debt or Action is extinct, and shall not revive. See *Suspension*. Co. 8. 136. 21 Ed. 4. 3. Plow. 184. 11 H. 7. 4. 21 H. 7. 24.

If a man disseise me of Land, and then I make him Lease for years of the Land: Or if I make him a Feoffment in Fee on Condition, and before the Condition performed, make a Lease of all or part of it to another; by this the right or title is suspended: And if I make a Feoffment in Fee; in these cases the right or title is extinct, and will never revive. So if the Disseisor levy a Fine of the Land to a stranger, the right is extinct, and the Disseisor shall hold the Land for ever, Co. 4. 52. Co. 2. 56. a.

When a man doth die, all these things called Choses in Action shall go to his Executors as part of his Chattels. See in *Chattels*.

If an Obligation be made to two men, and one of them forfeit by Outlawry or otherwise, or had granted all to the King; in this case the King would have had the whole, and the other had lost his part, 19 H. 6. 7. 22 Ass. p. 37.

If a Villain escheat, the Lord shall have no Choses in Action that were his: And if the King had had an Idiot, he should not have had any Choses in Action that were his hereby. And yet if a man had been outlawed, the King should have had thereby the Forfeiture, or all Debts upon Especialties, but not of Debts upon simple Contracts, 1 H. 7. 24. 50 Ass. p. 1.

12: Where a right or thing in Action once suspended, shall be at another time revived, where not.

13: Who shall have things in Action.

CHAP. XLVI.

Of Claim and Coaches.

1. Claim.

Quotuplex.



It is a challenge by any man of an Interest or Ownership of a thing, that is in the possession of another, or at least out of his own; and this is either Actual or by Deed; as by Action (i.) when a man doth bring his Action for the thing he claimeth, or by Entry or Seizure (i.) when one doth enter into, or seize the thing he doth so claim; or else it is verbal (i.) when one doth by words claim and challenge the thing that is so out of his possession; and this is sometimes to Lands and sometimes to Goods or Chattels: Also some distinguish Claim in-

to Expressed and Implied; for which see *Infra*, Co. *super Littl.* 251. b. *Terms Ley.* Plow. 359. *Littl. Sect.* 442. & 419, 420.

Sect. 1.
Continual
Claim.

And continual Claim is a frequent Claim, or a Claim made once every year and day at the least, unto some Land or other thing, by which means the Entry or Property of him that hath right is preserved, and a mischief prevented: So that this doth nothing differ from Claim, but that Claim is but once onely, and continual Claim is, and must be re-iterated and renewed once in every year at the least; for in their effects and operations they both agree for the most part. *Littl. Sect.* 414, 429.

And note that by Claim in most cases of Land, is understood a Claim with an Entry into some part of the Land, or at least a near approach thereunto; for a Claim is so to be made of Land, *viz.* In and upon some part of the Land, or within view of it, unless it be in special cases of fear, &c. And there it may be made in view, or as far off, as the cause of fear and danger is, Co. *super Littl.* 254. a. b.

And note also that this Claim may be by an Action brought, as if the Disseisor bring an Assize; this is a Claim for Lands: And if the Goods of a Villain be distrained before the Lord seize them, the Lord may have a Replevin, and by the bringing of this Action as by a Claim, the property of the Goods is vested in the Lord. Co. *super Littl.* 263. a.

2. The effects
and operations of this
Claim.
As to Lands.

The effect and operation of the Claim, is divers, and he that doth make it, hath thereby great advantage; for by it in some cases he shall avoid a dissent of Lands, and thereby in some other cases, he shall have his Title, which otherwise would be lost; and therefore such Claims in Judgment of Law, amount to an Entry in Law, and will preserve the right of Entry to him that maketh it, notwithstanding there be any Disseisors, Discontinuances, Remitters, or Dissents by any Disseisor, Intruder, Abator, &c, or their Feoffee or Donee, within the year and day: As where a man hath Right and Title to enter into any Lands or Tenements, whereof another is seized in Fee, or Fee tail: As if I be disseised, or my Tenant for life or years make a Feoffment in Fee, whereby he do forfeit his Land, and I having Title to enter, do make continual Claim, (i.) I claim the Land within the year and day before the death of the Disseisor, or the Feoffee: In this case, I or my Heir, if I die, may enter notwithstanding the Dissent. *Littl. cap. Continual Claim in toto.*

But if the Disseisor die seized, his Heir within age, and by office the King is intitled unto the Wardship of him; in this case I cannot enter upon the King, but must have other remedy. *Fitz. Continual Claim* 1. 5 Ed. 4. 4.

And they both do defeat the estate unjustly gained, and put the party that claimeth in possession so, that if the other occupy the thing, after he may have either an Assize against him, or an Action of Trespass, or forcible Entry, as if he were in the Actual possession of it: For such a Claim being an Entry in Law, is as strong and as forcible as an Entry in Deed, and that as well in the hands of one that hath the Land by Title, as by wrong; and therefore such an Entry in Law will avoid a Warranty.

But

But yet this continual Claim of the Disseisor, shall vest the possession and seison in him onely for his own advantage, and not his disadvantage: And therefore, if he bring an Assize, and hanging the Assize, he make his continual Claim otherwise; or by the bringing of the Writ which doth amount to a continual Claim in Law; this shall not abate the Assize, but he shall recover damages from the beginning: And as often as he which hath right of Entry, making such Claim, and the other doth continue the occupation, so often he doth wrong and disseisons to him, and so many Actions of Trespass he may have; and recover his coſts and damages; or may have an Action upon the Statute of 5 R. 2. 7. In which case he shall recover damages for the first wrongful Entry, but not for the mean profits; or may have an Action on the Statute of 8 H. 6. 9. In which case, without any Regress, he shall recover treble damages, as well for the mean occupation as for the first Entry, *Co. super Littl.* 253, 254. 11 H. 6. 51. *Littl. Sect.* 430, 431. *Co. super Littl.* 263. a. *Littl. Sect.* 430. *Co. super Littl.* 257.

This Claim doth sometimes also produce a Forfeiture of Estate. for an Estate may be forfeited by Claim in two sorts. Either Expressed; as if Tenant for life will in Court of Record Claim Fee, or if Lessee for years be ousted, and he bring an Assize *ut de libero tenemento*: Or Implied; as if in a Writ of Right brought against him, he will take upon him to joyn the *nise* upon the meer Right, which none but Tenant in Fee-simple ought to do: So if Lessee for years loose the Land in a *Precipe*, and bring a Writ of Error, for Error in Proces; this is a Forfeiture by Claim implied. *Co. super Littl.* 251. b. *Fitz. Judgment* 237. *Fines* 120. 15 Ed. 4. 29. 2 H. 6. 9. 16 Aff. p. 16.

Sect. 2.
3. How an Estate may be forfeited by claim.

By the Claim of Goods the property is altered and removed from one to another; As if my Villain have Goods, which by Law are mine; now after I have made my Claim to them, and seized some part of them, the property shall be said to be in me: So if the Wardship of a body belong to me, and I by words Claim the Ward being present; though I lay no hands on him, yet by this he shall be said to be seized. And so in other cases where Claim is necessary, by the Claim the Forfeiture of the Goods is prevented. *Vide infra. Fitz. Replevin* 43. 9 H. 6. 25. 42 Ed. 3. 18. *Co. super Littl.* 118. b.

As to Goods and Chattels.

If two Lords of two several Villages or Mannors have Wastes or Fields adjoining together parcel of their Mannors: And there is no inclosure or separation between them, but the bounds and circuits of each Mannor are known, and there is in that Waste or Field a Common, because of Neighborhood, for the Tenants of both Mannors: In this case the Lords and Tenants of either Mannor may inclose their own, and divide themselves from the other side, and so make an end of their Inter-commoning without their consent, although their side inclosed be the greatest part. *Co.* 4. 38, 39. 9. 113. 7. 5.

4. Where and in what case others may inclose one against another, and where not.

In cases where the owners of the Land have been used in a place to inclose their own Land in the Field, and to relinquish and wave their Common in the rest of the Field, and have kept out the Commoners; so that they have not taken any Common in the inclosed ground, there every man may inclose his Land at his pleasure: But where the rest of the Commoners have been used to take their Common, and put in their Cattle in such inclosed grounds, notwithstanding the Inclosure from Harvest till Sowing time; in this case no man may inclose, although he would wave his Common in the Field besides: And yet if in such a case there be an ancient Inclosure taken out of the Field held always in severalty; this may be kept inclosed always, *Co.* 7. 5.

If two men have Inter-common, the one in the ground of another, they may by Agreement inclose and seclude one another; but one of them alone, cannot inclose and seclude the other without his Agreement, although he wave and refuse his Common in the ground of the other; neither when the one hath inclosed, may the other inclose without mutual consent: Also the owners of the Soil, and the Commoners altogether, by an unanimous Agreement, may inclose any Commons whatsoever, *Co.* 7. 5. *Broo. Common* 47.

If

If the Lord make a Feoffment of Parcel of his Waste, it seems the Feoffee may inclose it; and that this is a kinde of Improvement of the Lord; but then it must be in case where an Approvement is lawful: So if a Lord have a great Moor and Infeoff another, of a hundred Acres of the North-side thereof, the Feoffee may inclose it, or the Lord may inclose the residue, *Fitz. Garant de Charters* 31. *Dyer* 372. p. 10.

If one have an ancient Sleight for Cattle in a Field upon his own Land, whereon he hath been used to keep them, and to drive out Cattle of other men that come within it; it seems in this case he may inclose this Sleight. *Per Just. Jones, 6 Car. Gloucester Assizes.*

If the Lord have Common in the Soil of the Tenant held of him, the Tenant in this case may inclose a part of his own Soil, so as he leave sufficient, by the Statute of Improvement, although it speak onely of Lords, *Broo. Commons* 22.

Señ. 3.
§: Where and
in what case a
Claim or Entry
is requisite,
where not.
To Lands.

In all cases where a Right or Title of Entry is come to any man, and nothing doth hinder but he may enter into it, or make his Claim to it, there he must so do before he shall be said to be in Actual possession of it, or before he can grant it over: But where the party that hath right, is in possession already, or where an Entry or Claim, cannot be made, *Contra*. As if a man Disseise me of my Land, or I make a Feoffment in Fee of Land in possession, upon Condition, and the Condition is broken; or my Tenant in Fee-simple do Alien in Mortmain; or my Tenant for life, do make a Feoffment in Fee, (in both which last cases he doth forfeit his estate.) Now in all these cases, I must either make an Actual Entry upon the Disseisor, Feoffee, and Tenant; or I must make my Claim to the Land (which is *tant amonni*) before the Law will adjudg me to be in Actual Possession: And the same Law is where one doth grant an Advowson, Rent, Common, Reversion, or any such like thing which doth lie in Grant, upon Condition, and after the Condition is broken: Now in this case also the Grantor must make his Claim to this thing, before it shall be said to be in him. But if a Feoffment be made on a Collateral Condition, and the Feoffee make a Lease to the Feoffor, and after the Condition is broken; in this and such like cases where the party hath it in possession, he need not make any Entry or Claim. *Littl. Señ. 436. Co. 1. 157.*

If a Tenant in Tail make a Feoffment, and discontinue the Estate-tail, and then die; in this case, the Issue of the Tenant in Tail must Claim, if he will prevent the inconvenience of a Discent; for after a dying seized of the Feoffee, the Issue cannot enter, but is put to his Formedon, *Vide Discontinuance*. See *Littl. Señ. Discontinuance*.

If a man seized of Land in the right of his Wife, and make a Feoffment in Fee on Condition, and the Husband dieth, and the Condition is broken, and the Heir enter, as he must; in this case the Wife need not Claim, nor enter to bring her Estate to her, for the Law doth vest it in her, without any Claim. *Co. super Littl. 202. a. C.* 8. 43, 44.

Infants, Feme-Coverts, persons *de non sane memorie*, beyond the Sea, or in Prison, whiles they so continue, need not make any Entry or Claim. *Vide Infra*.

If a Fine be levied of my Land; in this case if I will prevent the Bar, I must make my Claim to this Land within five years after the Proclamations had, made or certified, or else I am barred of my Land for ever. For which, see *Fines. 4 Hen. 7. cap. 24.*

To Goods.

If a Lord have right to the Goods of his Tenant, because he is Villain, he must claim or seize the Goods, ere he shall be said to have the property: If I have right to the Wardship of a Body, I must lay hands on him, or claim him, ere I shall be said to be seized of him. So if my Goods be taken as Waiffs, or Estray, or Wreck; in this case, I must claim them within a year and a day of the Seizure, or else I shall lose them for ever. *Co. super Littl. 118. b. Co. 3. 107.*

After

After a Right or Title of Entry accrewed, it is good policy to make a mans Claim or Entry, as soon as he can. For if a Fine be levied of anothers Land according to the Statute of 4 H. 7. (as most Fines are at this day) he that hath right must enter or make his Claim within five years after his Right or Title accrewed; or else he is barred, not onely of his Right of Entry, but of his Right to the Land for ever. But if the Fine be a Fine at Common Law, and not with Proclamations; in that case, he that hath Right must make his Claim within a year and a day after the Fine levied, or else he is barred for ever. See *Fines. Co. 9. 105. Dyer 3. 72. 224. Co. 5. 107. 8. 101.*

6. Within what time such Claim shall be made, and such Claim is good, being made within the time; where not.

To Lands:

If a Judgment were had in a Writ of Right and Execution thereupon, and another man hath right to the Land; now he must have made his Claim within a year and a day of the Judgment, or else he is barred for ever. *Co. 5. 507. 8. 101.*

If I be disseised of my Land, and thereby put to a Right of Entry: Now in this case, by the Common Law, I must make my Claim, or my Entry within a year and a day, (the day wherein the Claim was made being accounted one) of the disseison, or else if it happen the Disseisor die seized in the interim: I am barred of my right of Entry, so if one abate, or intrude into my Land. *Littl. Sess. 421. 426.*

So also if I make a Feoffment in Fee or Condition, and the Condition being broken, so as I have Title to re-enter, I must enter within the year and day, else if the Feoffee die seized within that time, my Title of Entry is gone, and I am put to my Action to recover the Land. But now by the Statute of 32 H. 8. 33. in case of Disseison, a Disseisor must be in five years quiet possession before his dying seized can hurt the Disseisor; and then it may, and therefore after that time the Disseisor must make his continual Claim; but the Law for Abators and Intrudors, and the Feoffee of a Disseisor is, as it was before, *Co. super Littl. 283. Plow. 47.*

Sess. 4.

But if I make my Claim, and after the Disseisor, or Feoffee, &c. of the Disseisor die seized; this will not hurt me. Also if it happen that the Disseisor, &c. do not die, in forty years after the Disseison. If I make my Claim before his death a year and a day, and he die within the year; this doth prevent the mischief of his dying seized. *Littl. Sess. 427.*

If a Tenant Alien his Land in Mortmain, the Lord if he will take advantage of the Forfeiture, must make his Claim or Entry within a year and a day after the Alienation; otherwise he is barred of his Entry and Action for ever. *Dyer 25.*

Continual Claim must be made once every year; and once every year doth suffice what ever happen. And therefore, if he that hath right maketh Claim, and the Tenant dieth within the year and the day, this Claim, though it be but once made shall preserve the Entry of him that maketh the Claim: And if the Ancestor or Predecessor, Claim, and the Disseisor die, and then the Ancestor or Predecessor dieth, now his Heir or Successor may enter. But if the Ancestor or Predecessor make a Continual Claim, and dieth, and the Son or Successor make no Continual Claim, and within the year and day after the Claim made by the Ancestor, the Disseisor dieth; this shall take away the Entry of the Son or Successor, for that the descent was cast in his time. *Co. super Littl. 250, 251. 22 H. 6. 37. 15 Ed. 4. 22.*

If my Goods be seized as Waiffs, or Estray, or Wreck; in this case I must claim them within a year and a day of the seising of them first, or else I shall lose them; but the Lord is not bound to this time for the Goods of his Villain, nor for the Body of his Ward. *Co. 5. 107.*

To Goods.

The party himself that hath right, either immediate or remote, may and must in most cases make his Claim or Entry to the Land; and this he may do in person, or by his Servant or Deputy, for *Qui per alterum facit, per seipsum facit*. And therefore if the Master say to his Servant, that he dares not come to the Land, or any part of it, &c. and that he dareth go no nearer then such a place; and command him to go thither, and make his Claim, and he do so; this is good, though the Servant do not fear at all. *Littl. Sess. 433, 433. Co. super Cro. 245. a.*

7. By what persons such Claim may be, or shall be made, and when such Claim is good by such persons, and where not.

If an Infant, or any Man of full age, have any Right of Entry into any Lands, any stranger in the name, and to the use of the Infant, or Man of full age may enter into the Lands, and this Regularly shall vest the Lands in them without any Com-

mandment Precedent, or Assent Subsequent. *Omnis enim ratihabitio retrotrahitur & mandato equiparatur.* But in case of a Fine, a stranger without authority present, or subsequent Agreement, cannot make a Claim to avoid. And in all cases where one hath a Right or Title of Entry that is in Ward, his Guardian in Chivalry or Socage may enter for him. *Fitz. Release* 28. 7 *Ed* 3. 39. 10 *H.* 7. 12. *Co.* 9. 106. a. & *super Littl.* f. 245. a.

Sett. 3.
To Lands.

If the case be so with a man that he dare not, being forbidden by authority to go abroad, or cannot being sick, and not able to go to the Land; if in this case he command his servant to make a Claim for him, and the servant is afraid of beating, maiming, or death, and goeth as near the Land as he dareth, and there doth make Claim for his Master; this is good, and will suffice, for *Impotentia excusat legem*. But if the Master in that case were in health, and might go to part of the Land himself, such a Claim by his servant will not avail him. *Littl. Sett.* 434.

Also in some cases he that hath right, and cannot enter, yet may make this Claim: As he in Reversion, after an estate for years (and as some hold after an estate for life) by Statute Merchant, Staple, or Elegit, may enter to make a Claim to prevent a descent, or to avoid a Collateral Warranty: But none but such as have Right or Title of Entry, can make this Continual Claim, *Co. super Littl.* 250, 251. b.

If a Fine be levied of my Land, any man may enter, or make claim for me, and to my use to avoid this Fine, by authority precedent from me; and without authority also, if I do afterwards agree to it within the five years, but not otherwise.

A Guardian for Education, or in Socage may enter or make Claim in the name of the Infant that hath right without any Commandment Precedent, or Assent Subsequent, in respect of the privity, is between him and the Infant.

The Chapter in case of a Dean and Chapter, nor Cominalty in case of a Major and Cominalty, in the vacancy of the Dean or Major, cannot make any Claim; for they have not ability nor capacity to sue or be sued, and Entry and Continual Claim must always pursue the Action. *Co. super Littl.* 263. b.

To Goods.

The party himself that hath right to the Goods or Chattels, or his Deputy or Servant, or any other in his behalf by his Precedent appointment, or Assent subsequent, may claim or seize Goods that he hath right unto and it shall be good; for such persons may claim Land, *a fortiori* then, Goods. *Vide supra.*

8. In what place such Claim shall be made, and when it is well done in such place, or not.

He that is to make any Claim or Entry into Lands, if he be not afraid, is to go to the Land, or some part of it; and if by his Entry or Claim, he be to divest any estate that is in another, he must enter into some part of the Land; but if it be onely to bring him into actual possession, and not to divest any estate in another, he may do it in view; but if he dare not come to, nor in view of the Land, he must come as near it as he dare, and make his Claim there. 9 *H.* 4. 5. 11 *H.* 6. 51. *Co. super Littl.* 252. 254.

To Lands.

If a man have cause to enter into any Lands or Tenements which are in divers Villages in one County, if he make his Entry into the Land within one Village in the name of all the rest he hath right to enter into, within all the Villages of that County; this is good for all the rest: But if it be in divers Counties, he must make divers Entries. But if three several men disseise me of three several Acres (though in the same County,) or if one man Disseise me of three Acres, and lettech it to three several men for life; or one Disseise me of one Acre at one time, and another Acre at another time; in all these cases my Entry must be several, else it will serve onely for so much as I enter into: But if I infeoff another of one Acre of ground upon Condition, and after I infeoff him of another in the same County on Condition, and both Conditions are broken, an Entry into one in the name of both is not sufficient; but an entry into one part in the name of all, subject to one Condition, is good; although there be divers parcels in divers Towns. And according to this pattern (as it seems) a Claim must be made, 7 *Aff.* 18. 12 *Ed.* 4. 10. 36 *H.* 6. 27. *Dyer* 337. 11 *H.* 7. 25.

But if it be so that the party in possession do lie in wait, or have threatned to kill, beat, or maim the party that hath right if he come upon the Land; so that he is in fear

fear of his life, and he doth not dare to go into any part of the Lands; there he may come as near it, within the view of it as he dare, and claim it; and this is good enough. *Littl. Sect. 421.*

If one have cause to claim or seize the body of a man or woman-child for his Ward, it must be in his presence by words, or else by laying hands upon him: But the Lord may claim his Villains Goods in any place where he findes them; and so may any man in any other case. 3 H. 4. 15. *Fitz. Barr. 217. Doct. & Stud. fol. 139.*

If a man have Right or Title to enter into any Lands or Tenements, whereof another is seised in Fee, or in Fee-tail, if he which hath Title to enter, makes Continual Claim to the Lands or Tenements, before the dying seised of him which holdeth them; then albeit such Tenant dieth thereof seized, and the Lands do descend to his Heir, yet he that hath made this Claim, or his Heir if he die enter into the same Lands, and the force of the descent is hereby avoided. *Littl. Sect. 414, 415.*

As if I be disseised, or my Tenant for life Alien in Fee, and I make Continual Claim to the Lands in the life of the Disseisor, or Alienee, if after the Disseisor or Alienee die seized, and the Land descend to his Heir, yet I may enter upon the possession of the Heir, and avoid this descent: So if the Disseisor, or Feoffee, &c. of the Disseisor disseised, yet my right of Entry by this Claim is saved.

If there be Tenant for life; the Remainder for life, the Remainder in Fee, and the Tenant for life Alien in Fee, and he in Remainder for life, maketh continual claim before the dying seized of the Alienee, and after the Alienee die seized, and after he in Remainder for life die before any Entry by him made: Now in this case he in Remainder in Fee shall have benefit by the Claim of the Tenant for life, and he may enter upon the Heir of Alienee; and so may he in Reversion also: And if two Joynt-tenants be disseised, and one of them do make continual Claim, and dieth, the Survivor shall have the benefit of this Claim: But if the Tenant for life doth make continual Claim; this will not avail him in the Remainder, unless the Disseisor die in the life time of the Tenant for life. *Littl. Sect. 416. & Co. super Cro.*

The Claim of the Lord shall avail the Tenant that is a Copiholder, so likewise shall the Claim of the Copiholder avail the Lord: So the Claim of him in Reversion or Remainder shall avail the particular Tenant, and the Claim of the particular Tenant avail him in Remainder or Reversion: For which see more in *Fines. Plow.* 359.

It is where one hath omitted, or neglected to make his Claim in the time and manner the Law appointed him, then this may be shewed or pleaded against him, to bar him of the thing he doth challenge, or would have. 34 Ed 3. 16. *Crompt. Jur. 144.*

If an Infant be disseised, and the Disseisor during the time of the Infancy die seized, this will not prejudice the Infant, although he made not his Claim in all that time, but he may enter when he comes to age: So if a Fine be levied of his Land, during his minority, and the proclamations and five years be passed, and in all this time, he hath made no Entry, nor Claim; this will not hurt him; for he shall have five years after he come to age to make his Claim. *Vide Fines. Co. 8. 200. & Littl. Sect. 402.*

If there be Tenant in Tail, the Remainder in Fee, and the Tenant in Tail levy a Fine with Proclamations, he in the Remainder die, his Heir within age; and after the Tenant in Tail doth die without Issue; so that the Tide doth accrew to the Infant, and five years incur, and yet he is within age: Now in this case he shall not be hurt by his non-claim in these five years, for he shall have five years after he come to his full age, *Dyer 133. a.*

If a man be disseised of Land he hath in the right of his Wife, and the Disseisor die, during the Coverture, and no Claim is made by the Husband; now in this case the non-claim of the Husband shall not prejudice the Wife, though it do bar him; And if a Fine be levied of any Land, which is the Land of a Feme Covert, within the Statute of 4 H. 7. In this case, though the Husband make no Claim, during the Coverture

To Goods.

9. Where the Continual Claim of him which hath Right or Title, shall avoid a descent. Where not.

Sect. 6.

10. Where the Claim of one shall avail another. Where not.

11. Non-claim. Ou Laches de Claim, ou non Claim serra prejudice ou barre, ou nemy.

Al Infant.

Feme Covert.

Coverture, yet this shall not hurt the Wife, but she shall have five years to make her Claim or Entry after the death of her Husband: But if the Wife, whiles she was sole (if she were of full age) were disseised, and after take a Husband that doth not make his Claim or Entry, but suffer a discent; now this Laches of her Husband shall prejudice her, and bar her of Entry after his death. *Co. 100. 9 H. 7. 24. 2 Ed. 4. 25. 7 Ed. 4. 7. Littl. Sett. 403, 404. 20 H. 6. 28.*

Home de non sane memorie.

If a man *de non sane memorie*, that hath not Intelligence and Reason, be disseised, have any Right or Title to enter into Land, and do not make his Claim, but suffer a cying seized, if all this be during the time of his dissemper; this Laches of his shall not hurt him at all. See *Non sane memorie. Co. 8. 100.*

Home en prison.

If a man be imprisoned, and he be disseised, and the Disseisor dieth seized, during the time the Disseisee is in prison, whereby the Tenements discent to the Heir of the Disseisor; this Discent, or his Non-claim, will not hurt the Disseisee which is in prison: But if he were at large at the time of the disseison, or at any time after, before, or at the time of the dying seized of the Disseisor, here is Non-claim will bar him: *Plow. 360. Co. super Littl. 359. a. 9 H. 7. 24.*

Sett. 7. Home ultra le mare.

If a man be out of the Realm, in the Kings service, for the business of the Realm, or otherwise, if such a one be disseised when he is beyond the Seas, and the Disseisor dieth seized, the Disseisee being still out of the Realm, his Laches of Entry here shall not prejudice him, neither shall his Discent grieve him: But if he were *infra quatuor maria*, at the time of the Disseison, or at any time after, before, or at the time of the Discent, *Contra. Littl. 9. Sett. 439, 440.*

Al Auters.

If a Bishop, Parson, Vicar, Prebend, or Abbot die, and during the Vacancy, one enter into any of the Land belonging to the Bishoprick, &c. and claim it to him and his Heirs, and die seized of that Estate, and it discent to his Heir during the Vacancy: Now this Discent and Laches will not hurt, but the Successor may enter notwithstanding. So if a usurpation be had to a charge in time of Vacation, this shall not prejudice the successor to put him out of possession, but that at the next avoidance he shall present. *Littl. Sett. 443. Co. super Cro.*

12. Disclaimer.

It is where a man doth not challenge, but deny that which is his; or it is a plea containing an expresse denial, or refusal. And this is sometimes in the Tenancy, sometimes in the Seignior, sometimes in the Blood, sometimes of Goods. As where the Lord distraineth his Tenant, and he sueth a Replevin, and the Lord avoweth the taking of it, by reason that he holdeth of him, if the Tenant in this case say, That he disclaimeth to hold of him; this is called a Disclaimer. And hereupon the Lord may bring a Writ of Right *Sur Disclaimer*, and if it be found against the Tenant, he loseth his Land for ever, if the Disclaimer be in a Court of Record, else he is to be amerced for it onely. So if a *Precipe* be brought against two men for Land, and one of the Tenants disclaimeth, and saith that he is not Tenant thereof, nor doth claim any thing therein, for the manner of Disclaim is such. *Nihil habet, nec habere clamat in terra illa, nec die impetrationis brevis originalis predicti habuit nec clamavit, sed aliquid in terra illa habere de advocat' & disclamat.* Now by this he loseth his part of the Land, and the other Tenant shall have the whole. And if there be but one Tenant, and he do so disclaim, the Writ shall abate, and the Demandant may enter into the Land presently, whether he have right or not. And in this case the Tenant hath no Remedy by Writ of Error, to avoid his own Disclaimer, 13 H. 7. 27. 16 Hen. 7. 1. Westm. 2. 2. Co. 3. 26. F. N. B. 150. 13 H. 7. 27. Co. 8. 62.

Des Terres.

Right of Disclaimer.

Also the Lord may disclaim of his Seignior, and in this case if he do so in Court of Record, the Seignior is extinct, and the Tenant shall hold of the Lord next Paramount, the Lord that did so disclaim by the Services he held before. *Littl. Sett. 146.*

Of Blood.

Also we may disclaim in the Blood, as in case where a *Nuper obiit* is brought by one Coparcener against another, the Tenant may claim by purchase, and disclaim in the Blood; and it seems if this be found against him, he loseth the benefit of the Blood and Discent. *F. N. B. 197. 9.*

Of Goods.

Also one may disclaim his own Goods: As if a man be Indicted that he did feloniously

ously steal the Goods of another, where in truth they are his own proper Goods, and the Goods are brought in Court, and set before him, and being demanded what he saith to them, he doth disclaim them; now hereby he hath lost them to the King, as Goods confiscate, although he be afterwards acquitted of the Felony. *Fitz. Corone* 355. *Stamf. fol. 186. a:*

Also there is a Disclaimer of Estates; (which see more of in *Wayver* :) As if Lands be given to Husband and Wife in Fee, or in Tail, and the Husband dieth: Now the Wife cannot by any Verbal Wayver, or Disclaimer in the Country. As if before any Entry made, she saith she doth altogether wave, and disclaim the said Estate, and will never take, nor accept thereof; yet the Freehold doth remain in her, and she may enter when she pleaseth: So a Charter of Feoffment was made to four, and Seison delivered to three, in the name of all; and the fourth when he seeth the Deed, saith, He will not have, nor accept it, and disclaimeth; yet the Freehold is in him, and he hath as much to do with the Land, as the rest. *Co.* 3. 26.

Of Coaches.

FOR Coaches, these things are to be known.

1. There shall not above Two hundred persons within *London, Westminster*, and six miles about the late Lines of Communication, keep Hackney Coaches and Horses. Nor shall they have and use above Three hundred Hackney Coaches, nor above Six hundred Hackney Horses.

2. The Stage Coaches that come to, and go from *London*, to or from the remote places of the Nation excepted.

3. That the Government of them be always in the Court of Aldermen, within the City of *London*:

4. This Court may make and set down Orders, and offer them to the Lord Protector and his Council, who may alter them as they see good, and then they shall be binding to them.

5. The Thirteen persons named in the Ordinance, are to be Thirteen of the first Two hundred persons, who shall keep Hackney Coaches, and Hackney Horses.

6. These Thirteen, or the greater part of them, were to name to the Court of Aldermen Two hundred persons; out of which, the Court of Aldermen, if they thought fit, were to chuse thereof.

7. Every one to be first admitted to keep a Hackney Coach, was to pay Forty shillings towards a common Stock, to bear up the Company.

CHAP. XLVII.

Of Collusion or Covin.

SECT. 1.
1. Collusion or
Covin. What.

Fraud or Dis-
ceit.



Collusion is a crooked proceeding, or the deceitful and secret Assent and Agreement between two or more, to the prejudice or hurt of another.

It differeth nothing from Fraud, but in this, That Fraud may be by one, but Collusion must be by two or more.

This Collusion is either apparant, when it is, and sheweth it self in the face of the Act it self; or else (which is most common) it is Secret, that is, when it is vailed over with the shews of honesty, or done in the dark, that it cannot be

easily espied, *Co. 9. 109. Plow. 54. Co. on Littl. 3. 12. Sect. 678.*

2. The effect
or operation
of it.

This Covin, although it doth insinuate it self into most of the Acts and Affairs of men, yet is it a thing the Law doth much abhor and oppose; and therefore it doth make void all Acts that are done by it, and not onely so, but all Acts that are dependant upon it, though otherwise in themselves never so good, or much favored in the Law. *Quod aliàs bonum & justum est; si per vim vel fraudem petatur, malum & injustum efficitur. Fraus & dolus nemini patrocinari debent. Co. upon Littl. 366. Co. 3. 78.*

3. Wherein
it is conver-
sant. And
what signs are
of it.

Covin is commonly hatched, and conversant in and about Conveyances of Land, be they by Fine, Feoffment, Recovery, or otherwise, and then it is tending to defeat Purchasors of their Lands, or Creditors of their Debts, or Lords of their Wardships and Services. Also it is used oft-times in and about Deeds of Gift of Goods. But it is sometimes practised in Suits of Law, and Judgments had thereupon, in Letters Patents, in Presentations, Administrations, Contracts, Releases, and almost in every thing.

And if the Fraud be in the Conveyance of Lands or Goods, there are some certain signs or marks, whereby the same may be descried and found out. As

1. When the Conveyance, or Deed of Gift, hath in it a power of Revocation or Alteration at the will of him that makes it.

2. When the party granting, giving, or selling, doth notwithstanding the sale, or gift, still possess and use the thing given, or granted, as his own.

3. If the sale or gift be made after Suits of Law be begun against him, or when he is about to sell the thing to another.

4. When the thing is done in secret, *Qui malè agit odit lucem. Et Dona clandestina semper inducunt suspicionem.*

5. Where there is any Expreß, or any implied Trust in the Case.

6. When the Deed doth contain some unusual clauses or flourishes of honesty and truth in it. *Clausula inconsueta semper inducunt suspicionem.*

7. When the Deed is very general, *Versus vadis in generalibus.* 27 Eliz. 4. Dyer 294. Co. 3. 81. 6. 72. 10. 53.

SECT. 2.
4. What shall
be accounted
a Fraudulent
Conveyance to
deceive a Pur-
chaser, and
void, or not.

All Fraudulent Conveyances of Land, or any Rent, or profit out of Land made by whomsoever, with intent to deceive any one that shall purchase the same Land, or any Rent, or profit out of it, for money or other good consideration of the Fruit, and effect of their Purchase, shall be void as to such Purchasors; and all such as come under their Estate, as to so much as they shall so convey, and he that shall knowingly avow such a Conveyance, may be punished for it. 27 Eliz. 4. But such Conveyances as are made *Bona fide*, and upon good consideration, are not to be accounted Fraudulent. *Ibid.*

For the further opening and clearing of this Statute, and the Law, in this point, these things are to be known.

1. The

1. The good Conveyance must be both *Bona fide*, and upon good consideration, or else it is void, for *Bona fide* is opposed to such as are made upon, or with any trust Expressed or Implied: And good Consideration is to distinguish from such Considerations, as are not valuable, as Nature, Blood, and the like; for such Purchasors as come in upon any such Consideration, cannot avoid a former Conveyance as Fraudulent, *Co. 3. 81.*

2. If one convey Land with a present or future power of Revocation or Alteration at the will of him that doth convey it; this is Fraudulent as against him that shall after purchase the Land of him that made the first Conveyance. As if one convey Land to the use of himself for life, and after to the use of divers of his Blood, with a future power to revoke it after the death of such a one, or after such a day, and before the day, he sell the Land for valuable Consideration; in this case, the first Conveyance is void as to the Purchasor; and he may avoid it, *Co. 3. 82.*

3. If the Father make any Fraudulent conveyance, and after continue the occupation, and then the Land descend to the Son, and the Son sell it for money, or other valuable consideration; in this case the Purchasor may avoid the Conveyance made by the Father, whether the Son were privy to it, or not. *Co. 6. 62.*

4. If a man have made an Estate with power of Revocation, and after with an intent to defraud a Purchasor, levy a Fine, or make a Feoffment to a stranger, to extinct the power, and after sell the Land for valuable consideration; in this case the Purchasor may avoid both the former Conveyances, as Fraudulent. *Co. 3. 83.*

5. If one had made the first Conveyance to the King, and after had sold the Land for good consideration to a common person; in this case the Purchasor might have avoided the first Conveyance. *Co. 11. 74.*

6. If the first Conveyance be made by way of Bargain and Sale, yet if it be Fraudulent within the intent of this Statute; it is voidable by the Purchasor. So it was ruled by the Lord Chief Justice *Hide*, in evidence to a Jury in *London at Guild-hal. 3 Car.*

7. If there be Grand-father, Father, and Son, and the Grand-father makes a Lease for a thousand years to the Father, and the Father to prevent the drowning of the Lease by the descent of the Reversion, assigned it to divers of his friends to the use of the Son, being an Infant, under pretence to pay Debts, the Grand-father dieth, the Father continueth the Occupation and maketh Estates, and doth all Acts as owner of the Land, the Son paid no Debts, and Assignment, though divers persons of good quality were named in it, yet it was delivered by the Father to one of the Assignees of mean Estate, and in private, and afterwards the Father sold the Land for a valuable consideration; in this case it was resolved, That the Lease and Assignment both might be avoided by the Purchasor, as Fraudulent, *Co. 6. 72.*

8. If a Feoffment be made of Lands held by Knights Service to *J. S.* upon condition, that he within a certain time shall Enfeoff *J. D.* And that this Feoffment to *J. D.* shall be to the use of the Wife of the first Feoffor, for her Joynture, &c. In this case the Feoffment shall be Fraudulent. *Dolus circumitus non purgatur.*

9. Albeit the Purchasor when he buyes doth know of the Precedent former Conveyance, and go on with his Purchase, yet he may avoid the former Conveyance as Fraudulent. *Co. 5. 60.*

10. If there be Tenant in Tail, the Remainder in Tail or in Fee, and he in Remainder in Tail or in Fee, sell his Remainder by Deed, inrolled to the King; and after one buy the Land of the first Tenant in Tail, and he suffer a common Recovery; in this case the Purchasor may avoid this sale to the King, as Fraudulent. *Co. 11. 74.*

11. If there be a Lease for years, and the Lessor make a Fraudulent Conveyance in

in Fee, and then for good consideration make another Lease to begin after the end of the former Lease; this may be a Fraudulent Lease. And he for publishing and avowing of this Lease (though it be during the first Lease) yet he may fall under the penalty of the Statute, and the party likely to be grieved, may have his Action. *Cowel and Barton. M. 4. Jac.*

12. If *A.* make a Lease for years to *B.* upon good consideration, and after he make a Lease to *C.* of the same Land for the same time, and *B.* drives this Bargain, and is witness to this second Lease, and doth not discover the Lease to him, nor is it excepted in the second Lease; and this second Lease is upon good consideration also. In this case it was said the first is Fraudulent. By two Justices. *Hil. 18 Jac. B. R.*

13. If one after marriage make a voluntary Conveyance of his Land for a Joynture or a maintenance of his Wife, and after sell the Land for money; in this case the Conveyance made to, or for his Wife, shall be said to be Fraudulent. And yet if a man upon a marriage before the marriage made, and in consideration thereof convey Land to the use of his Wife, &c. In this case, without question, the Conveyance is good, and shall not be avoided as Fraudulent, especially if it be in consideration of money also, as the common course is.

If one in consideration of a marriage had, and money to be paid, convey his Land, and after sell it for money; the first Conveyance will not be Fraudulent. So also it is thought when it is in consideration of a marriage past, and money paid together. *A.* being to have fifteen hundred pounds with his Wife in marriage, in consideration hereof did Covenant to assure Land for the benefit of his Wife, the fifteen hundred pounds is secured to *A.* they enter-marry, after *A.* having a Lease of the Mannor of *S.* for sixty years, doth grant it to Friends to the use of himself for his life, after of his Wife for her life, and after of their Son; after this, he doth Mortgage to *J. S.* for money borrowed. This it seems was ruled not Fraudulent, during the life, and therefore much less after his death. *H. 30 Jac. Peter Vanlores case.*

And if the Joynture or Estate be made before the marriage, and this after the marriage is delivered up, and a new Estate for Joynture, &c. made in consideration thereof of other Lands; this perhaps may be good also, and not judged to be Fraudulent. The opinion of some Learned Lawyers. *Mich. 10 Car.*

14. If one make a Lease by Covin or Fraud to one, and after make another Lease to another *Bona fide*, but without Fine or Rent; in this case, this second Lessee cannot avoid the first lease, because he is not a Purchaser that comes in for money, *Co. 3. 83.* So if one make a Lease for thirty years without consideration, and after marriage make it to his Wife in Joynture; this last will not avoid the first.

15. If one Covenant for the advancement of his Heirs Males, or for the like consideration, to levy a Fine by a day, to the use of himself for life, and after of his Issue Male, &c. and before that day he make a Lease by Fraud for many years, and after levy the Fine accordingly; in this case they cannot avoid this Lease as Fraudulent within this Statute, for they come not in for money. *Co. 3. 83.*

16. If a man be somewhat foolish and given to waste, be perswaded to settle his Land upon some of his Friends, of purpose to maintain himself with it, and after some of his friend companions inveigle him, and get him for a small sum of money to convey it to them; in this case they shall never avoid this former Conveyance as Fraudulent, *Co. 3. 83.*

17. If one that hath a Term of Land for sixty years, if he live so long, make it away, and he forgo a Lease for ninety years absolutely, and he by Indenture reciting the forged Lease for valuable consideration, doth sell the forged Lease, and all his interest into the Land to *J. S.* In this case *J. S.* is not such a Purchaser as within this Statute to avoid this precedent Lease. *Co. Inst. 1. part. pag. 3. Pasche, 12 Jac. Jones case.*

18. If

18. If a man be seised of Land in Fee, and he make a Feoffment for divers good Considerations to the use of himself and his wife, and the heirs on the body of his wife begotten, and after he sells the Land to *J. S.* for money: In this case it seems the former Conveyance shall not be said to be fraudulent to the Purchaser, but the Estate made thereby is good, except there be some circumstances of fraud in it more than usual.

19. *A.* seised of the fifth part of the Manor of *D.* and *C.* of the sixth part, and *M.* comes to *A.* to buy this Manor of him; after *M.* tells *A.* My Council tells me, you cannot sell, unless *C.* join with you: After this, *C.* grants a Rent-charge of Fifteen pounds a year out of the Manor, to *S.* her youngest son and his heirs of his body, for natural affection, he being then but three years old; with a Proviso, That if *B.* (whom he intended to marry) shall grant to *S. T.* the like Rent of Fifteen pounds, and for the like Estate out of Twenty pounds a year Land of *B.* then the Grant to be void: After *A.* doth buy the sixth part of the Manor, of *B.* and *C.* his wife, (they being now intermarried together) and after *A. B.* and *C.* his wife join in a Grant to *M.* In this case it was agreed, that this Grant was not fraudulent: For it is the changing of an Estate, and at a great charge. Otherwise it were, if it were upon the tender of a pair of Gloves, or the like, *M. 19 Jac. Co. B. Millers Case.* But no Purchaser but he that comes in for money or good value, can take advantage of the fraud, for it doth bind all others: And the latter Conveyance must have a good, as well as valuable cause, *M. 37. 38 Eliz. Uptons Case, Co. 3. 83.*

All Feoffments, Gifts, Grants, Alienations, Bargains and Conveyances of Lands, Tenements, Hereditaments, Goods and Chattels, or any Rent, Profit or Commodity out of Land. So all Bonds, Suits, Judgments, Executions made and entered into by Fraud or Collusion of Trust for him that made it or entered into it, or otherwise with intent to hinder, delay, or put by Creditors, or others of their just and lawful Actions, Suits, Debts, Accounts, Damages, Penalties, Forfeitures, Heriots, Mortuaries, or Reliefs shall be void as against them to whom such Debt or Duty doth belong, and they may proceed to take their remedy, as if no such thing had been done or made, *Stat. 3 H. 7. 4. 47 Ed. 3. 6. 2 R. 2. 3. 17 Eliz. 5. 50 Ed. 3. 6.* And for the further opening of these Statutes, and the Law in this matter, these things are to be known.

Seff. 3.
5. What shall be accounted a fraudulent Conveyance, or an Act to defeat Creditors or others of their Debts or Duties, and therefore void; or not.

1. By the antient Common-Law, he that had a former Right, Title, Interest or Demand, might avoid an Estate subsequent made by fraud. As if one sell my Goods in a Market overt by Covin and fraud, I may avoid it: And if I have a Judgment for Debt or Damages against another, and in the mean between the Judgment and the Execution he give or sell away his Goods by fraud, I may make Execution of them, *22 Aff. 44. Dyer 295. Co. 3. 83. Bro. Don: 0.*

2. But now by these Statutes, one that hath a subsequent right, and may avoid a precedent estate, right, &c. And therefore if one be indebted to *A.* Twenty pounds, and to *B.* Forty pounds, and be possessed of Goods to the value of Twenty pounds, and *A.* sues him for this Twenty pounds, and hanging this Suit, the Debtor secretly makes a general Deed of Gift of all his Goods to *B.* in satisfaction of his Debt, and yet he himself doth continue the possession and use of the goods as the Owner thereof, sell and shear the Sheep &c. mark them in his own name, and after *A.* getteth a Judgment and Execution in his own name, and after *A.* getteth a Judgment and Execution in his Suit for his Twenty pounds; in this case *A.* shall make Execution of these goods, as if no such Deed of Gift had been made. So if in this case the Debtor had given all his goods to *B.* in satisfaction of his Debt before any Suit begun by *A.* upon any express or implicate Trust, as that he should be favorable to him in respect of his poor estate, or the like; or that he should suffer him to use his goods, and pay him as he can, or the like: In all these and such like cases, although the thing be done upon good consideration; yet because it is not done *bona fide*, because there is a Trust in the Case, therefore it shall be said to be fraudulent, *Co. 3. 83.*

3. If one in consideration of natural affection give all his goods to his Child or Cousin, *bona fide*; this as to Creditors shall be said to be fraudulent. So if I, when Suits be against me, convey away my Land to my Children or Cousins, with a Pro-

viso to avoid it at my pleasure; this as to Creditors will be fraudulent, Co. 3. 80. Dyer 295.

4. If two be bound together in an Obligation, and the Principal having a Lease for years grants it over to his Surety, in consideration he is bound with him, and after he enters into a Statute, or suffers a Judgment against him; in this case the Grant shall be said to be fraudulent, and subject to Execution. But if the Surety had been bound to save the Principal harmless, and he had paid the money for him, and delivered up his Counterbond, and for this he had made him this Assignment without any Trust, this had been good, *Wilsons Case, Pasch. 8 Jac. B. R.*

5. Where the Deed is made upon these terms, That if he can provide the money, he shall have his goods again; this shall be esteemed fraudulent.

6. If one bind him and his heirs in an Obligation, and after make a fraudulent Conveyance to another to defeat the Debtee, and die; in this case the Obligee may sue the Heir, and recover the Debt against him, Co. 5. 60.

7. If after a Commission of *Bankrupt* be sued out, the Debtor deliver or make over all his goods, or any part thereof to one of the Creditors in satisfaction of his Debt; this shall be said to be fraudulent, and the Commissioners may sell them notwithstanding.

8. If the fraudulent Deed be made by one to some of his friends, and they are not privy to it; yet it shall be accounted fraudulent, and shall be void as to Purchasers or Creditors, Co. 8. 131. *Plow. 54.*

9. If an Administrator do covinously give or sell away the Goods, and after his Administration is revoked, and another granted to another; in this case the Creditors may sue the first Administrator, and his Deed of Gift as to them shall be void, Co. 6. 18.

10. If a Recusant or any other, with an intent to defeat the King or other Lord of his Forfeiture, make a Deed of Gift of his Goods and Chattels, after the offence is committed; this as to the Lord or King shall be said to be fraudulent, *Stat. 13 Eliz. chap. 1.*

11. If one sue an Executor or Administrator for a Debt due from the deceased, and there is a Judgment had before that time against him at another mans suit, which is not satisfied, and he have not Assets in his hands more then to satisfy for the first Judgment; in this case if the first Judgment be *bona fide*, it is a Bar to the second Suit. But if the first be fraudulent, as the Law will judge it to be, in case where either there was no, or not so much Debt *rei veritate* due from him that is dead, or the Executor or Administrator hath compounded for less, and the Judgment is left of purpose to bar other Creditors; this Judgment, as to the Plaintiff in this Suit, shall be said to be fraudulent, Co. 1. 132.

12. If one being indebted, and having goods, make a Deed of Gift of his goods to *J. S.* and then make him his Executor, supposing by this to keep his goods from being liable to his Debt; this shall be said to be fraudulent and void as to Creditors, and *J. S.* will be charged as Executor for all the goods. So if one, when Judgment is given, or like to be given against him for a Debt, make away his Lands or Goods of purpose to avoid Execution: Or if one in prison for divers Debts, procure himself to be indicted and attainted for some offence, to the intent to forfeit his Estate, have his Clergy, to defeat his Creditors; all these Acts will be made void as fraudulent.

13. If a man a little before his death convey away his Land, to the intent that a Warranty and Assets should not bar his son for other Land; this may be avoided as fraudulent, Dyer 295.

14. If *A. bona fide*, and for valuable consideration mortgage his Lease for Twenty one years to *B.* upon condition, that if he repay the money a year after to *B.* he shall re-enter; *B.* covenant with *A.* that he shall receive the profits till the time of payment, &c. *A.* doth not pay the money at the time: *B.* hoping that *A.* in time will pay him, doth not interrupt him, but suffer him to take the profits two or three years after; and in the interim a Judgment is had against *A.* upon a Bond, and Execution awarded: In this it was held, that this was no fraudulent; and being no fraudulent

duleat Conveyance at the first making, it cannot become a fraudulent Conveyance by matter *ex post facto*. By both the Judges of Assise, in the Case of the Lady *Lambeth*, in *Com. South. 5 Car.*

15. Such Conveyances, Deeds of Gift, Contracts and Agreements as are made *bona fide* and upon good consideration, are not to be accounted fraudulent, nor can they be avoided. And all such Conveyances and Deeds as are void by these Statutes, are void as to Purchasers and Creditors only, but good against them that make them, and all others, and as to all other purposes. And therefore it was adjudged, That if *A.* for Twenty pounds paid him grant all his Goods in a Schedule annexed to the Deed to be carried away upon demand, and covenant that he and his Executors shall deliver them upon demand, and the Executor is required to deliver them, that he shall not say, being sued, that this Deed is fraudulent, *Brownl. 3 part, 111.* And any man that will, may by word or writing give, or he may sell his Goods outright for money, at any time before Execution done; so that there be no Trust in the case, that upon payment of the money, he shall have the Goods again, or the like; and this will be good against himself, his Executors, Administrators, or any to whom he shall after sell or convey them. *Stat. 3 H. 7. c. 13. Eliz. ch. 15. Co. 3. 82. 59. 60.* See more for this in my Book of *Common Assurances*, in Chap. of Deeds.

If any Tenant holding Land of the King or other Lord *in capite*, or by Knights service, make a Feoffment or other Conveyance to defraud the King or Lord of whom he holds his Land, of his Wardship, primer Seisin, or other benefits of his Tenure reserved to him by the Statute of 32 and 34 H. 8. of *Wills*, it will be void as to a third part as to the Lord, and he shall have the same benefit as he should have had if no such Conveyance had been made. And as to this, take these Cases.

1. Therefore if such a Tenant enfeoff his lineal or collateral Heir within age, or make a Lease for life, the Remainder to his Heir; or make a Gift in Tail, the Remainder in Fee to his Heir; or make a Feoffment to another and his Heir; or make a Feoffment on condition that he shall enfeoff back again his Heir at his full age; or make a Feoffment for the payment of his Debts, Preferment of his wife and children; or enfeoff one to the intent that he shall receive the profits till he have an Heir male, and then to re infeoff him; or devise all his Land by his Will in any such sort: This shall be esteemed fraudulent, and will be void as to the Lord for a third part. *Co. 6. 76. Plow. 49. Co. 8. 164. 9. 119. Dyer 36. Stat. Marlb. c. 6.*

2. But in case the Tenant had left a full third part to descend to his Heir, he might have disposed the rest either by Act executed, or by Will before, or at his death how he had pleased, and no Averment of Fraud doth lie for more then a third part in any such case: For a man might by those Statutes have conveyed or devised two parts in three of his Land to or for his wife, children, or payment of his Debts, and the Lord shall have nothing out of that, but he must have what is due to him out of the third part that is left. *Dyer 276. Co. 8. 164.* And for Lands held by Socage tenure, every man may dispose them at his pleasure.

3. If one that holdeth his Land to pay a Heriot at his death, and he in consideration of natural love enfeoff his son and heir; and the son, to prevent the Dower of his wife during his fathers life, makes a Lease for Forty years, if his father live so long; the father pays the Rent, and the son doth suit of Court for the Land, and after the father dieth: In this case the Conveyance shall not be adjudged fraudulent as to the Lord to deceive him of his Heriot, for it was done to another end. *Brownl. Rep. 2 part, 287. Co. 10. 46.* So if a man for fear of Debts convey his Land to friends with condition, that upon payment of Ten pounds they shall convey it to whomsoever he shall appoint. *Co. 10. 47. Dyer 268.*

4. If one make a Feoffment of Land to two and their heirs for money, or other valuable consideration, and this was of Land holden by this Tenure, this was not accounted fraudulent. So neither where one of the Joint-tenants make a Feoffment of his Moity to a stranger. *Co. 8. 164.*

5. If a Feoffment be made by Collusion, and the Feoffee die, or make a Feoffment over *bona fide* to another before the death of the Ancestor; this second Feoffment is good, and the Collusion is gone. *Co. 1. 22. 2. 94. Dyer.*

Señ. 4.
6. What shall be accounted a fraudulent Conveyance to defraud the Lord of his Wardship or other Duty; and void, or not.

Sett. 5.
7. In what
cases Judg-
ments and Re-
coveries in
Suits shall be
void by Covin
or not.

Sett. 6.
8. In what
cases Fines
and Common
Recoveries
may be void
by Covin, or
not.
Fine.

*Common-
Recovery.*

6. For fraudulent Conveyances to deceive the King of Abbey-lands, See Stat. 35 H. 8. 13. 1 Ed. 6. 44.

For this matter, take these Cases following:

1. If a woman that hath a title of Dower to the Land of her husband, cause one to disseise the Tenant of the Land, with intent to sue him, and after she doth so, and recover her Dower against him; all this is void. And yet if a Disseisor, Intruder, or Abator do endow a woman that hath a lawful title of Dower, without any practice; this is good, and shall bind him that hath right. Co. 3. 77. 11 Ed. 4. 2. 7 H. 7. 11. 19 H. 8. 12. So if a Tenant in tail be ousted of his Land, and may bring his Formedon, and he shall cause another to disseise the Tenant of the Land, and bring his Action, and recover the Land against him; this is void, and shall be no Remedy to the Tenant in tail, Plow. 54. Co. 3. 77. So in all cases where a man hath a rightful and just cause of Action, and he of Covin and consent doth raise up a Tenant by wrong against whom he may recover, this Covin doth suffocate the Right; so as the Recovery, though upon a good title, shall not bind nor restore the Demandant to his Right, 41 Aff. pl. 28. 25 Aff. pl. 1. 15 Ed. 4. 2.

2. If A. and B. Jointenants, be entitled to a real Action against the Heir of the Disseisor, and A. cause the Heir to be disseised, against whom A. and B. recover and sue Execution; in this case B. is remitted, and shall hold in common with A. for he was no party to the Covin, but A. is not remitted, Co. upon Lis. 357.

3. So it is said, if an Attorney appear without Warrant, and suffer a Judgment against me by fraud between him and the Plaintiff in the Action, it is all void, Dyer 361.

For answer to this, take these Cases.

1. If a Copholder or Lessee for years levy a Fine of Covin, or make a Feoffment of Covin with intent to levy a Fine to bar him in Reversion, this is all void; and though five years pass without claim, yet is he not hurt by it, especially where the Tenant doth pay the Rent, and do the Service still as he was wont to do. But if a man purchase Land of B. by Feoffment, or by Bargain and Sale enrolled, and after finding that B. hath a defeasible Title, and that C. hath the Right, and B. levies or taketh a Fine with Proclamations, with an intent to bar the Right of C. this is good. So if one pretend Title to Land, and enter and disseise the Tenant, and after levy a Fine with intent to bar the Disseisor, this is not fraudulent, but is good. And if the Disseisee do not claim nor enter within the five years, he is barred, Co. 3. 79.

2. If the King had given Lands in tail to any one in recompence of any service done to him, or for other cause; and the Tenant in tail, while the Reversion was in the King, had suffered a Common-Recovery; this had been esteemed fraudulent and void, as against the King and his Successors, Stat. 34 H. 8. 201. Co. 10. 48. 1. 15. Plow. 54.

3. If Lands be conveyed by a husband or any of his Ancestors, to the wife for her life, or to her and her husband and their issue in tail, for the Jointure of the wife; and after the husband's death, the wife alone, or she and another husband suffer a Common-Recovery of the Land; this shall be esteemed fraudulent and void, by the Statute of 11 H. 7. c. 20.

4. If a Tenant for life suffer a Common-Recovery without the Assent of him in Reversion, this is void by the Stat. 32 H. 8. 31. 14 Eliz. 81. But if any Tenant in tail in Possession or Remainder suffer a Common-Recovery by Agreement, (except in the case before where the Reversion is in the King;) this is good, and cannot be falsified as done by fraud. And if there be Tenant for life, the Remainder in Tail, or in Fee, and the Tenant for life doth suffer a Common-Recovery, and vouch over him in the first Remainder in Tail; this is not fraudulent, but a Bar to the Estate tail, Co. 10. 49.

5. But in many cases where there is a fraud in the first Conveyance to defeat Purchasers, Creditors, &c: if the Grantee shall after *homo fide* grant it away to a third person, here perhaps the Collusion may be gone, and this second Grant may be good, 33 H. 6. 28. Goldsb. 118. pl. 2. in Br. Collus. 23. 39 H. 6. 19. 44 Ed. 3. 46. 41 Aff. 28. 15 Ed. 4. 4. Co. 6. 58. Ca. 8. 132. Plow. 51.

A Deed of Gift may be of Goods, with intent to defeat Successors of Spiritual persons of their remedy for Dilapidations; of which see *St. 13 Eliz. 10. 14 Eliz. 11. 17. 25.*

If one sell another mans Goods in a Market overt or Fair, *revera & bona fide*; by this the Property is altered. But if this be by Covin and Agreement, and of purpose to alter the Property, it is otherwise, *Co. 3. 83.*

If the Husband sell away his Wives goods of purpose to prevent her having them again after a Divorce, and they be divorced; in this case she shall have all her goods she had before the marriage, that are so covinously sold away: But being sold away *bona fide*, she cannot avoid the Sale, *26 H. 8. 7.*

If Tenant in tail and his Issue discontinue the Discontinuee to the use of the Father, and the Father dieth, and the Land descend upon the Issue; he is not remitted against the Discontinuee, for he is privy to the wrong, but in respect of all others he is remitted, and shall deraign the first Warranty, *Stat. 11 Ed. 4. 2. 13 Ed. 4. 21. 15 Ed. 4. 23.*

If a Disfeisor give to another Seisin of a Rent out of the Land, that hath right to the Rent; this is good, if there be no Covin in it: Which if there be, this will make it void, *Co. 6. 58.*

Letters Patents may be void by Fraud; as when it shall be to compass the Land held of another in Mortmain, or the like, *Co. 11. 74.*

If one die intestate, and the Administration is committed to his Wife, and another by Covin between him and a Creditor procure the Administration to him, and a Revocation of the first Administration, and then release to the Debtor his Debt; if this be all of purpose, it is a void Release, *Dyer 339.*

If one be outlawed while he is in Prison, the Outlawry may be avoided: But if it be of purpose that he is imprisoned, it is otherwise, *38 Aff. 91. 17.*

If one in Prison, to the intent he may be removed, cause himself to be indicted by Covin, this will make it all void, *37 Aff. 210.*

There may be Collusion in divers other cases. For which see *Stat. 30 Ed. 3. ch. 5. 1 R. 2. 15. 5 H. 4. 13. 11 H. 7. 27. 13 Eliz. 10. 23 Eliz. 8. 43 Eliz. 8. 31 H. 6. 9. 4 H. 7. 29. 33 H. 8. 1. 5 Eliz. 2. 43 Eliz. 6.*

This Collusion may sometimes be tryed in the same Action wherein the Covin is, and sometimes it may be tryed in another Action, as for Lands aliened in Mortmain by a *Quare ius*, *Co. 9. 33. 18 H. 8. 6.*

And when it is apparent, there need no proof of it: *Quod constat clart, non debet verificare.* But when it is secret, it must be proved by Witnesses, and found by a Jury, as other matters of fact be; and a little proof will serve, because it is commonly very secret. And if a Jury find a Fraud specially by their Verdict, they must express it how, to defeat Creditors, or to defeat Purchasors: For if the Jury find only a Fraud in general, or some circumstances of Fraud only, this will not be a good Verdict: And if the Jury find it a Fraud to one purpose, it shall never be said to be a Fraud to any other purpose, *Co. 10. 47. 9. 108. Plow. 46. Brownlows Rep. 2 part, 187.*

Disceipt, is a Writ that lieth against him that doth any thing deceitfully in the name of another, for him that receiveth harm thereby. And this is properly *Disceipt*. But others do take it in a larger sense, and say it is Original, where any *Disceipt* is done to another, so that he hath not performed his Bargain. For which see much in my *First Part of the Marrow of the Law*, Chap. 22. where many Cases are put upon it. Or it is Judicial, when upon a *Scire facias* sued out of a Record to warn a man to appear, the Sheriff doth return the party summoned, and it is not so, or he was not legally summoned, and hereby Judgment is given against him for the Land: For this the party grieved, in some cases, shall recover damages against the Sheriff; and in some cases also the Judgment shall be vacated, *F. N. B. 95. Old N. B. 5. St. 2 Ed. 3. 15.*

If I make an Attorney for me in a Real Action, and the Attorney by agreement between him and the Plaintiff suffer me to lose the Land, I may have this Action, *F. N. B. 95.*

SeB. 7.
9. Where other things done shall be said to be done by Covin, and therefore void, or not.
Dilapidations. Property. Sale of Goods.

Remitter.

Seisin of Rent.

Letters-Patents

Release.

Outlawry.

Indictment.

SeB. 8.
10. Where it shall be tryed, and how it may be proved and found by a Jury.
Verdict.

11. *Disceipt*; what it is.

SeB. 9.
Where it doth lie, or not.

So

So if in any Action against me, another person will come into Court and personate me, and hereby any mischief come to me, I may have this remedy against him: As if he sue out a Writ in my name, wherein a Fine is to be paid. So if one acknowledge a Judgment in my name, and I suffer any loss hereby, I may be righted against him by this means, *F.N.B.* 96, 97.

So if one levy a Fine, suffer a Recovery, knowledge a Statute, Recognisance, or Bail in my name, and I be hereby dammified, I may have this remedy, *F.N.B.* 100. So if a man in a Suit I have against him, get a Protection, or remove the Suit only to delay me, and without any cause; I may have this Writ, *Co.* 534. *F.N.B.* 97. So if one forge any Deed in my name, and use it, or it be used against me, I may have this Writ, *F.N.B.* 99. *Dyer* 75. And so in many other cases. As if my Attorney in a Suit do any thing in my name he hath no Warrant for: One procure another to sue and vex one: I be bound to pay money on a Statute, and have paid it at the day, and another causeth the Statute to be extended without the will of the Conusee. One promise to make me a Feoffment of Land by a day, and before the day he make it to another: Or promise me to deliver Wares, and he deliver false and sophisticated Wares; or sell me Cloth, and warrant it of a certain length: Or another and my self are sued as Executors, whereas I only am Executor, and the other confesses the Action; in all these cases I may have remedy by this Writ, *F.N.B.* 98. *Dyer* 301. 75. 23, 24.

And if a Recovery be had in a Real Action by the false Return of the Sheriff, the party grieved or his Heir may have this Action against the Sheriff and the Demandant; and the Summoners, Vexors, and Pernors shall be examined; and if it be found, the party shall recover damages against the Sheriff, reverse the Judgment, and have Restitution of the Land, *Co.* 69. upon *Lit.* 259. *Co.* 8, 9. *F.N.B.* 97. So in a *Scire facias* to execute a Fine, if the Land be recovered on the Sheriffs false Return, the party grieved may avoid the Judgment by this Writ, *F.N.B.* 97. So if one sue a *Scire facias* on a Recognisance for Debt, and the Sheriff return Summons where none was, *F.N.B.* 97, 99. So if after a Recovery in an Annuity, such a Return be on a *Scire facias*, and hereby the Annuity is recovered, the party grieved may have this Writ, *F.N.B.* 88. And if a Tenant in ancient Demesne levy a Fine of his Land, the Lord may avoid it by this Writ, *Plow.* 370. *F.N.B.* 98, 99. See *Albin of the Case, Chap. 4. Set.*

There are other Deceits, as by Counterfeit-Letters to get money; in a Miller to change his Grift, and otherwise; punishable by Justices of Peace. See my *Justice of Peace* for it:

CHAP. XLVIII.

Of Common.



Common is that Soil, Water, or other thing, the use whereof is common to this or that Town, Lordship, or Person: Or it is the Right that a man hath to take of that which is anothers. And it is either of Pasture; of Turbary, (*i.*) of digging and taking Turfs; or of Fishing; or of Estovers, (*i.*) taking Wood; or it is of digging for Coals, Mines, and the like. And the Common of Pasture is divided into Common Appendant, Appurtenant, Engross, or by reason of Neighborhood: And some is certain, (*i.*) for so many Cattel, or the Cattel levant on such a place; or incertain, which is for Cattel without number, *Co. 8. 70. upon Lit. 122. 6. 60. 5. 60. 7. 5.*

And whosoever doth claim any Common, he must claim it in one of these kinds. For if a man will claim it in any other kind, as *Ratione commorantia* or *residentia*, (*i.*) by reason of dwelling or residence in a house, this is no good title. And that Common that may be claimed, is, and may be claimed in some cases by Grant; but in most cases a Title is made to it, and it is claimed by Prescription or Custom, *Co. 4. 38.*

But Copiholders may allege a Custom, That every customary Tenant of the Manor may have Common in the Lords Waste. So also Inhabitants of a Village who are a Corporation, may allege a Custom to have Common in such a place, as belonging to their ancient houses, *Co. 6. 59. 60.* Or Copiholders may prescribe to have Common in the ground of another besides the Lord; but then they must do it in the Lords name, *Co. 4. 32.*

One may make himself a title to have and enjoy *solum vestrum terra* for a time, (*i.*) from such a day to such a day, and so long to exclude the Owner himself to feed there: But a custom or prescription to exclude him always, is not good, *Co. super Lit. 122.*

A Lord prescribed, That time out of mind the Lord of the Manor had been used to have for himself, his Farmers and Tenants of the Manor, Common of Pasture in &c. for all his Sheep which are levant and couchant in and upon the Demesne lands of *W.* which lie and are in *A.* aforesaid, every year; and it was allowed for good, *Duncombs Case, H. 9 Jac. Brownl. 1 par. 232.*

One prescribed that he was seised of a Messuage and certain Land in *Dale*, and that he, and those whose estate he hath, for himself, his Farmers and Tenants, used to have Common in the Field or place called *B.* in *S.* when the said Field called *B.* was fresh and not sowed all that year, with their Cattel levant and couchant; and when the Field was sown with corn, and the corn carried away, until it was sown again; and allowed good.

One prescribed to have Common in anothers ground, as belonging to his Messuage and Yard-land, thus: For six Horses, Geldings or Mares, two Colts, six young Beasts called Steers, or young Beasts called Heifers, and two Mares called Breeders, in and upon the said Messuage and Yard-land lying and rising in manner following; that is to say, from the 1. of August until the 25. of February then next following, and good, *Brownl. Rep. 2 par. 61.*

A Custom was alleged, That the Lord had the place wholly to himself till Lammas, and after it was common to the Tenants, every one of which is to put in a certain number, and no more; and that then the Lord is to put in but a certain number; and it seems good, *Brownl. 1 par. 187.*

And generally for Common, a Custom or Prescription may be alleged for Common, either for all sorts of Cattel, or for some kind of Cattel only: And it may be for a certain number of Cattel only, or it may be for the Cattel levant and couchant

Common, what it is.

The kinds of it.

Turbary, what.

Self. 1.

2. How a man may claim Common, and what kind of Common a man may claim or not; and what Prescription or Custom for Common shall be good, or not.

on such a place, which is certain by consequence; or it may be without number. And it may be either for the whole year, or at some times only of the year: And it may be for more cattel at one time, and for fewer at another time, and the like. But for an Allegation of a Prescription of Common that shall be good and allowable, there must be these things in the case.

1. It must be such a Common as might have a reasonable commencement by agreement of parties or otherwise, *Brownl. 2 par. 64.*

2. The Land wherein the Common is to be taken, and the Land to which the Common to be had doth belong, must be laid to be in a Parish and County in certain.

3. If it be Common appendant, it must be for cattel levant and couchant upon such Land; for if it be for all his cattel without restriction, it is not good.

4. It must not be belonging to a thing which began of late: And therefore Prescription of Common time out of mind, to a House built within time of memory, cannot be good, *Goldsb. Rep. p. 38.* See for all these things, *Brownl. Rep. 1 par. 180. 189. 198. 232. 2 par. 47. 63. 222. 297. March. Rep. 83. 37 H. 6. 34. 32 Aff. pl. 3.* See more in the next Questions, to every kind of Common: And see more in my *Second Part of the Marrow of the Law, p. 296, 297.*

For this, take these Cases,

See 2.
3. How a
Grant of Com-
mon shall be
taken.

1. If one grant me Common *ubique*, where-ever the Beasts of the Grantor shall go: By this, if he occupy an hundred Acres with his Beasts, I may common in that hundred Acres with him at all times. But if it the Grant be made to me of Common in his Land *quandounque*, whensoever the Beasts of the Grantor shall go there; in this case I may not common in his ground, but at such times only as his Beasts are in the Common, and at no other time, *9 H. 6. 35. Finch. 36.*

2. If a Lord grant me Common out of all his Manor, this must be understood in all commonable places, and not in his Gardens, &c. and it must be understood of Common with commonable Beasts only, and not with Pigs, and such like things, *9 H. 6. 35. Fitz. Dower 123.*

3. If one grant me a Messuage with Common appurtenant for ten Beasts; by this I cannot take Common without number, but for ten Beasts only, *9 H. 6. 35.*

4. If one grant me Common for ten Beasts in his ground for three years, and I take no Common for the first two years; I may not by this put in thirty Beasts the third year, and take the three years profit together, but must put in ten Beasts only, *27 H. 6. 10.*

5. If a Lord of the Manor of *Dale*, wherein is a great Waste, wherein the Farmers of every House have Common, grant a House with all the Commons thereunto belonging and therewith used; by this it seems the Grantee shall have usual Common in the Waste, *Brownl. 2 par. 222.*

6. If a Lord seised of a Moor of two hundred Acres, enfeof me of fifty Acres of the North-side thereof; by this I have no Common in the rest, but we must divide and keep our cattel one from another, or we shall be Trespassors one to another, *Dyer 372.*

7. If one grant me Common in his ground without number, it seems I may put in as many cattel as I will, and so he may also; though some say I may not put in so many, as not to leave him enough for his own cattel, *12 H. 8. 2.* See more, *Self. 6. Brownl. Rep. 220.*

8. If one grant me Common in his ground, he can do nothing to prejudice his own Grant: And therefore he cannot set a Rick there on the ground, nor drive my cattel from his Rick, *Brownl. 1 par. 220.*

Common Ap-
pendant, what.

Common appendant is, where a man hath Common for his commonable cattel, as Oxen, Horses, Sheep, Kine, and the like, only in the ground of another man, by reason of certain Land that hath been ancient errable Land, unto which that Common is so annexed, that it cannot by any means be severed from the same, but he that hath the one must have the other, *Co. 8. 70. 4. 37.*

The nature of
it.

This Common is of all other the best; for this is said to be of common right, and is evermore belonging to errable Land, or to the Land which was anciently errable Land,

Land; for it cannot be created at this day, nor can it belong to new Errable Land. But it may belong to a Mannor, Farm, or Yard-Land, which are things in Gross (wherein there is Errable Land included) and then it doth in truth belong to the Errable onely.

This Common began when Lords did infeoff their Tenants of Errable Land, to hold by Tenure in Socage; for in this case it was included in the Feoffment, That for the maintenance of their Plough, which they by their Tenure were bound to keep; and for the furtherance of Tillage (a thing much favored in Law) the Tenant was to have Common in the Lords great Wastes for all his Commonable Beasts, that did dung or drefs his Land; for at the first, almost all the Ground that doth now lie inclosed in Meadows and Pastures, did lie open in great Wastes and Commons, and were in the hands of Lords of Mannors. *Co. 4. 37. Mert. 4. Perk. 670.*

One may prescribe for this Common; or one may claim it without prescription, thus, That he hath two Acres of Land, to which he hath Common Appendant,

&c.

For the Answer of this Question, these things must be known.

1. If there be a House built upon that which was antiently Errable, and part of it be turned into Meadow, and part into Pasture, the Common Appendant to it may be claimed and taken still as Appendant; and he shall have Common for all the Beasts that he doth keep upon that which was ancient Errable Land. *Co. 4. 37.*

2. It may belong to a Mannor, Farm, or Plough Land. *Co. 4. 37.*

3. It may be claimed to be taken in a Field, when it is not sown to Corn onely. *37 H. 6. 34.*

4. This Common is always for such Beasts, as either manure the Land, as Oxen or Horses; or else for such as marl and compast the Land, as Sheep and Kine: And therefore if the Common be claimed for any other Cattle, it cannot be this Common, but it must be some other. *37 H. 6. 34. 26 H. 8. 4.*

5. In Parishes where their Lands in their Fields do lie intermixt, and any one of them do inclose his Land, and the Inhabitants have used to have Common in this inclosed ground, after Harveft, till Seed time again; in this case if the Common be for Beasts onely that manure and marl the Land, then it is Common Appendant; but if it be for all manner of Beasts, then it is Common Appurtenant, *Co. 7. 5.*

6. If there be two Villages adjoining, and a great Field or Waste between them, part of which doth belong to one Parish, and part to the other; and the Tenants of the one Parish do, have Common there with the Tenants of the other Parish; this is not a Common Appendant, but a Common because of Neighborhood. *Dyer 47.* But if there be two Villages, and a third between them, and one Village hath Common with the third, and there are no Wastes adjoining; this it seems, shall be a Common Appendant, and not by cause of Vicinage. *Dyer 47.*

7. Where the Lands of men do lie intermixed in little parcels in great Fields, and they do use to Common altogether promiscuously, from Harveft till the Field be sown again; this which is like to their Shack in *Norfolk*, is a kinde of Common Appendant; and there if any man inclose, and the rest do then use to Common with him notwithstanding; this is Common Appendant. *Co. 7. 5.*

Common Appurtenant is, where a man hath Common for all manner of Beasts in the Ground of another man. And this Common, a man may have or claim by Grant, or by Prescription; for this Common a man may create at this day. *Co. 8. 70. 6. 60.* And therefore this Common differeth from Common Appendant in many things: For,

1. Common Appendant cannot be created at this day; for when it began it grew by continuance, and must now be claimed by Prescription, time out of minde, but Common Appurtenant may be newly granted.

2. That may be had by, and claimed for those Cattle onely that manure and marl the Land; but this may be had and claimed by, and for all manner of Cattle.

3. That is to be claimed for, and taken by, so many Beasts onely as will serve to marl and manure the Land, to which it is Appendant. But this may be claimed for, and taken by Beasts without number.

The beginning of it.

Title to it.

Self. 3.

4. What shall be said to be Common Appendant; or not, but some other Common.

Common Appurtenant.

Common by cause of the Vicinage.

Shack, What it is.

Self. 4.

5. Common Appurtenant. What, and what shall be said to be this Common; or not, but some other. And how it differeth from Common Appendant.

4. That is to be claimed for, and taken with the Beasts onely, whiles they be Demurrant, Levant, and Couchant upon the Land, to which it is Appendant. But this may be claimed for, and taken by the Beasts of him that doth claim it, where ever they go or are kept.

5. That is to be claimed for, and by reason of ancient Errable Land onely. But this may be claimed for, or by reason of a House, or any other Land as Meadow or Pasture, or Errable Land newly made.

Appurtenment.

6. That cannot be severed from the Land, to which it is Appendant by any act of God, act of Law, or act of the parties: But this may be severed from the House or Land, to which it is Appurtenant.

Admeasurement of Pasture.

7. That must be taken with a proportion, having respect to the Land to which it is dependant, as if it be Appendant to one Acre, he shall have Common for so much, as that one Acre will keep, and if he take more, the rest of the Commoners may have a Writ of Admeasurement of Pasture. But this may be taken by Beasts without number, and this Writ will not lie in this case of Common Appurtenant.

8. That must be taken with a mans own Beasts, and cannot be taken with the Beasts of another man. But if he have but a Special Property in the Cattle, it seems it is well enough. *Co.* 8. 70. 6. 60. 4. 38. 15 *Ed.* 4. 32. 10 *Ed.* 3. 56. 37 *H.* 6. 34. 9 *Ed.* 4. 3. 4 *Ed.* 4. 29 22 *H.* 6. 43. 26 *H.* 8. 4. 5 *H.* 7. 7. *F. N. B.* 125. 4 *H.* 6. 13. 15 *Aff. pl.* 5. 18 *Ed.* 3. 30. 13 *H.* 7. 13. 15 *H.* 7. 10. 14 *H.* 6. 6.

6. Common in Grofs.

What shall be said to be this kinde of Common, or not.

Self. 5. Appurtenant. How it may be taken.

Common in Grofs is, where one claimeth to have Common for all manner of Beasts, or for some kinds of Beasts without number, or to a certain number of Cattle, by special Grant in writing, and not by reason of any Land. *Terms Ley.* *Co.* 4. 38.

If one that is Lord of a Mannor, wherein are divers Wastes, grant to another certain Lands within the Mannor and Common, within the Wastes of the Mannor, for all his Cattle; this is a Common in Grofs, and not Appurtenant. But if the Grant be of Common for a certain number of Beasts, then it is Common Appurtenant. By three Judges, *B. R.* in *Stamps* case. And so this Common may be made at this day, for every man may grant to another what Common he will, upon his own Ground: And this Common, the Grantee may take with the Cattle of another body, if his Grant do not express that he must take it with his own Cattle, as if it be a Grant of Common for his Cattle, or for his Ten Beasts, or the like; for then he must take it with his own Beasts. 11 *H.* 6. 22. 36 *Aff. pl.* 5. But otherwise he may take it with any Beasts he will, that he hath for the present any Special Property in, for that purpose. 15 *H.* 7. 10. 14 *H.* 6. 6.

Common by cause of Vicinage.

The nature of it.

Appendant. How it may be taken and used.

Inclosure.

Common by cause of Vicinage is, where the Tenants of two Lords, which be seized of two Villages or Towns, lying neer one another, and either of them have been used time out of minde, to inter-common and feed their Cattle of all sorts of Commonable Cattle together, and one with another.

This Common is much of the nature of Common Appendant, for it cannot be created at this day, but one must have and claim it by Prescription. And the Commoner may not put in what he will, but according to the proportion of the Land, to which it is Appendant, and the quantity of the Common belonging to that Village, of which the Commoner is: And this Common by consent may be inclosed. *Co.* 4. 38. 7 *Ed.* 4. 26. *Dyer* 47.

But this, the Commoners of one Village cannot put in their Beasts into the Common of the other Village, but they must put them in on their own side upon their own Common; and then if they go into the Common of the other Village that lieth open with their Common, they cannot distrain them damage Fesant, nor bring any Action, nor chase them out. And such a Commoner may put in what kinde of Cattle he will.

Distres damage Fesant.

Estovers. What.

Common of Estovers is, where a man hath right to cut and take Houf. boot in anothers Wood to spend in his House: And this is sometimes Certain, and sometimes Incertain, and sometimes Appendant, sometimes in Grofs: It may be by Grant,

Grant, or by Prescription; but it is always belonging to a dwelling House, and cannot be granted or severed from it, but he that hath the one must have the other, and it must belong to the old House, not a new one; and the old Chimneys, not to new Chimneys. And this, if the Commoner be hindred of, as if the owner of the Wood cut down so much, that he doth not leave him enough, he may have a *Quo Minus*; *Quo Minus*. What. if he have a Freehold, he shall have Remedy by Assize, otherwise by Action of the Case. And if the Commoner take too much, the owner of the Wood may sue him in Trespass. *Co. 4. 37. 8. 46. F.N.B. 180. Bro. Rep. 1. part. 221.*

For Answer to all these Questions at once, take these things.

1. In these Cases the Law doth much heed the Custom of the place.
2. No Commoner may take away the Grass upon the Common, otherwise then by the mouths of his Beasts. *45 Ed. 3. 25.* Nor can he meddle with the Soyl, no not to better it. *12 H. 8. 2. 22 Aff 36. 13 H. 8. 16.*
3. If I have Common in another mans Ground, I cannot shut him out, but he may Common with me. *Co. upon Litt. 122.*
4. If one have two Tenements in two Villages, and Common Appendant to one of them; in this case he cannot take his Cattle that are upon the other Tenement, to eat up the Common Appendant to that Tenement. *F.N.B. 125. 10 Ed. 3. 56.*
5. He that hath Common in Gros by Grant, as if a Grant be to him of Common for twenty Beasts, may feed it with another mans Cattle; but if the Grant be for Common for his own Cattle onely, it is otherwise. *11 H. 6. 22.*
6. If a Grant be to me of Common for Cattle, without number in a Close, I may put in without stint; but if the Grant be of Common, for a certain number of Cattle, I can take no more then are named. *11 H. 6. 22.*
7. He that hath Common Appendant, or because of Neighborhood, may put in no more but a reasonable number of Cattle, he must be stinted. *13 H. 7. 13. Co. 4. 38. 12 H. 8. 2.*
8. If a Copiholder be to have Common, it must be onely for the Cattle that are Levant and Couchant upon his Copihold. *15 Ed. 4. 32.* See more to this before *Self. 2.* How the Grant of Common shall be taken.
9. For the power of the Commoner against them that disturb him, take these things.

First, If any Commoner that hath any Freehold in the Common be ousted or hindred of his Common, totally by Inclosure, Trespass, or the like, so that he cannot have it; he may have remedy by an Assize, be it the Lord, or any other that doth hinder him. But if the Impediment be such, that he cannot have and enjoy his Common so beneficially, and so plentifully as he was wont to do; his proper Remedy is by Action of the Case. And if the Commoner be onely Lessee for years, or a Copiholder, albeit the hindrance deprive him totally of his Common; yet he cannot have an Assize, but must have an Action of the Case. Or the Commoner may take the Beasts of any man but the Lords, upon the Common damage Fesant. But all this is to be understood of such a Trespass, as that thereby the Commoner doth in all or part, lose his Common: For if it be onely a little Trespass, by cutting a Tree, digging a Turf, or the like, that is no hindrance to the Commoner in his Common, the Commoner can neither have Action, nor distrain damage Fesant. And yet perhaps the Lord may for this. Also a Commoner may drive out any mans Cattle that are there doing Trespass, *Co. 9. 112, 113. 8. 79. Kelw. 41. 147. Goldsb. 132. pl. 30. Dyer 3. 116. Bro. Rep. 1 part. 187, 197, 208, 228. 2 part. 55. 148, 149; 323.*

Secondly, If the Lord of the Soyl make new Coney-Burrows, and his Coneys grow to so many, that they hinder the Commoner of his Common, the Commoner cannot stop the Burroughs, Ferret-Chafe, or kill the Coneys, nor distrain them, no more then his Piggs, or the like; but he must have his Action of the Case against the Lord, *Bro. 1 part. 208, 228. Mich. 9 Jac. Sawburns case. Mich. 7 Jac. B.R. Mich. 3 Jac. Sir Christopher Hudsons case.*

Thirdly, A Commoner may come upon the Common to see to his Cattle, and to see to Trespassers. But if he shall then do any unlawful thing there, as cut down a

M m 2

Tree,

Self. 6.
7. Of the Acts of a Commoner. How he may take and use his Common. And what he may do to them that hinder him thereof. And the power of such a Commoner, otherwise.

Assize.

Action of the Case.
Damage Fesant.

Trespasser *ab initio*.

Tree, dig up the Soyl, or Mow, and carry away the Grass, or the like, he will be a Trespasser *ab initio*. *M. 5 Jac.* Sir Christopher Hudsons case, 15 H. 7. 12. 13 H. 7. 13. 12 H. 8. 2.

4. If any one set up any Houses or Ditches on the Common, any Commoner may throw it down. Sir Christopher Hudsons case. 5 Jac.

5. If Trees be cut in the Common, and lie upon the Grass, the Commoner may lay them aside in the same Ground: But if he take them away, or put them in another Ground, he may by this be a Trespasser *ab initio*. *Hil. 9 Jac.* Dean of Winchester case.

6. If the owner of the Ground, make a Hedge on the Ground, and keep out the Commoner, he may throw down all the Hedge. But if the Hedge be on another Ground, the Commoner must break his way to it onely. 15 H. 7. 10.

7. If one Grant me Common in his Ground, and he set up a Rick there, and my Cattle come to his Rick, and he chase my Cattle away; I may have an Action of Trespass against him for this. *Farmers case, Hil. 8 Jac. Brownl. 1 part. 130.* See more of this point in my *Second Part of the Marrow of the Law*, p. 301, 302, 303, 304, 305, 306.

8. Of the Acts of the Lord, or owner of the Soyl. And what he may do and justifie.

Sett. 7.

Approvement or Improvement.

9. Where a Common may be extinguished and gone for ever, or suspended for a time. And where it shall be apportioned, or not.

Apportionment. Sett. 3. 4. 5.

The Lord and Commoners together, may do what they will with the Soyl and Common. And the Lord himself, without his Tenant, and against his minde, may in some cases, to preserve Woods, or make a Pasture, inclose a part of the Common, leaving sufficient for the Commoners; and this is called an Approvement or Improvement. And he may make a Warren, and keep Conies there, if he do not keep so many to deprive the Tenants of their Common. But for this, see more in my *Second Part of the Marrow of the Law*, p. 306, 307, 308.

For the Answer to this Question, we are to know these things.

1. That where one comes to as high, as good, and as durable estate in the Land, as he hath in the Common; there generally the Common is extinct: As if the Commoner purchase the Land wherein he hath Common, or it descend to him, and being extinct, it can never be after revived. *Co. 4. 38. D. & St. 25. Dyer 45. Plow. 72. Goldsb. 3. pl. 6.*

2. If one that hath Common out of Land in Fee, and he get an estate for life or years onely; by this the Common is onely suspended, and may be revived again when that estate is ended. *Co. super Littl. 310.*

3. If one have Common Appendant, and purchase some of the Land out of which it comes in Fee; this is not gone, but shall continue, and be apportioned. But otherwise it is of Common Appurtenant. *Brownl. 2. Rep. p. 287. Co. 8. 79. 4. 38.*

4. If a Commoner, Alien or Demise part of his Land, to which the Common doth belong; this doth not extinguish the Common, be it Common Appendant or Appurtenant: But it doth still continue, and shall be apportioned. *Co. 8. 79. Bro. Rep. 2 part. 297.*

5. If one have Common Appendant in a great Waste, belonging to his Tenement, and the Lord improve and inclose part of it, leaving sufficient, and after make a Feoffment of this to the Commoner; this doth not destroy his Common in the rest of the Waste, *Dyer 339.*

6. If a Copiholder claim Common by custom in a great Waste, and the Lord grant part of this Waste to another, and then make a new estate of this Copihold; this Common in the Waste granted away, is not gone, but the Copiholder will have Common there also. *Co. 8. 64.*

Sett. 7.

7. If he out of whose Land the Common is had, doth purchase part of the Land, to which the Common is Appendant; yet the Commoner hath not lost his Common, but shall have *pro rata* for the Residue. *Co. 4. 37, 38.*

8. If one have Common in Certain, (i.) for ten Beasts in twenty Acres of Land, and ten Acres of this Land doth descend to the Commoner; by this the Common is not gone, but shall be apportioned. But if the Common were Common Incertain, and without number, there shall be no Apportionment, but it shall be as it was before. *Co. super Littl. 149.*

9. If there be Common Appurtenant to Copihold Land, and part of it be sold away,

away, and divided from the rest, it seems by this the Common is gone; otherwise of Common Appendant. *Brown. 1 part. 171.*

10. A Copiholder is of a *Messuage*, and two Acres of Land in Fee, and the Lord by Deed doth grant and confirm the *Messuage* and Lands, with the Appurtenances to the Copiholder in Fee, and so destroy the Copihold; by this the Common is gone, and the Grant of the Land, with the Appurtenances, will not create it *de novo*. *Grant of Common.*

Brown. 1 part. p. 220.

So if a Copiholder be to have Common in the Land of another, besides the Lord, and the Lord make him a Feoffment of his Copihold. But perhaps if in these Grants there be a Grant of all Commons belonging to it, or used with it, it may be continued. *Brown. 1 part. 173. 2 part. 209, 210. See more in Suspension.*

Admeasurement of Pasture, is a Writ lying where many have Common in the Ground of another man, and one of them doth surcharge the Common with more Beasts then he should keep, then any one of the Commoners, or all the rest of the Commoners together, may have this Writ against him that doth oppress the rest. Or one may sue him that doth surcharge, and all the rest of the Commoners; for all the Commoners must be Plaintiffs, or Defendants in the Suit, because all must be Admeasured. *F. N. B. 123. 8 H. 6. 26. Old N. B. 72.* And by this means it shall be enquired of, and hereupon an Order shall be set down, how they shall take their Common for after times. And if any one of them do break this Order, and overcharge again, the party grieved may bring another Writ called a *Secunda super- Seft. 8.*
operatione. And thereby he shall recover damages, and the party that doth surcharge, 10 Admeasure-
shall lose the value of the Beasts, wherewith he doth surcharge more then his pro- ment of Pasture.
portion, as forfeit to the King. *Westm. 2. 8. What.*

This Writ of Admeasurement lieth onely for, and against such as have Common Appendant, or Common by reason of Neighborhood. And it will lie also against him that hath Common Appurtenant, or ingross to a certain number. But it lieth not amongst them that have Common Appurtenant, or ingross without number. Nor will it lie against the Lord of the Waste, by a Commoner that is his own Tenant. For in this case, if the Lord surcharge or improve more then he ought, the Tenant may have an Affize against him. And if the Tenant surcharge, the Lord may distress him Damage-Felant: Or either of them (as it seems) may have his Action of the Case against the other. *F. N. B. 125. Old N. B. 73. 22 Aff. pl. 65.*

Quod permittat is a Writ lying where a man is disseised of his Common of Pasture, and the Disseisor alieneth, or dieth seized, and his Heir entreth, and then the Disseisee die; then his Heir may have this Writ. *Terms Ley. 159. Damage-Felant.*

Quo jure is a Writ lying for him that hath Land, wherein another doth challenge Common time out of minde; and this is to compel him to shew by what Title he doth challenge this Common. *F. N. B. 128. Quo Jure.*

See more of these things in *Extinguishment, Apportionment, Action of the Case, Grant, Seisin, Prescription.*

CHAP. XLIX.

Of Common Law, Common-Weal, Concealment,
and Confirmation.Common Law.
What.

He Common Law is taken divers ways, sometimes it is taken for the ancient Laws and Customs of the Realm, before any Statutes were made; and so it was nothing else but the common usage and custom of the Country, grounded upon the Law of God, and common Reason; and in this sense it is distinguished from the Statute Law. And sometimes it is taken for the whole Common Law and Statute Law together. And so it is distinguished from the Civil Law, the Spiritual Law, and certain private Customs, or Customary Laws: And sometimes it is taken for the Courts at *Westminster*, and so it is distinguished from the lower and bale Courts in the Country. *Terms Ley. Co. 9. 15. Dyer 54.*

For the Original Antiquity, Equity, and Excellency of the Common Law: See *Homs Annals 94. Fortescue in Laudem Legum Anglia. Co. 3. In the Epistle. Dugl. & Stud. l. 1.*

Of Common-Weal.

Common-Weal.

BY Common-Weal is understood in our Law, *Bonum Publicum*, or Common Good; and this is a thing the Law doth much eye: And therefore it doth to rate many things to be done for Publick good, that otherwise might not be done. As in case of Fire, or Enemies, to prevent increase of mischief by them, men may pull down Houses, or do any other thing upon mens Houses or Lands, and justifie it when it is done. To apprehend Felons, or prevent Murders, and the like, men may break Houses or Doors: The Oxen of the Plough, Horfe that is under a man in travel, may not be distrained: And upon this score it is, that all Monopolies are void, all Obligations, and Covenants, to restrain Tillage, or free Trade, are void; the Law will suffer a little wrong to go unpunished, then suffer multiplicity of Actions, as knowing, *Expedis Respublica ut sit finis litium. Plow. 10. 25. Co. 11. 50. Dyer 36. 14 H 8: 25.*

Of Concealment and Concealers.

Concealment.

CONCEALED Land was that Land which was concealed from the King, and secretly detained in the hands of common persons that had nothing to shew for it. And Concealers were such as did finde out such Lands concealed, wherein the main Rule is this, That Land shall never be said to be concealed, or unjustly detained from the King, where there is any Record extant, to inform him of his Title, or where he is, or may be acquainted with his Title by any reasonable intendment; but for this, see *Co. 10. Sir Arthur Legates case. Co. 4: 113. 43 Eliz. 1.*

By the Statute of 22 Jac. The King is to be barred where there is sixty years possession against him. See for this *Co. 3 part. of Inst. cap. 87.*

Of Confirmation:

1. Confirmation:
What.

A Confirmation is the Conveyance of an Estate or Right that one hath into Lands or Tenements to another that hath the possession thereof, or some estate therein, whereby avoidable estate is made sure, and unavoidable, or whereby a particular estate is increased and enlarged: And this albeit it may be made by other words, as by *Dedi* or *Concessi*, which are generall words, and serve to make a Grant, Feoffment, Lease, Release &c. yet it is most commonly and properly made by these words *Confirmasse, Ratificasse, & Approbasse*, which do signifie *Ratum & firmum facere & supplere omnem defectum*. And he that makes the Confirmation

is sometimes called the Confirmor, and he to whom it is made the Confirmed.

Terms Ley. Co. super Lit. 295.

Confirmor Confirmee.

There are two kinds of Confirmations, viz. a Confirmation implied, or in Law, which is when the Law by Construction makes a Confirmation of a Deed made to another purpose, and a Confirmation express or in Deed, which is when the Act Done or Deed made is intended for a Confirmation. And both these are always in writing. The latter is properly called a Deed or Instrument of Confirmation, and is made after this manner, *Noveritis universi &c. me A de B ratificasse, approbasse & confirmasse C de D statum & possessionem quos habeo de & in anno Mlesnagio &c. cum pertinen. in F &c.* A Confirmation is also distinguished by his effects, for sometimes it doth tend and serve to confirm and make good a wrongfull and defeasible estate, or to make a Conditionall estate absolute. And then it is said to be *confirmatio perficiens*. And sometimes it doth Tend and Serve to increase and enlarge a rightfull estate, and so to passe an interest. And then it is called *confirmatio crescens*. And sometimes it doth tend and serve to diminish and abridge the services whereby the Tenant doth hold. And then it is called *confirmatio diminuens*. *Co. super Lit. 295. Plow. 140. Lit. Sect. 515. Co. 9. 142.*

2 The Kinds:

The nature and work of this where it doth find a foundation to work upon is, either to increase and enlarge the estate of him to whom it is made from a lesser to a greater, and to give him some new interest he had not before, or to Corroborate and perfect the estate that was imperfect before, or to change the quality of it from an estate upon Condition to an absolute estate or otherwise, for this a Confirmation will doe. In some Cases also it will extinguish Rights and Titles of Entry. But it will not make an estate good that is merely void; nor add, nor take from an estate a descendible quality, and make a man capable of it that is incapable in himself, or *à contra*. In some cases also it will lessen and diminish rents or services. But it cannot ne will change the nature of the service into some other kind of service, nor increase it into a greater service. *Co. 146. 147. Dier. 109. 7. H. 6. 7. Lit. Sect. 539. Co. 9. 142.*

3. The nature and operation of it in general.

If a Bishop, Dean, Archdeacon, Prebend, or the like, make any lease of the Land they have in the right of their Bishoprick, Deanery, Archdeanery, or Prebendship not warranted by the Statute of 32 H. 8. and within the other Statutes, it seems this lease must be confirmed by the Dean and Chapter by their common seal, and if there be two Chapters, it must be confirmed by them both, or otherwise it is not good. But if the lease be such a lease as is warranted by the Statutes, the Bishop may make it without the confirmation of the King, the Patron, and Founder of Bishopricks, or the Dean and Chapter. And so also it seems of the rest. And a Corporation aggregate as Dean and Chapter, Master and Fellows, and the like, may grant without any confirmation of the Founder, and this grant will be good. If a Bishop, &c. grant an ancient office belonging to his Bishoprick, albeit it be but for the life of the Grantee, yet it must be confirmed by the Dean and Chapter, otherwise it is not good. If a Parson or Vicar had made any lease for longer time than his own life, it must have been confirmed by the Patron and Ordinary. But at this day albeit it be confirmed by the Patron and Ordinary, yet the lease is good for no longer then during the Parsons ordinary residencie, except it be impropriated. *Co. super Lit. 300. 301. Co. 10. 62. 5. 3. Dier. 145. 273. 349. 338. 339. 61. Co. 10. 62. Dier. 52. Stat. 13. El. ch. 20.*

4 Where the Confirmation of some persons is needfull to perfect the grant of others Or not. And how it may be done.

If Tenant for life grant a Rent-charge to I. S. and his heirs; in this case he in reversion must Confirm it, otherwise the grant of the Rent will be good for no longer then the life of the Tenant for life. *Co. 1. 147.*

Where a man hath an interest in any Lands, Tenements, Rents, Commons, Felons-goods or the like, by grant of any of the Kings of the Realm, he need not have the Confirmation of any or of every succeeding King. Also it seems grants of Fairs, Markets, Warrens, and the like, made by one King, will be good in Law against his successors without any Confirmation. But all such as have any judiciall or Ministeriall Offices, Commissions and Authorities derived from the King, must have the Confirmation of every succeeding King, otherwise they may lose them. *Co. 8. 167. Dier. 277. Dier. 327. Lit. Bro. 203. Kelm. 145. 188.*

5 What Confirmations may be made. And what shall be said a good expresse or implied confirmation. Or not. And by what words it may be made.

1. To Confirm,
Or alter the
quality of the
estate of him
to whom it is
made;

In every good Confirmation tending to confirm an estate or alter the quality of it, these things must concur.

1. There must be a good Confirmor, and a good Confirmee, and a thing to be Confirmed as in other Grants, and the Deed must be well sealed, &c.

2. There must be a precedent Rightfull or Wrongfull estate in him to whom the Confirmation is made in his own or in anothers Right, or at least he must have the possession of the thing whereof the Confirmation is to be made that may be as a Foundation for the Confirmation to work upon. As if Feoffee on condition make a Feoffment over, and the Feoffer confirm his estate to him to whom the second Feoffment is made and his heirs; this is a good Confirmation to make his estate absolute. *Co. 1. 146. 9. 142. 7. H. 6. 7.* And if Lessee for life make a Feoffment in Fee, or Lease for years, and the first Lessor confirm this second estate; it seems this is a good Confirmation. *Littleton section 5. 16.* And if one Disseise me of Land, I may after Confirm the estate of the Disseisor, or of his heir if he be dead, or of his Feoffee if he have aliened it, and this will make his estate good for ever: And if the Disseisor make a Lease for Life, or years of it; I may Confirm the estate of the Lessee, and this will make it good for the time. *Co. 9. 142. 6. 15. Perk. sect. 86. Lit. sect. 518. 521. 11. H. 7. 29. 28.* And if one make a Lease for Life absolute, or a Feoffment in Fee, or Lease for Life on Condition, or be Disseised of Land, and the Lessee for Life, Feoffee, or Disseisor doth grant a Rent out of the Land in Fee, and the Lessor, Feoffer, or Disseisee doth Confirm the estate of the Grantee; this doth make good the Grant for ever. *Co. 1. 144. Lit. sect. 527. 529. 11. H. 7. 28. Co. super Lit. 300. Lit. sect. 547. 11. H. 7. 28.* And so also if the heir of a Disseisor that is in by Descent Grant a Rent-charge, and the Disseisee Confirmeth it; this is a good Confirmation. And if an Infant make a Lease for 20 years, and the Lessee doth make a Lease to another for all or part of the time, and the Infant at his full age doth confirm this second Lease; this is a good Confirmation, and doth perfect the Lease; for it is a Rule, That which I may defeat by my entry, I may Confirm by my deed. But if there be no precedent estate on which the confirmation may work, or the estate be such an estate as is meerly void, then is the Confirmation void, and cannot take effect as a Confirmation: as for example, If a man assign Dower to a woman that hath nothing to do with it, or a Court that hath not power doth make Leases by Commission, or an estate that was upon Condition is avoided by entry, or a Lessee surrender, or a Disseisee enter upon a Disseisor, and afterwards he that hath the Rightfull estate Confirm their estates so defeated and gone; these Confirmations are void. *Debiles fundamentum fallit opus. Co. super Lit. 295. 301. Dier. 263.* And a Confirmation to him that hath nothing in the Land is void. And hence it is that if one Confirm all his estate that he hath granted to another, when in truth he hath granted none at all; this is void. And so also it is if there be an estate and no possession: as if a Disseisor make a Lease for years to begin at Michaelmas, and before the day the Disseisee doth Confirm the estate of the Lessee for years; it is said, this is not a good Confirmation, *sed quare. 4. H. 7. 10. Dier. 109.*

Infant.

3. The Confirmor must have such an estate and property in the thing whereof the Confirmation is made, as he may be thereby enabled to Confirm the estate of the Confirmee, at the Lessors, Feoffers, and Disseisees in the cases before have, otherwise the Confirmation is void. *19. H. 6. 62.* And therefore if the heir of the Disseisee during the Life of the Disseisee Confirm to the Disseisor; this is no good Confirmation to perfect his estate, albeit the Disseisee die, and the Right of the Land descend to his heir afterwards. *Co. 9. 138.* So if Lands be given to A. and B. his Wife and the heirs of their bodies issuing, the Remainder in Fee to A. and A. levy a fine with Proclamations and die, and she within five yeares doth enter and Claime, and after the Conusee doth Confirm the estate made by the first gift to the Wife, To have and to hold according to the same; this Confirmation is to no purpose. *Co. 9. 138.* So if Lessee for Life make a Lease for thirty yeares, and after he in Reversion and the Lessee for Life Lease for sixty yeares; in this case he cannot Confirm the Lease for thirty yeares, because he hath granted it before for sixty

fixty

sixty yeares. *Fitz Confirmation* 15. *Lit. Sect.* 523. *Dier* 263. And hence it is also that the Confirmation by one Jointenant of the estate of his companion worketh nothing, for their estates are equall, and each hath interest in the whole Land. And yet if one Jointenant confirme the whole Land to his companion, To have and to hold the Land to him and his heires; this shall amount to a Grant, and so will be good to pass his moiety. *Lit. sect.* 543. *Co. super Lit.* 308. And hence it is also, that if a man grant a Rent-charge out of his Land to another for life, and then confirme his estate without any clause of distress (for by a clause of Distress a grant of a new Rent may be made) To have and to hold, to him in Fee-simple, or Fee-tail; that this is void, for the Confirmor hath no reversion of the Rent to him.

4. The precedent estate must continue untill the Confirmation come, as in all the cases of voidable estates made the confirmation must be before the estates be made void by entry, &c. or otherwise the confirmation will be void. And therefore if Lessee for life or yeares surrender, or the Disseisee enter upon the Disseisor, and after the Lessor or the Disseisee confirme the estate of the Lessee or Disseisor; this Confirmation comes too late. *Co.* 5. 15. *Lit. sect.* 60.

5. The estate precedent and that which is to be Confirmed, must be lawfull and not prohibited by any act of Parliament. And therefore if a spirituall person, as Prebend, or the like, make a Lease not warranted by the Statutes; the Confirmation of the Deane and Chapter will not help nor amend it. And if Tenant in tail make avoidable Lease, and after confirme it himself, this is voidable still. *Lit. sect.* 531. 532. 10. *Ed.* 4. 3. *Co. super Lit.* 295. *Dier.* 116. *Co.* 1. 147. 5. 15.

6. There must be apt words of Confirmation in the Deed or Instrument. And herein note that albeit the words *Confirmavi, ratificasse & approbasse*, be the most significant & proper words to make this conveyance, yet such as are made by other generall words may make a good Confirmation. And therefore it is agreed, that a Deed made by the words *Dedi, Concessi*, or *Demisi*, may make a good Confirmation; And therefore that if the Disseisee, Coparcener, or Lessor make a Deed of the Land by the word *Dedi*, or *Concessi* to the Disseisor or other Coparcener, or Lessee for life, and deliver the Deed; this is a good Confirmation without Livery of Seisin. Also if a Feoffment be made to *A*, to the use of *B* and his heires upon condition, and before the Condition broken, the Feoffor and *B* doe joine in the grant of a Rent-charge, and after the Condition is broken; in this case the Law doth interpret this a good Grant from *B* and a good Confirmation of the Feoffor without any words of Confirmation. So if Tenant for life doe grant a Rent to him in reversion, and he by Deed doth grant it to another and his heires in Fee; in this case the Law doth continue this a good Grant and a Confirmation also. *Lit. sect.* 519. *Co. super Lit.* 296. And in these cases of Confirmations of estates, if it be by the Disseisee to the Disseisor, it is good without any words of heires, as if the Disseisee confirme the estate of the Disseisor, or confirme the Land unto him, and say not, To him and his heires; this is an effectuall Confirmation to him and his heires for ever. And if a Lessee for life or a Disseisor make a Lease for life, or yeares, &c. and he in the Reversion, or the Disseisee confirme their estates and not the Land, and without any *Habendum* or limitation of estate; this is good for so long as the estates do continue. *Co.* 1. 147. But it is most safe alwayes to expresse the estate, i. to say, To have and to hold the Land to him and his heires, or for life, &c. as the agreement is. If Lessee for life grant a Rent to one and his heires out of the Land, and the Lessor doth confirme the estate, or this Rent-charge this doth make the estate of Rent sure. And so also if he doe confirme the Rent, and say, To have and to hold to him and his heires; this is a good Confirmation. But if he confirm the Rent, To have and to hold to him in fee, without naming his heires, hereby his estate is not bettered. *Lit. sect.* 531. 532. 10. *Ed.* 4. 3. *Co. super Lit.* 295. *Dier* 116. *Co.* 1. 147. 5. 15.

If the Lessor confirme the estate of his Lessee for life with this clause, To hold without impeachment of waste, this is a good Confirmation to change the quality of the estate so far as to make it unpunishable of Waste. So if the Lord Paramount confirm the estate of the Mesn with clause of Acquital. And so if Lessee for yeares or

2. To enlarge the estate of him to whom it is made.

for anothers life be without impeachment of waft, and the Lessor confirme to him for his own life, and omit that clause; hereby this privilege is gone and the estate is become punishable for the waft. *Co. 9. 139. F. N. B. 136. Co. 8. 76. Dier. 10.*

This kind of Confirmation *Crescens* must have all the qualities of the former: and there must be also in this case a privity between the Confirmor and the Confirmer. *Co. 9. 142. super Lit. 305. Dier. 145. 296. Co. 6. 15. Lit. Sect. 533. 532. 523. Dier. 263.* And then it may enlarge the estate of him to whom it is made, as from an estate at will to an estate for yeares, or to a greater estate; from an estate for yeares to an estate for life, or to a greater estate; from an estate for life to an estate in Taile, or in Fee; and from an estate Taile to an estate in Fee; and these Confirmations are good. But in all these kind of Confirmations care must be had of the manner of penning them, and that in every such Deed there be a limitation of the estate. That these words be inserted, To have and to hold the Tenements, &c. to him and his heires, or to him and the heires of his body, or to him for terme of life, or yeares, as the agreement is; for if Lessee for life make a Lease for yeeres, and then Lessee for life, and he in Reversion confirm the land, To have and to hold to him for life, or to him and his heires; these words will make the estate to increase. But if the Confirmation be made to the Lessee for life or for yeares of his Terme or estate, and not of the Land; As when he doth confirm his estate, To have and to hold his Estate to him and his heires, this doth not increase the estate. And yet if he confirme the Land, To have and to hold the Land to him and his heires; this will increase the estate. *Et sic de similibus. Littleton sect. 524. 545. Plow. 540.*

If the husband have an estate of Land for life or yeares in the right of his wife, or to them both for life, and a Confirmation to him alone, of his estate or of the Land, To have and to hold the Land to him and his heires; this is a good conveyance of the Fee simple to him after the death of his wife. And if I let Land to a woman Sole for the Terme of her life, who taketh a husband, and after I doe confirme the estate of the husband and wife To have and to hold for Terme of their two lives; this is good, but it shall enure onely to enlarge his estate for Terme of his life if he survive his wife. But if one lease to another for life, and after confirm the estate of the Lessee to him and his wife for Terme of their two lives; this is void as to the wife. *Co. super Lit. 299. Plow. 160. Lit. sect. 535. Fitz. Confirmation 7. 17.*

If one Grant a Rent-charge out of his Land for life, and after the Grantor confirme the estate of the Grantee in the Rent without any clause of distresse To have and to hold to him in Fee simple or Fee taile; this Confirmation is not effectually to enlarge the estate. But if a man be seised of an old Rent-charge or Rent-service, and grant the same first for life, and after confirme the estate of the Grantee in Fee simple, or Fee taile; this is good and will enlarge the estate accordingly. *Lit. sect. 548. 549.*

If Tenant for life grant a Rent out of the Land to one and his heirs during the life of the Lessee for life, and after the lessor confirme the Rent to the Grantee and his heires; it seemes the estate is not hereby enlarged, but when the Tenant for life doth die, the Rent shall cease. *Co. 1. 147.*

This kind of Confirmation may be made by the same words as the former, viz. by the words, Give, Grant, or Demise. But neither of these may be made by the words, Surrender, Release, Exchange or the like, for these are peculiar words destined to a speciall end being proper and peculiar manner of conveyances. And yet if I that am a Lessor do say to my Lessee for yeeres by my deed, I will that you shall hold the land for your life; this is a good Confirmation to increase the estate by this word *volo* onely. So if I grant to my Lessee for yeares, that he shall hold the Land for Terme of his life; this without any other words is a good Confirmation. *Co. super Lit. 301 Fitz. Confirmation 23.*

By a Confirmation the Lord may confirme the estate of his Tenant which holdeth by Knights service to hold in Socage, or to hold for a lesse Rent, or to hold at common law where before he did hold in ancient demesne, and such a Confirmation is good. But such a confirmation as is to hold by new services, as a rose for money

3. To diminish or abridge the services, &c.

or the like, is not good for that purpose. And in this case there must be also a privity; and therefore if there be Lord, Meisn and Tenant, and the Lord confirm the estate of the Tenant, to hold by less services; this is void. And if the Lord confirm to his Tenant after he is disseised before his Entry, to hold by less services; this is void. *Co. 9. 194. Littl. Sess. 538.*

A Confirmation may be by apt words in case of a Lease for years for part of the time, but in case of a Freehold it cannot be so. And so also it may extend to part of the thing before in estate; and therefore if a Disseisor, Tenant in Tail, Husband of the Land, he hath in the right of his Wife, or Lessee for life make a Lease for years, and the Disseisee, Issue in Tail, Wife, or Lessor make a Confirmation of all the Land, for part of the time, or of part of the Land for all the time; this Confirmation is good. But if any such person make a Lease for life, Gift in Tail, &c. the Disseisee cannot confirm part of the estate, but he must confirm all; and therefore if he confirm his estate for one hour, it is a Confirmation of the whole estate. And so also if he confirm the Land to the Disseisor himself but one hour, one week, one year, or for his life, &c. this is a good Confirmation of the estate for ever. And if it be a Lease for years that is confirmed, care must be had to the manner of the Confirmation; for if the Confirmation be of the estate or the term for one hour; this is a good Confirmation for the whole time: And therefore the Confirmation must be had of the Land, To have and to hold for part of the term; and being so made, it may be good for that time onely, and no longer. *Co. 5. 81, 82. Littl. Sess. 519. Co. super Littl. 197. Littl. Sess. 520.*

If I make a Feoffment on Condition, and before the Condition broken, I confirm the estate of the Feoffee absolutely; this will not extinguish the Condition. And yet if the Condition be broken first, so as my Entry is lawful; in this case the Confirmation will extinguish the Condition. And if the Feoffee make a Feoffment over absolutely to another, and I confirm the estate of the second Feoffee, whether it be before or after the Condition broken; by this, the Condition is discharged. *11 H. 7. 29. Co. 1. 146. 9. 142.*

If the Lord confirm the estate of his Tenant in the Tenements, or one that hath a Rent, Common, or profit out of Land, confirm to the Terretenant his estate; in these cases notwithstanding this Confirmation, the Signiory, Rent, Common, &c. do continue, and this shall not enure to extinguish it. *Littl. Sess. 535, 536, 537.*

If the Disseisee and a stranger disseise, the Heir of the Disseisor, and the Disseisee confirm the estate of his Companion; this shall not enure to extinguish the suspended right of the Disseisee, but when the Heir of the Disseisor shall re-enter it shall be revived: And if the Grantee of a Rent-charge and a stranger disseise the Tenant of the Land, and the Grantee confirm the estate of his Companion; this shall not enure to the Rent, suspended to extinguish it, but after the re-entry of the Tenant, the Rent shall be revived. *Co. super Littl. 298.*

If a man hold his Land of me by Knights service, Rent, suit of Court, &c. and I confirm his estate to hold of me by Knights service onely, for all manner of services and demands; in this case albeit this do abridge the service, yet it shall not be construed to take away Wardship, Relief, Aid, to marry my Daughter, and make my Son Knight, and the like. *Co. super Littl. 305.*

If I have an estate in Land for my life, and he in the Reversion doth confirm the estate to me, and my Wife, for the term of our lives; this shall enure onely as a Confirmation of my estate, and not so as to give any estate to my Wife: But if I have a Lease for life or years in right of my Wife, and he in the Reversion do confirm the estate to me and my Wife, To have and to hold to us for our lives; this shall enure not onely to confirm the estate, but also to create an estate to me after my Wives death: And in the case of a Lease for years, it maketh our estate joyns, but in the case of a Lease for life, I shall take by way of enlargement of estate for my life after my Wives death: And if in this case the Confirmation be to me and my Wife, To have and to hold the Land to us two, and our Heirs; this shall enure to us in Fee-simple as Jointenants. See before.

If Land be let to Husband and Wife, To have and to hold the one moyety to the

N n 2

Husband

6 Where a Confirmation may be good for part of the Estate, or for part of the thing, or not.

7. The force and vertue of it; and how it shall enure and be construed and taken.

Husband for his life, and the other moyety to the Wife for her life, and the Lessor confirm to them both their Estate in the Land, To have and to hold, to them and their Heirs; in this case, as to the one moyety it doth enure onely to the Husband, and his Heirs, but as to the other moyety they shall be Jointenants. And yet if such a Lease for life be made to two men by several moyeties, and the Lessor confirm their Estates in the Land, To have and to hold to them and their Heirs; by this they are Tenants in Common of the Inheritance. *Co. super Littl.* 399.

If the Disseisee confirm the Estate of the Disseisor, To have and to hold to him, and his Heirs of his Body engendred, or, To have and to hold to him for term of his life; this shall enure to him as a Fee-simple, and shall confirm his estate for ever. *Littl. Sel.* 419.

If my Disseisor make a Lease for life the Remainder over in Fee, and I confirm the Estate of the Tenant for life; this shall not enure to, nor avail him in Remainder. And if the Disseisor make a Gift in Tail, the Remainder to the right Heirs of the Tenant in Tail, and the Disseisee confirm the estate of the Tenant in Tail; this shall not extend to the Fee-simple, no more then if the Disseisor make a Gift in Tail the Remainder for life, the Remainder to the right Heirs of the Tenant in Tail, and the Disseisee confirm the estate of the Tenant in Tail; for this shall extend onely to the estate Tail, and not to the Remainder for life, or in Fee. But if the Disseisee in the first case confirm the estate of him in the Remainder; this shall enure to and avail the Tenant for life. And so if a Disseisor make a Lease for life, and keep the Reversion, and after the Disseisee doth confirm to the Disseisor; this shall enure to the Tenant for life. And so if a Disseisor make a Lease for life to *A.* and *B.* and the Disseisee confirm the estate of *A.*; this shall enure to *B.* and make his estate good also in the other moyety. And so if there be two Disseisors, and the Disseisee confirm the estate of one of them, without saying more; this shall enure to them both. But if the Confirmation be of the Land, To have and to hold the Land to one; in this case it may enure to him alone. So if a Disseisor enfeoff *A.* and *B.* and the Heirs of *B.* and the Disseisee confirm the estate of *B.* albeit it be but for his life; yet this shall enure to both, and to the whole Fee-simple. *Co. super Littl.* 298.

If a Lease be made for life to *A.* the Remainder to *B.* for life, and the Lessor confirm their estates in the Land, To have and to hold to them and their Heirs; this shall enure as to the one moyety to *A.* in Fee, after the death of *B.* and as to the other moyety in Fee to *B.* after the death of *A.* *Co. super Littl.* 299.

If Lands be given to two men, and the Heirs of their two Bodies begotten, and the Donor doth confirm their estates in the Land, To have and to hold the Land to them two, and their Heirs; it seems this shall enure to them as a joynt estate for their lives, and after for several Inheritances, *Co. Idem.*

If the Lessee for life, or the Disseisor doth make an absolute Lease for years, and he in the Reversion or the Disseisee doth confirm the estate of the Lessee for years; this makes the Lease good for all the time. So if the Disseisor makes a Lease for life, and the Disseisee doth confirm the estate of the Lessee for life; this makes the estate good for the life. And if he in Reversion confirm the estate of the Termor but one hour; this doth make it good for all the term. And if an estate for life, or in Fee, be confirmed but for one hour; it is a good Confirmation for all the estate. And if the Disseisee confirm the estate of the Disseisor, To have and to hold for one hour, year, or for life, or in tail; this is a good Confirmation for ever, and makes his estate unavoidable. And yet if the Disseisee confirm the Land *Habendum* the Land for life, or in tail, &c. *Contrà. Littl. Sel.* 516, 521. 519, 520, 541. *Co.* 5. 79.

If a voidable Lease be made for forty years, and the Lessor confirm the term for twenty years; this is a good Confirmation of the whole term. But if he confirm the Land for twenty years, it may be good for that time onely and no longer; where-in as in divers other cases before observe, that the very words whereby the Confirmation is made are much to be heeded, for *Parols font Plea. Dyer* 52: 339. *Co.* 5. 81.

Note.

If Tenant in Tail, or for life of Land, letteth it for years, and after confirm the Land to the Lessee for years, To have and to hold to the Lessee, and his Heirs for ever; by this the Lessee hath onely an estate for term of the life of the Tenant in Tail, or for life, and therein his Lease for years is extinct. *Littl. Sect. 606, 607, 610.*

If Tenant for life doth grant a Rent to another, and his Heirs, during the life of the Tenant for life, and the Lessor confirm to the Grantee, and his Heirs; this shall be construed to be an estate for life onely, and no enlargement of the estate. But if Tenant for life, Grant a Rent-charge in Fee, and the Lessor confirm it; this shall be construed to be a Confirmation of the Fee-simple. *Co. 1. 147. super Littl. 301.*

CHAP. L.

Of Consanguinity, Affinity, Consideration, Conspiracy, and Condition.



Consanguinity is a kindred or joyning of persons by Birth or Blood, and Affinity is a kindred or joyning of persons by Marriage. *Consanguinity, Affinity.*

For the Exposition of these words, and how they shall be taken in Exposition of Devises, and in Disceits; to whom Land shall descend, and in Heir who shall be Heir to another. *Next of Blood;*

Of Consideration.

Consideration is described to be a cause or an occasion meritorious, requiring a mutual recompence in Deed or in Law, or the material cause of a Contract, without which, no Contract is so to be binding in Law. And this is either valuable, as Money, Land, or Goods; or not valuable, as Natural love and affection, advancement of Blood, and the like; and both these are sometimes Expressed, and sometimes Implied. Expressed when the thing is agreed upon, and set down between the parties, and where one for Twenty pound doth bargain and sell his Land, or where one doth sell his Land for other Land in exchange, or where one doth give twenty shillings for a Horse, or where one for twenty pound doth promise to do a thing: Or else it is implied, as where one doth come to an Inn, and call for provision for himself or his Horse; in this case there is an Implied contract, and the Inn-keeper may either sue him for it, or keep his Horse, but not his person, till he pay as well, as if he had made an Express agreement with him. So if one without expressing any consideration, covenant to stand seized to the use of his Wife, Child, Brother, or Cousin; in these cases, by the naming of them to be of their Kin, there is an Implied consideration, and thereupon the use will rise, which without some valuable or invaluable consideration will not rise by Covenant. But for these things see *Co. 3. 80 Dyer 366. and Contracts, Bargain and Sale, and Uses;* in my Books of the Marrow of the Law, and of Common Assurances. *Consideration. What. The kinds of it.*

Of Conspiracy or Confederacy.

This word is always in our Law, taken in ill part: And largely it doth signifie any Agreement, Combination, or Confederacy between two or more to do some unlawful act: As where they do agree or binde themselves by Oath, Covenant, or other Alliance, that every of them, shall bear, and aid the other, falsly and maliciously to indite, or falsly to move or maintain Pleas, and also such as cause children within

*Sect. 1:
1. Conspiracy or
Confederacy.
What.*

within age, to appeal men of Felony, whereby they are imprisoned and sore grieved; and such as retain men in the Countreys with Liveries or Fees, to maintain their malicious enterprises; and this extendeth as well to the takers, as to the givers: Also Stewards and Bailiffs of great Lords, who by their Seigniorie, Office, or Power undertake to bear or maintain Quarrels, Pleas, or Debates, that concern other parties, then such as touch the Estate of their Lords, or of themselves; but in this sense it is confounded with maintenance, and champerty. See *Maintenance* for this. 34 Ed. 1. 2. 4 Ed. 3. 11. 3 H. 7. 13. 1 H. 5. 3. 18 H. 6. 12.

And sometimes, and most commonly, and so in this place, it is taken more strictly, that is, where two or more persons, do purposely and maliciously conspire and labor together, to indite another falsely and unjustly, without any ground at all; for some Treason, Felony, or other offence; and after, he which is so indicted, is upon that indictment after a lawful tryal, purged and acquitted. *Poulton de Pace* 231. 28 Aff. pl. 12.

Judgment in it.

Frank-law.

In this case, and for this wrong, the party grieved may have the offenders indicted, and so punished at the Suit of the Lord Protector. And therein if the partie be found guilty, their Judgement is, That they shall lose their Frank or Free Law. (i.) That they shall not afterwards be put into Juries, or Assizes, nor be otherwise produced as witnesses to testify truth. And if they have anything to do in the Lord Protector's Court, they must do it by Attorney, and shall not come themselves within twelve miles of the Court, that their Lands, Goods, and Carcles, shall be seised into the Lord Protector's hands, their Houses wasted, their Trees eradicated, and their Bodies taken and imprisoned; and this is called a Villanous Judgement. Or the party grieved, might have preferred his Bill into the *Star-Chamber*, and have punished them there; or he may have his Writ of Conspiracy at the Common Law, which is a special Action of the Case; and therein the Judgement shall be, that the Plaintiff shall recover his damages, and the Defendant shall be taken. 27 Aff. pl. 39. 23 Ed. 3. 34. 46 Aff. pl. 11. 24 Ed. 3. 34. F. N. B. 114, 115. Co. 9. 56.

There are divers Confederacies, and Conspiracies, to other purposes, whereby men are wronged, and for those there is relief given by other means. F. N. B. 116.

Sec. 2.
2. In what case this Writ of Conspiracy, or general Action of the Case for Conspiracy lieth, or not.

In all cases where this Writ may be had, or this Action doth lie; there must be these Incidents in the case.

1. There must be two persons or more in the plot and practise; for a Writ of Conspiracy is not maintainable against one, unless the charge be, that he *smul caus* others did conspire with him. And hence it is, that it will not lie against a man and his wife alone, unless some others be made Defendants with them; for they two are but one person in Law. And hence it is also, that although the Suit be begun against divers, yet if all of them, but one, be discharged to all intents, as if all of them, but one, be acquitted by a Verdict, or by matter in Law, as if they plead they were Indictors, or any such like matter in Bar, hereby that one is discharged also; and if the Writ be brought against two, and they plead not guilty, and one is found guilty, and the other not, hereby he is discharged also, and the Plaintiff cannot recover. But if the Writ be brought against two, and one of them is attainted, and the other doth Bar the Plaintiff by a Demurrer in Law, or one doth appeal, and plead, and his Plea is found against him; in this case the other is not discharged, but the Plaintiff shall recover, though the other be not attainted (and yet perhaps in this case, the one may refuse to answer without the other.) So albeit one of the Conspirators be dead, yet the Suit may be had against the other alone; and in all cases, where the practise is such by one person, that if there were more joyned with him, a Writ of Conspiracy would lie, there a general Action of the Case will lie. F. N. B. 116. 114. 18 Ed. 4. 1. Broo. Conspiracy 11. 24 Ed. 3. 34. 40 Ed. 3. 19. 38 Ed. 3. 3. 22 Aff. pl. 71. 28 Aff. pl. 12. 11 H. 4. 62. 28 H. 6. 35. 24 Ed. 3. 34. 35 H. 6. 14.

2. The party that would have this Action, must be indicted, arraigned, and acquitted, and therefore a man cannot have this Action, nor a general Action upon his case, for a plot or preparation, onely to such an act without an Execution; for

in this case the Rule doth hold *Non officit conatus nisi sequatur effectus*. And yet notwithstanding such a Confederacy in preparation onely, as where two or more, knit, unite, and binde themselves to maintain each other in their matters, right or wrong, or to do any unlawful act (which implies no more but a false Accusation) albeit the party be never indicted and acquitted; this is punishable by Indictment at the Assizes, or might have been by Bill in the *Star Chamber*. Therefore Justices of Assize and *Nisi prius*, are to inquire of Conspirators in their Circuits, and punish them. But then such Confederacies as are so punishable by the Law, before they be executed, must have in them always these four Incidents.

First, They must be overtly declared by some manner of prosecution, as giving of Bonds, or the like.

Secondly, They must be malicious as for some unjust revenge, &c.

Thirdly, They must be false against an Innocent.

Fourthly, They must be voluntarily out of Court, and not by restraint. If the parties proceed further therefore, as to cause the accused person to be apprehended, brought before Justices, examined, bound to appear, sent to Gaol, indicted, or if they give Evidences, retain Counsel, or the like, against the prisoner, although the Jury finde an *Ignoramus* upon the Indictment; this is much more punishable by Indictment or Bill, for *Quando aliquid prohibetur & id per quod pervenitur ad illud*. But if all this be done and no more, in that the party be not arraigned and tried by the Petty-Jury, and thereupon acquit, it seems he cannot have this Action, for the Writ is *Et legitimo modo acquiescit*. And yet *Quare*, for I have heard say, that it hath been adjudged on the contrary. See for this 19 R. 2. Co. 9. 50. F.N.B. 114: 6 Ed. 4. 1. 24 Ed. 3. 34. 27 Ass. pl. 59. 19 H. 6. 28. 21 H. 6. 26. 9 Ed. 4. 12. 27 Ass. pl. 44. *Articuli super Chartas*, c. 10. 4 Ed. 3. 11. Co. 9. 56, 57.

3. The proceeding and prosecution must be voluntary, and therefore neither this Action, nor the general Action of the Case, will lie against him or them that shall prosecute any man after this manner, by constraint or compulsion; as when they are thereunto obliged by their Oaths, Duties, or Offices. Hence it is, that if a Justice of Peace doth any thing in open Sessions, to discover or punish offenders, or Jurors sworn upon an Enquest, to enquire of Felonies, do indict a man for Felony, or make known the Felony to their fellows, or move or set forward an Indictment against him whiles they stand sworn, albeit some of them did conspire before they were sworn, or they be after discharged before their verdict given; or one come into a Court to discover a Felony voluntarily, or one is sworn and doth give Evidence to the Enquest, unless he did before conspire, falsely to give this Evidence, that no Action will lie for any of these things, for all these things are justifiable and not punishable in any Court. Therefore it seems to be a good Plea to this Action, for the Defendant to say he came to the Sessions of the Peace, and informed a Justice of Peace, of the matter against the party, and that at the Justices requiring, he did put the Information in writing, for this any man may justify, for therefore is Proclamation made, that any man shall inform the Court that will, that such as will may do it. 27 Ass. pl. 12. 12 Ed. 4. 18. 21 Ed. 4. 67. 47 Ed. 3. 17. 21 Ed. 1. 17. 17 H. 4. 31. 27 Ass. pl. 12. 36 Ass. pl. 21.

4. The proceeding and prosecution must be malicious, and therefore if one man do prosecute another, upon good ground, as when a Felony is done, and there is some cause of suspicion of that person, either by the common fame, or otherwise; or when a man is robbed, and the next Village upon Hue and Cry make pursuit, and take a man they suspect, and the party robbed doth indict him, and he is acquitted; or a Coroner after a murder, sitting *super visum corporis*, cannot finde out the murderer, and then enquiring of the first finders of the body, they say that J. S. killed him, and after J. S. is indicted and acquitted. These are no faults at all, neither are any of these punishable at all in any Court. *Broo. Conspiracy*.

5. The charge and accusation must be false, so the Writ must run, That the Defendants conspired to indict the Plaintiff falsely and maliciously without any ground or cause. And hence it is, that if there be a conspiracy to indict a man for murder, and upon his arraignment it is found he killed the man; but it was lawful, or *per infortunium*, or *se defendendo*; no action will lie for this. *Broo. Conspiracy*. 21 Ass. pl. 77. *Fitz. Consf.* 21, 24. *Stamf* 3. 12.

6. The

6. The party indicted must be *legitimo modo acquietatus*, he must be acquitted after an indictment found upon his tryal by the other Jury, or he must be non-suite, if he bring an Appeal in the suit. And hence it is, that if any conspire to indict another man, and he is acquitted by the Kings general Pardon, or he is acquitted by the Kings particular Pardon (unless he wave that, and after plead not guilty, and then be acquitted) or he is discharged by the insufficiency of the Indictment; or there be a general Pardon, and the party doth not take advantage of it, but doth plead, and is acquitted. In all these cases, the parties that do prosecute, cannot be punished, neither can the party grieved, have any Remedy; for in the cases of the general Pardon, the Judges ought to have allowed it, and dismissed the party without pleading of it. And hence it is also, that it hath been always held, that if the party be indicted for an offence. And hence it is also, that it hath been always held, that if the party be indicted for an offence by a conspiracy, and the Jury upon Bill finde an *Ignoramus*, no Action lieth for this.

2. This Writ lieth as well where the Defendant is acquitted, or the Plaintiff is non-suit upon an Appeal. As where the Plaintiff was acquitted upon an Indictment: But if the Appeal be founded on an Indictment, and the Defendant be acquitted, or the Appellant be non-suit upon the Appeal, after Declaration, and the Defendant be arraigned and acquitted at the Kings suit, or the Plaintiff be non-suit upon the Appeal *contra*, (and yet see *F. N. B.* 114. contrary to this) *Dyer* 85. 33 *H. 6.* 1. 40 *Ed.* 3. 42. *Stamf.* 5. 12.

3. If a Conspiracy be to indict one as Principal, and another as Accessory, and after he is non-suit in his Appeal, or the Principal is acquitted (which is an acquittal of the Accessory) yet the Accessory may have this Action, as well as the Principal. But if the Principal had been out-lawed, had got his pardon, or had died before tryal. *Contra.* *F. N. B.* 115. *Bro. Conspiracy* 2. 34 *H. 6.* 9. 33 *H. 6.* 2.

4. If the Indictment and acquittal be before a Major, or a Bailiff, or any other that have power to deliver Goals, the party grieved may have this Writ. *F. N. B.* 115.

5. If the Conspiracy be to indict a man for Trespass, or any other offence, besides Treason or Felony, the party grieved may have this Action against the Conspirators. *F. N. B.* 116. *Broo Conspiracy* 25. 3 *Aff. pl.* 13.

6. If the Conspiracy be to indict a man for any offence against any Statute Law, the party grieved may have this Action, as well as when it is for an offence against the Common Law. *New Book Entries* 126.

7. If any person shall be indicted or appealed of Felonie, Treason, or Trespass in a Forreign Countie, Liberties, or Franchises, where the said person did never dwell or converse, after he is duly acquitted by verdict, he may have an Action of the Case against the procurer of such Indictment, and herein shall recover treble damages. *Old Book of Entries.* f. 126.

8. If any doe maliciously indict of Treasons, or Felonies, supposing that in their said Appeales and Indictments that the said Treasons or Felonies were committed in one certain place, where in truth there is no such place in the Countie; the Indictments and Appeales and Proces thereupon shall be void, and the parties grieved may have this Writ against the Conspirators. 9 *H. 5.* 1. 13 *H. 6.* 12.

9. If one of meer malice procure one to be falsely indicted at Assises for a pretended murder and he be acquitted, the partie may have an Action of the Case. *Hobbar Rep.* 8. *Miles case.*

10. If Overseers of the Poor or other Officers conspire in an undue way, and by colour of their Office to oppresse a man and do so, this Action may lye for this.

See §. 3.
3. What shall be a good Barr or Plea to this Action.

1. It is a good Bar or Plea to plead a Concord made between the Plaintiff and them. 21 *H. 6.* 28.

2. Any thing that will prove the Indictment or the Acquittal of the Plaintiff erroneous is a good Bar, although the partie indicted did take no advantage by it. *Co.* 9. 26. 9 *Ed.* 4. 12.

3. It is a good Plea to say that there is no such Record, as the Plaintiff doth set forth. 9 *H. 6.* 26.

4. It is a good Plea to say, that they were Jurors, and did present upon their Oaths; or that they were Witnesses, and gave evidence, or any such like matter as is above. 20 H.6.5.

5. But if the Writ be brought against two, it is no good Plea for one of them to say, the other is dead hanging the Writ; for it may be found, that he and the other did conspire, and then it is well enough, 18 Ed.4.1.

6. It is no good Plea to say, the Plaintiff was guilty of the Felony, after he is acquitted of it. 20 H.7.11.

7. If twenty be indicted, and one of them doth bring a Writ of Conspiracy, supposing that the Defendant conspire to indict him; it is no good Plea, that the Record is, that he and others are indicted. 9 Ed.4.23.

Of a Condition.

A Condition is a kinde of Law or Bridle, annexed to ones act, staying or suspending the same, and making it uncertain, whether it shall take effect, or no. Or as others define it, It is *modus* an Equality annexed by him that estate interest or right to the Land, &c. whereby an estate, &c. may either be created, defeated or enlarged upon an uncertain event. *Terms Ley. Co. super Littl.* 201.

And this doth differ from a Limitation, which is the bounds or compass of an estate, or the time how long an estate shall continue.

And this sometimes is contained in a Testament or Will, and sometimes in a Deed. And when it is in a Deed, it hath no proper place assigned it, but it may be in any part of the Deed; howbeit, for the most part it is placed next after the *Habendum*, or next after the Reservation of the Rent. It is also sometimes annexed to and depending upon estates; and sometimes annexed to, and depending upon Recognizances, Statutes, Obligations, Contracts, and other things: Conditions are also contained in Acts of Parliament and Records. But of these we speak not here in the ensuing matters, which are especially to be applied to such Conditions, as are usually contained in Deeds and annexed to the realty, i. To estates in Fee-simple, Fee-tail, for life or years. 27 H.8.16. Co 2.70.

And of these Conditions there are divers kinds. For some are in Deed or Express, i. When the Condition is expressed by the party in legal terms, and by express words in writing, or without writing, knit to the estate, as if I enfeoff a man of Land, rendering Rent at a day on condition, That if it be not paid, it shall be lawful for me to re-enter. And some are in Law or implied, i. When the Condition is *tacite* created by the Law, without any words used by the party. *Co. super Littl.* 201. *Plow. Colthirsts case.* Co.8.43.

The first sort of Conditions also are some of them precedent or executed, i. When the Condition must be fulfilled ere the estate can take effect, as where an Agreement is between me and J. S. That if he pay me Ten pound at *Michaelmas*, he shall have such a ground of mine for ten years; or I make a Lease of Land to J. S. for ten years, provided, That if he pay me Ten pounds at *Michaelmas*, he shall have the Land to him and his Heirs; and in these cases by the performance of the Condition the estate is required.

And some of them are Subsequent and Executory, i. When the estate is executed, but the continuance thereof dependeth upon the breach or performance of the Condition, as where a Lease is made for years, on condition that the Lessee shall pay ten pound to the Lessor at *Michaelmas*, or else his Lease shall be void; and in this case, by the performance of the Condition, the estate is held and kept.

These Conditions also are some of them in the Affirmative, i. That do consist of doing, as providing that the Lessee shall pay the Rent, or pay ten pound to the Lessor, &c. And some in the Negative, i. that consist of not doing, as provided, That the Lessee shall not Alien, &c. And some of them are in the Affirmative, which imply a Negative, as provided, That if the Rent be unpaid that the Lessor shall re-enter which implieth a Negative, *viz.* not paid.

Conditions also are some of them Collateral, i. When the act to be done is a

Collaterall act, as that the party shall pay 10 l. goe to Rome, or the like. And some are inherent. *i.* Such as are annexed to the Rent reserved out of the Land whereof the estate is made. And some of them also are Restrictive and contain a restraint, as that the Lessee shall not alien, or do wast, or the like. And some are compulsory, as that the Lessee shall pay to the Lessor 10 l. such a day, or his lease shall be void.

And some of them be single. *i.* To doe one thing only. And some Copulative, *i.* To doe divers things. And some disjunctive. *i.* when one thing of divers is required to be done. And some conditions make the estate whereunto they are annexed voidable only by entry or claime. And some of them make the estate void *ipso facto* without entry or claime.

And sometimes they tend to destroy estates, sometimes to make, or to enlarge estates, and sometimes neither to make nor destroy, but only to clogg estates. as where a Lease is made rendring Rent on a day, on condition if it be not paid that the Lessor shall enter on the Land and keep it till the Rent be paid. And all these wizes conditions may be lawfully made. *In esse potest donationi modum, conditio sine Causa. Lit. sect. 327.*

The conditions in Law or implied are either by Common Law, or by Statute Law. The first sort are some of them founded on skill, as where an office is granted, there is a condition *sacite* implied, that if the Grantee doth not execute it faithfully according to the trust, the Grantor may put him out. *Co. 8. 44. 3. 65. Lit. 325. 378. F. N. B. 205.*

And some are without skill, as where an estate is made for life or years of Land, there is this condition implied, that if the Lessee doe wast he shall forfeit the place wasted, or if the Lessor make a Feoffment of the Land he shall forfeit his estate and the Lessor shall enter.

And where an estate is made in Fee of Land; this condition is implied, that the Feoffee shall not alien it in Mortmain.

And these conditions doe sometimes give a recovery, and no entry, as in the case of wast: And sometimes they give an entry and no recovery, as in the case of Alienation in Mortmain. In the case of exchange also there is a condition in Law, for which see *Exchange. Co. 4. 121.*

3 What things may be made and done upon Condition. And to what things a Condition may be annexed, Or not: And how it may be made and annexed ther-unto.

It is a generall rule, That when a man bath a thing, he may condition with it as he will. Conditions in deed therefore may be annexed to things inheritable, to Frank Tenements, or to Chattels Reall and Personall: as for example. If a Feoffment in Fee, gift in Taile, or Lease for life be made of Lands or Tenements, or a grant be of a Rent, Common, or the like thing in Fee-simple, Fee-taile, or for life, these things may be done upon condition.

So a Lease for years of Land, or a grant of a Rent, &c. for years may be made upon condition. And a Lease may be made for five years on condition that if the Lessee pay to the Lessor within the first two years 100 markes, that then he shall have the Fee, otherwise but for five years. *21 H 7. 24. Perk. sect. 707. 708. &c.*

Also a Gardian in Chivalry may grant the wardship of the body and land of either of them on condition. A Tenant by statute Marchant, Staple, or Elegit may grant their estates upon condition. The Lord may grant his Seigniorie to his Tenant on condition. The Tenant for life may grant his estate to his Lessor, or him in reversion upon condition. The King may make letters Patents of denization to an Alien, or a Charter of pardon to a man for his life upon condition. Also releases and Confirmations may be made upon condition. And a submission to an award may be upon a condition. But an Institution to a Benefice, or an induction may not be on a condition. An Atturment, or an expresse Manumission of a villaine cannot be upon a condition subsequent, as it may be upon a condition precedent. And a condition cannot be released upon a condition, as some hold. But the contrary is held by others clearly, and that there is no difference between this and a release of a right, *Idco quare.* An award cannot be made on a condition as was held in *Sherers case 35 Eliz.* A Contract or sale of a Chattel personall, as an ox or the like, may be upon condition, as if *A* sell his horse to *B* that if *A* doe such an act, then that *B* shall pay 5 l. at the day agreed upon, otherwise but 4 li.

So if I agree with a Physician, that if he cure such a disease, he shall have so much, and in this case he cannot have the money untill he have done the cure. As where I promise a man 10 l. when he hath built such a house, in this case he cannot have the money untill the house be built. Also retaining of servants, delivery of Charters and divers other things may be done upon condition.

And if an Executor assent to a Legacy upon a condition; the Assent is good, but the condition is void. *Perk. sett. 121. Co. super Litt. 274. Perk. sett. 724. Co. 8: 98. Dier. 242. Co. 2. 74. Co. super Litt. 174. Perk. sett. 712. 713. Co. 4: 28.*

And conditions annexed to estates in all the cases before, howsoever they are most frequently and falsely made by deed in writing, yet it seems such conditions may be made and annexed to any estate of a thing grantable without deed without any writing at all; howsoever in some cases it cannot be well pleaded nor used without a deed, for it is a Rule, That if a condition be pleaded in any action to defeat a Freehold, the deed wherein the Condition is contained must be shewed. But of Chattels real, as Leases for years and the like, or grants of Chattels personall, a man may plead that such leases and grants were made upon condition, without shewing the deed. *Litt. sett. 365. Co. super Litt. 161. 216. Dier. & Sim. 16. Perk. sett. 715.*

And in the first case also of a condition to avoid a freehold, it may be given in evidence to a Jury, and they may finde the matter at large as it is, and so the party may have advantage of the condition without shewing any deed of it. Also the pleading of a Feoffment in Fee on condition without deed and Reentry, is good if the party confess the condition. A condition may be annexed to a limitation of uses, and thereby the same may be made void. See *Vfe. Co. 5. 40. Co. 8. 90.*

The nature of an expresse condition annexed to an estate in generall is this: That it cannot be made by, nor reserved to a stranger, but it must be made by, nor reserved to him that doth make the estate. And it cannot be granted over to another, except it be to and with the Land or thing unto which it is annexed and incident.

4: The nature of a condition in deed, and of a limitation.

And so it is not grantable in all cases; for the estates of both the parties are so suspended by the condition, that neither of them alone can well make any estate, or charge, of or upon the Land; for the party that doth depart with the estate, and hath nothing but a possibility to have the thing again upon the performance or breach of the condition, cannot grant or charge the thing at all. *Co. super Litt. 186. Perk. sett. 818. Litt. Sett. 358. Dier. 6.*

And if he that hath the estate, grant or charge it, it will be subject to the condition still, for the condition doth alwaies attend and wait upon the estate or thing whereunto it is annexed: so that although the same doe pass through the hands of an hundred men, yet is it subject to the condition still; And albeit some of them be persons priviledged in divers cases, as the King, infants, and women covert, yet they also are bound by the condition. And a man that comes to the thing by wrong, as a Disseisor of Land whereof there is an estate upon condition in being, shall hold the same subject to the condition also. *Dier. 298. Co. 8. 44. Perk. sett. 818. 819.*

And when the condition is broken or performed, &c. the whole estate shall be defeated: So that if there be a Lease for life made by deed and not by will, the remainder over in Fee, on condition that the Lessee for life shall pay ten pound to the Lessor; if the Lessee pay not this ten pound, the estate in remainder is avoided also, *Et sic e converso*, unless by speciall limitation it be otherwise provided, as if A grant by Indenture Land to B for life, the remainder to C in Fee, rendering Rent to A and his Heirs with condition that if the Rent be behind, to reenter and retain the Land during the life of B and no more, and A doth enter in the life time of B for non-payment; this doth not destroy the remainder. *Dier. 117. Co. 10. in Mary Portingtons case. super Litt. 230. Litt. sett. 374. Perk. sett. 564. f. 108. Litt. f. 224. Dier. 127. Co. super Litt. 224.*

And if Tenant for life and he in remainder joyne in a Feoffment on condition that if, &c. that then the Tenant for life shall reenter; this is good without defeating the entire estate, for regularly a condition cannot avoid a part of an estate onely, and leave another part entire; neither can the estate be void as to one person, and good as to another, (except it be in case of a condition annexed to an estate limited by way of use, as in *Frances case*, Co. 8. 90.) And yet if A make a gift in tail to B, the remainder to B in Fee upon condition not to alien, and B doth alien; this doth defeat the estate taile onely, and not the remainder. Also the whole estate of the whole, and not of some part only, shall be avoided, except by agreement the condition be specially restrained to some part, and the reentry given in that part only, as where a Feoffment is made of two acres, on condition that if such a thing happen, the Feoffor shall enter into one of them. And further when he that hath right doth reenter by force of such condition, he shall avoid all charges and incumbrances put upon the Land after the condition made, for he that doth enter into Land by force of such a condition, must have it again in the same plight as it was when he parted with it. And finally, a condition for the most part will not determine the estate without entrie or claim. So that howsoever a limitation hath much affinity and agreement with a condition, and therefore it is sometimes called a condition in Law, both of them doe determine an estate in being before, and a limitation cannot make an estate to be void as to one person, and good as to another, as if a gift be made in taile to one and his Heirs males, untill he doe futh anything, and then his estate to cease and goe to another: yet herein they differ. 1. A stranger may take advantage of an estate determined by limitation, and so be cannot upon a condition. 2. A limitation doth always determine the estate without entrie or claime, and so doth not a condition. see *Brown. 1 part 31. Co. 4. 121. Dier. 127. Perk. sect. 840. See Infra. Litt. sect. 380. Co. 9. 128. 8. 17. 6. 41. Blom. 413. Cp. 10. 40. Dier 300. Litt. sect. 90.*

Conditions annexed to estates are sometimes so placed and confounded amongst covenants, sometimes so ambiguously drawn, and at all times have in their drawing so much affinity with limitations, that it is hard to discern and distinguish them. Know therefore that for the most part Conditions have Conditionall words in their frontispice, and doe begin therewith, and that amongst these words there are three words that are most proper, which in and of their own nature and efficacy without any addition of other words of reentry in the conclusion of the condition that doe make the estate Conditionall, as *Proviso, Ita quod, and sub condicione*. And therefore if A grant Lands to B, To have and to hold to him and his Heirs, Provided that, or so as, or under this condition, that B doe pay to A Ten pound at Easter next; this is a good condition, and the estate is Conditionall without any more words. But there are other words, as *Si, si contingat*, and the like, that will make an estate Conditionall also, but then they must have other words joined with them, and added to them in the close of the condition as that then the Grantor shall reenter, or that then the estate shall be void, or the like. And therefore if A grant Lands to B, To have and to hold to him and his Heirs, and if, or but if it happen the said B doe not pay to A Ten pound at Easter, without more words, this is no good condition, but if these or such like words be added, that then it shall be lawfull for A to reenter, then it will be a good condition. Co. 2. *Lord Cromwells case*. 10 *Mary Portingtons case*. Co. super Litt. 204. 27. H. 8. 16. Litt. sect. 328. 329. 330. 331.

But here note that these words *Proviso, Ita quod, and sub condicione*, albeit they be the most proper words to make conditions, yet doe they not always make the estate by the deed to be Conditionall, but sometimes doe serve for other purposes; for the word *Proviso* hath divers operations besides; for sometimes it doth serve for, and work a qualification or limitation, and sometimes it doth serve to make and work a covenant onely. And then only (being inserted amongst the covenants of the deed) it doth make the estate Conditionall, when there are these things in the case. Co. super Litt. 146. Co. 2. 70. Dier 152. 311. Litt. Bro. 256. Dier 6. 222. Plow. 136. 5 H. 7. 7. Perk. sect. 732.

In A.

1. When

3 When an estate shall be conditionall. And what words will make a condition. And what not. And how a condition may be known from a covenant, or limitation. *Proviso, Ita quod sub condicione. Si. Si contingat.*

1. When the clause wherein it is, hath no dependance upon any other sentence in the Deed, nor doth participate with it, but stands originally by and of it self. 2. When it is compulsory to the Feoffee, Donee, &c. 3. When it comes on the part, and by the words of the Feoffor, Donor, Lessor, &c. 4. When it is applied to the Estate, and not to some other matter, as if one grant a Manor with an Advowson appendant, and after the *Habendum* and reservation of Rent amongst the Covenants, there is this clause inserted, [Provided that the Grantee shall regrant the Advowson for the life of the Grantor] this is a good Condition. And thus it may be also a Condition, and a Covenant: As if the words run thus; Provided always, and the Feoffee &c. doth covenant &c. that neither he nor his heirs shall do such an act, this is both a Condition and a Covenant. But if the clause have dependance on another clause of the Deed, or be the words of the Feoffee, &c. to compel the Feoffor to do something, then is it not a Condition, but a Covenant only: As if there be in the Deed a Covenant, that the Lessee shall scour the ditches; and then these words follow, [Provided that the Lessor shall carry away the earth:] Or there is a Covenant, that the Lessee shall repair the Houses; and then these words follow, [Provided that the Lessor provide Timber.] So if this clause be applied to some other thing, and not to the thing granted, then it is no Condition; as if a Lease of Land be made rendring Rent at B. Provided, that if such a thing happen, it shall be paid at C. this doth not make the Estate conditional. Or a Lease is made for years without impeachment of Waste, *proviso quod non prosterneat domus voluntarie*; in this case howsoever this doth make the privilege, yet doth it not make the Estate conditional. Or a Lease is made for years rendring Rent, provided that the Lessor shall not distrain for the Rent; in this case this is a good Condition, but not annexed to the Estate. So if in a Deed of Bargain and Sale of Land, after the *Habendum*, there are these words, *viz.* upon these Conditions following, *viz.* That if the Vendor pay the Vendee twenty pounds at Easter, and enfeoff him of the Meadow called S. before Whitsuntide, that the Bargain shall be void: Provided nevertheless, that the Bargainor shall hold the Land for 20 years without let of the Bargainee; it seems this *Provided* in this case doth not make a Condition. So if a Lease be made of a House, and amongst the Covenants these words are inserted, [Provided also, that if the Lessor will dwell upon it, or keep it in his hands, then the Lessee, his Executors and Assigns doth covenant upon one years warning to remove and give place to the Lessor, this Lease notwithstanding;] it seems this is no Condition, but a Covenant only, *Dyer* 318. 27 H. 8. 15. *Bro. Condition* 7. If a Lease be made, provided that if the Rent be behind, without any more words; this is no good Condition, *Curia Pasch.* 14 Jac. Br. in the Case of *Muddy*. Co. super Lit.

Covenant.

Proviso, sometimes makes a Condition: As if one lease Land, Provided that the Lessee shall not alien without the assent of the Lessor, under pain of Forfeiture. Sometimes it is taken for an Explanation: As if I have two Manors called Dale, and I lease to you the Manor of Dale, Provided that you shall not have my Manor of Dale in the occupation of I. S. Sometimes for a Covenant: As if one lease a House, and the Lessee covenant to keep it in Repair, provided that the Lessor shall find great Timber. Sometimes for an Exception: As if I lease to you my Messuage in Dale, Provided that I will have such a Chamber my self. Sometimes for a Reservation: As if I make a Lease rendring Rent at such Feasts as J. S. shall name, Provided that the Feast of S. Michael be one. *Goldsb.* 13. 1 pl. 27. See more, *Brownl.* 1 par. 45. 170. 2 par. 150.

The word *si* also doth not always make a Condition; for sometimes it makes a limitation, as when a Lease is made for years, if J. S. shall live so long.

There are other words also, that in the Kings Grant, in last Wills and Testaments, and other special cases do make Conditions; as, *ea intentione, ad effectum, propositum, intentionem, Paying*, and the like. So that if one devise his Land to J. S. *ea intentione, &c.* that he shall pay to W. S. Ten pounds, or paying, or so as he pay to W. S. Ten pounds, or to sell, &c. these are good Conditions. But these words regularly do not make a Condition when they are used in Deeds.

And

And therefore if one make a Feoffment in Fee *ea intentione, ad effectum, &c.* that the Feoffee shall do, or not do such an act; these words do not make the Estate conditional, but it is absolute notwithstanding. And yet perhaps these words being conjoined with some others, may make a Condition; as if Lands be granted *ea intentione quod si defeceris, &c. tunc quod reintrabis*, or the like. *Co. super Lit. 236, 237. Doct. & Stu. 122. Dyer 138. Plow. 142. 7 H.4. 22. Co. super Lit. 204. Ca. 10. 42. Dyer 318. Doct. & St. 34. Idem 94. Dyer 6. 91. 63. 92.*

Also Conditions are sometimes made, especially in Estates and Leases for years, without any of these formal words; when the apparent intent of the Lessor is to make the Estate conditional, albeit the words be not used as the words of the Lessor, but as the words of the Lessee, or indefinitely of neither. And therefore it hath been said, That if an Indenture be made between A. and B. thus: It is agreed and covenanted between the parties aforesaid, that B. shall have the Land for years, and that he shall not alien it; that this Estate is conditional. But it seems this is not Law. But if this clause be inserted amongst other Covenants, viz. If the Lessee hinder the Lessor to sell, cut, and carry away the Trees upon the Lands devised, that the Lessor may re-enter, and the Lease shall be void; this is a good Condition, and so it hath been adjudged in the case of *Howard and Fletcher*, Hil. 3 Car. B. R. And if a Lessee for years do covenant in his Lease, that if he; his Executors or Assigns shall alien, that it shall be lawful for the Lessor to re-enter; it seems this is a good Condition, and not a Covenant only. And if a Lease for years be made, and this clause is inserted in the Deed: It is agreed between the parties, That if the Lessee do not pay Ten pounds to the Lessor at Easter, from thenceforth the Lease shall be void; this is a good Condition. And if a Lease be made with this clause inserted in the Deed: It is agreed, That whosoever shall have the Estate or Interest, that he or they shall find Sureties within the year for the Rent, otherwise the Estate shall cease; it seems this is a good Condition. *Dyer 86. 65. Curia M. 37. 38. Eliz. B. R.* And if a Lease for years be made with this clause inserted, And that it shall not be lawful for the Lessee to alien without licence of the Lessor, under pain of Forfeiture; this is a good Condition. And if a Lease for years be made of a House, with this clause inserted in the Deed, And the Lessee shall continually dwell upon the same House, upon pain of Forfeiture of the said Term; this is a good Condition, *Dyer 79. 27. Co. super Lit. 204. Plow. 132.* And if in a Lease for years, the Lessee covenant to pay so much Rent, and then these words are inserted; And if it shall happen the said yearly Rent, &c. then the Lessee doth covenant and grant, &c. that the Lease shall be void; it seems this is a good Condition, and so hath it ever been taken, as was said by *Just. Dodridge*, Hil. 3 Car. And in all these cases the Estate is conditional. But in cases of Feoffments in Fee, Gifts in tail, and Leases for life, it seems words penned in this manner will not make Conditions; but that in these cases the precise and formal words of a Condition are requisite. And therefore that if a Feoffment be made by Deed, and therein is inserted this clause; That it is agreed, or that the Feoffor doth covenant, that if the Feoffee do such an act, that the Feoffor shall re-enter; this is no Condition, nor the Estate hereby made conditional. And yet see *Perk. sect. 744. Co. super Lit. 204. Doct. & Stu. 94. Dyer 65. 138.*

If one make a Lease for years on condition to pay Rent at four Feasts; and after there is a clause in the Deed, And if the Rent shall be behind, &c. that he shall distrain; this clause doth not take away the Condition, but the same doth continue, and the Estate is conditional still, *Dyer 348.* See more in the next Question.

In the making of Estates, the Cause is regarded: And in case of the Grant of Lands or Tenements, *Causa* doth sometimes make a Condition; as if a woman give Lands to a man and his heirs, *causa matrimonii prolucuti*; in this case if she either marry the man, or the man refuse to marry her, she shall have the Land again to her and her heirs. But on the other side, if a man give Land to a woman and to her heirs *causa matrimonii prolucuti*, though he marry her, or the woman refuse, he shall not have the Lands again to him and his heirs. And in the case of a Grant executory, the word *pro* may make a Condition. *Co. super Lit. 204. 10. 42. Plow. 141: 9 Ed. 4. 19. 15 Ed. 4. 2. Dyer 6.*

And

And therefore if a man grant me an Annuity *pro una acra terre*, or *pro decimis*, &c. or if he grant me an Annuity for a way, or a gutter through my ground, this is Conditionall, and if he be disturbed in the way, acre, of Land, Tithes, or Gutter, he may refuse to pay the Annuity. So if an Annuity be granted to an Officer for the executing of his Office, or *pro consilio impendendo*, if the Grantee doe not execute the Office, or give counsell, &c. the Annuity shall cease. But if one grant me Tithes or an Annuity, and I grant an Annuity for these Tithes, or grant to give counsell for the Annuity; it seems the Grants that are in this manner are not Conditionall, but absolute. So if I *pro consilio*, &c. or *pro una acra terre* &c. make a Feoffment in Fee, or Lease for life of another acre, these estates are not Conditionall. And if one devise Land to be sold by his Executors, and to be distributed for his soul; by this it seems the estate or power of the Executors is Conditionall. So if one devise his Land to find a Preacher or a Chaplain. But otherwise it seems it is of Land so conveyed by Deed in a mans life time. And if a Feoffment be made of Land *ad erudiendum filium*, some have said this estate is Conditionall, *Dier* 7. 127 see *Testament. Plow.* 141. 142.

Testament.

The most apt and proper words to make a limitation of an estate are *Quamdiu*, *Dummodo*, *Dum*, *Quousque*, *Si*, and such like. And therefore if A grant Lands to B, To have and to hold to him and his Heirs, untill B goe to Rome. or untill he be promoted to a Benefice, or untill B pay to A, or A pay to B twenty pound, or so long as I. S. shall live, or if A grant Lands to B, To have and to hold to him, his Executors, &c. if I. S. and I. D. shall live so long. Or if A grant Lands to B, To have and to hold to him for the life of T. So that B, pay 20 pound to A at Easter following; these are not Conditionall, but limited to estates. So if A grant Lands to B To have and to hold to him for so long as he shall keep himself a Widower, or *dum sola fuerit*, or *durante viduitate*, if the Grantee be a Widow, these are good limited estates, but these words doe not make the estates to be Conditionall. *Co.* super *Litt.* 234. 235. *Co.* 19. 42. *Plow.* 413. *Litt. sect.* 90. *Dier* 290.

Limitation.

If the words in the close, or conclusion of a condition bee thus, that the Land shall return to the Feoffor, &c. or that he shall take it again and turn it to his own profit, or that the Land shall revert, or that the Feoffor shall *recipere* the Land, these are either of them good words in a condition to give a Reentry, as good as the word *reverter*, and by these words the estate will be made Conditionall. *Dier* 125, *Plow.* 159. *Perk. sect.* 749.

The Tenant by the curtesy, the Tenant in Taile after the possibility of issue extinct the Tenant in Dower, the Tenant for life, the Tenant for years, by Statute, or Elegg, Guardian, &c. doe hold their estates subject to a condition in Law, so that if either of them Alien his Land in Fee, or claime a greater estate in a court of Record then his own, he doth forfeit his estate, and he in Remainder or Reversion may enter, and if such a Tenant doe wast, he in Reversion shall recover the place wasted. The Tenant in Fee-simple doth hold his estate subject to a condition in Law, so that if he Alien his Land in Mortmain, he doth forfeit it, and the Lord may enter upon him. So also he that doth take Land in exchange doth hold it under a condition in Law, viz. that if the Land he give in Exchange for that Land be recovered from him that hath it, that he shall enter upon his own Land again. Also every Officer that hath to doe in the Administration of Justice, all Keepers of Parks, Stewards, Beadles, Bailiffes, and such like hold their Offices under a condition in Law; so that if they doe not duly execute it, and doe all that thereunto doth appertain, they may forfeit them, and the Grantor may put them out. *In quo quis delinquit in eo est de jure puniendus.* *Co.* super *Litt.* 233. 234. *Co.* 8.

6 What shall be said a condition in Law. And when an estate shall be subject to such a condition.

7 What shall be said a good condition in a deed or limitation in his Original creation. And what not. For the manner, and frame, and order of making of it.

44. To every good condition is required an externall form. i. Words to declare an intent in the party to have the estate Conditionall, as in the cases before.

And an internall form, that is, such matter as whereof a condition may be made.

As

As to things executed, the condition must be made and annexed to the estate at the time of the making of it, but as to things executory, it may be made afterwards. And if the condition be made in another deed, and not the same deed wherein the estate is made, if it be delivered at the same time it is as good as if it were contained in the same deed. And therefore if a man make a Feoffment, Lease, or the like, by one deed absolute, and at the same time make another deed of Rescance or condition, and deliver both together, this is a good condition, and will make the estate Conditionall. But if the Rescance be sealed and delivered before, or after the Deed, *contra*. And therefore if one make an absolute Feoffment in Fee, and before or after the sealing or delivery of that Deed the Feoffor declare himself by Deed: or the Feoffor and Feoffee agree by deed that the estate made before, or to be made after, shall be Conditionall, yet this is not Conditionall. And yet if an Annuity be granted absolutely by one Deed, and after the Grantee grant to the Grantor, that if the Grantor doe such a thing, the Annuity shall cease: in this case the Annuity is Conditionall. *Perk. Sess.* 717. *Co.* 1. 113. *Plow.* 133. *Co. super Litt.* 146. 217. *Co.* 2. 71.

A condition may be annexed to an estate by way of use, as if a Feoffment be made to a *A*, to the use of *B*, and his Heirs, on condition that *B* shall pay to the Feoffor twenty pound such a day; this is a good condition. So if one Covenant to stand seised of Lands to the use of *B* and his Heirs, on condition that if he pay him Ten pound, the use shall be void, or the like. Also a condition may be annexed to an estate created by Will, as if one devise Land to *J. S.* for his life, Provided that he pay ten pound yearly to *J. D.* this is a good condition. Whereof see in *Testament*, *Co.* 146. *Hil.* 40. *Inc. B. R. Warners case*: *Co.* 1. 112. *Albanes case*, *Dier* 126, 348.

A Rent, or any such like thing may be granted on condition, that if such a thing be or be not done, the Rent shall cease for a time, and then revive again; and this condition is good. But in case of Land it is otherwise, for that cannot be granted after this manner. Also a condition to make an estate void for a part of the time is not good. And therefore if a Feoffment be on condition, that upon such a contingent the Feoffor shall enter and have the Land for a time, or the estate shall be void for a part of the time; or make a Lease for Ten years, provided that upon such a contingent it shall be void for five years; these conditions are not good. And yet if a Feoffment be made of two acres, provided that upon such a contingent the estate shall be void as to one acre onely; this is a good condition: *Co.* 8. 17. 24. *Ed.* 3. 29. *Co.* 1. 86. *Perk. Sess.* 718. *Co.* 4. 121. *Dier* 6.

A condition that a stranger, or the Heir of the Feoffor shall doe an act is good, as if a Feoffment be made to *J. S.* on condition that *J. D.* shall pay to the Feoffor, Ten pound at Easter next; or if a Feoffment be made on condition that if the Heir of the Feoffor pay Twenty shillings to the Feoffee, that the Feoffor and his Heirs shall reenter. But a condition to give a stranger a reentry is void so far forth. And therefore if an estate be made upon condition, that upon such a contingent a stranger shall enter, or the estate shall cease, and another shall have it; howsoever this may be so drawn, as it may be a good condition to give him his Heirs, &c. that doth make the estate an entry, yet it cannot be good to give the estate or the entry to the stranger. So if a Feoffment be made on condition that upon such a contingent the Feoffor and a stranger, shall enter; this is not good to give an entry to the stranger, but it is good to give the Feoffor a reentry, And yet by will a man may devise a Terme after this manner. *Co. super Litt.* 214: *Duch. & Stud.* 94. 159. 160. *Co. super Litt.* 379. *Co.* 1. 84. *Dier.* 33. 21 *H.* 7. *Dier* 4. *Co.* 8. 95.

If a man Enfeoffe another, upon condition that he and his Heirs shall render to a stranger and his Heirs a yearly Rent of Twenty shillings, &c. and if he faile of payment thereof, that the Feoffor shall reenter, albeit this as a reservation of Rent is meerly void, and the condition that doth call it a Rent, is meerly mistaken, yet the condition is good, and *ut res valeat*, the words shall be taken contrary to their proper sense. *Co. super Litt.* 213.

If I infeoffe I S. of land on condition that if I D. give to him ten pound, or goe to Rome before such a day &c. that then the feoffee shall pay to me ten pound &c. this is a good condition. *Perk. Sett. 798.*

If a feoffment be made to one and his heirs, on condition that if the feoffee pay to the feoffor ten pound, hee shall have the fee of land; this is not a good condition.

But if he say further, And if he fail to pay that, the feoffor shall reenter, this is good. *Co. super Litt. 207.*

If a gift in tail be made to a man and the heirs of his body, and if he die without heirs of his body, that then the donor and his heirs shall reenter; this is a void condition, for when the issues fail, the estate is at an end. *Co. super Litt. Sett. 324.*

A man makes a lease for years rendring Rent on Condition with a Covenant that the lessee shall repair the house with other Covenants. And after he devise the same land to the lessee for more years rendring the like Rent and under the like Covenants as in the first lease the Remainder in fee to another; in this case there is no Condition made by the devise to give Entre to him in Remainder. *Goldb. 74. Pl. 1.*

Conditions that are so penned, as they are insensible and altogether incertain are void. as if one make a lease on condition that if the rent be behinde to restrain, and if there be not sufficient, the ground to enter into the premises, this condition is void for insensibility, and the estate is absolute. *Et sic de similibus. Muddy & Gardners case. Adjudge pasche 14. Jac. B.R.C. 6. 41.*

A condition to enlarge or encrease an estate may be good, as if a gift be made in tail, or a lease be made for life or years, on condition that if such an act be done or not done, the lessee shall have the land to him and his heirs, as if one make a lease for life to one, and if the lessor die without heir of his body, then he doth grant the land to the lessee and his heirs for ever. Or if land be granted to a man for 5 years, on condition that if the grantee pay to the grantor within the two first years ten pound, then that he shall have the fee-simple; otherwise that he shall have the land but for five years, and livery of seisin be made according to the deed; this is a good condition, and by this upon the performance of the condition the fee-simple will passe. *Co. 3. 75. Plow. 477. 481. Litt. Sett. 350. Perk. Sett. 710. Plow. 135. 10. Aff. pl. 15. Perk. Sett. 745. 707. Plow. 25. Litt. Sett. 707. 350. Plow. 272. 482. 483. 4. H. 7. 4. See more in the Lord Staffords Case, Co. 8. 73.*

So if one grant land for five years rendring rent, and that if the lessee will hold it over to him and his heirs, that he shall pay twenty pound rent; this is a good condition, and if he pay the rent, he shall have the fee-simple. So if a man make a lease for years, and at the same time for the surety of the terme to the lessee makes a feoffment to him upon condition that if he be disturbed in his term, hee shall have the fee-simple of the land, and deliver both these deeds at one time, and give livery of seisin accordingly; this is a good condition. So if a lease for life be made upon condition, that if the lessor or his heirs pay to B or his heirs, ten pound at a certain day, that then the lessor may reenter, and if he doe not pay it at that time, and the lessee pay to the lessor or his heirs ten pound at a certain day, after the former day, that then the lessee shall have the land to him and his heirs for ever; this is a good condition. But in all cases where these kind of conditions are good to make the increased estate good, there must be these things in the case.

1. There must be a precedent particular estate as an estate in tail for life, or years, for a foundation to erect the subsequent estate upon, and that first estate also must be certain and irrevocable, not upon contingency, or with power of revocation.

2. The privity must remain untill the time of the performance of the condition, for if the donee or lessee doe grant away the first estate, the condition cannot afterwards be performed to effect and produce the encreasing estate.

3. The subsequent estate must vest *eo instanti*, when the contingency upon which the condition dependeth, shall happen or never.

4. The first and second estate must take effect by one and the same deed, or else by two deeds delivered at the same time; for *qua incontinenti sunt in se videmus*.
 5. The condition upon which increase is, must be possible and lawfull, for upon an impossible condition it cannot, and upon an unlawfull condition it shall not increase: see *Browl. 2 parts 324. 225. 349. 250.*

Covenant.

If one make a Lease for life, provided that if the Lessee die within sixty years, that his executors shall have the Land for so many of the sixty years as shall be to come at the time of his death; this is no good condition to make the estate to increase, but it may be a Covenant. And if a lease for years be made, on condition that if the Lessor sell the reversion of the same land, the Lessee shall have the Fee of it; this is no good condition to increase the estate. And a possibility cannot decrease upon a possibility, as a Lease for years to a Lease for life by one covenant, and the Lease for life to a Fee-simple by another. And if a Lease be made to a man and a woman for their lives, on condition that which of them two shall first marry, that one shall have the Fee & they intermarry; in this case neither of them shall have the Fee for uncertainty. *Co. 1. 155. Dier 150. Co. 84. Co. 8. 75. Co. super Litt. 218.*

To abridge an estate.

If a man make a Lease for life, and add this condition, that if the Lessee within one year doe not pay twenty shillings, that he shall have but a Term of two years, and he doe not pay the 20^s. by this his Lease for life is gone, and he hath now but a Lease for two years. *Co. super Litt. 218. 50 Ed. 2. 27.*

2. For the matter and substance of it.

If a Lease be made, on condition that if a stranger dislike it, or be discontented with it, that the Lease shall be void; this is a good condition. *1 H. 8. 13.*

Prerogative.

If a Lease be made, on condition that if the Lessee be outlawed, the Lease shall be void; it seems this is a good condition. *Hil. 6 Jac. B. R. Curia.*

If a Feoffment be made, on condition that if the Feoffee commit treason, that the Feoffor shall reenter; in this case the condition is vain; for if the Feoffor enter, his entry is not lawfull, for the King is intitled, and his title shall be preferred. *Trin 3 E. 6. per Curiam.*

Testament. Use.

No condition or limitation, be it by act executed, limitation of a use, or by devise, or last Will, that doth contain in it matter repugnant, and tending to the utter subversion of the estate, or matter that is against Law, or matter that is impossible to be done is good. And therefore in all such cases if the condition be subsequent, the estate is absolute, and the condition void: And if the condition be to goe before the estate, the estate and the condition both are void. *Co. 1. 83. 6. 43. Co. 9. 128.*

Repugnant conditions. To restrain Alienation.

If a Feoffment or other conveyance be made of Land, or a grant of Rent, &c. in Fee-simple by deed or will, upon condition that the Feoffee or Grantee shall not alien to certain persons, as to *J. S.* or to *J. S. and W. S.* this is a good condition, So if one make a Feoffment in Fee of Land, on condition that the Feoffee shall not alien it in Mortmain; this is a good condition. So if *A* be seised in Fee of black acre, and *B* doth infeoffe *A* of white acre in Fee, on condition that he shall not alien black acre; this is a good condition. But if the condition be that the Feoffee or Grantee shall not alien the thing granted to any person whatsoever, or that if he doe alien to any person, that he shall pay a fine to the Feoffor; these conditions are void in the case of a common person as repugnant to the estate. But in case of the King, such conditions are good. And in the cases of a common person also the alienation is good until it be avoided by the Feoffor. And in *Pasc. 19 Jac. B. R.* it was held by Just. *Dodridge and Chamberlain*, that if a Feoffment be on condition that if the Feoffee alien, he shall pay 10 l. to the Feoffor; that this is a good condition; but Ch. Just. and Just. *Haughton* held the contrary, for then this shall be a circumvention of the Law. If a gift had been made to an Abbot, and his successors, on condition not to alien; this had been a good condition. *Co. super Litt. 223. Bragge and Tanners case. Dolt. & St. 124.*

Prerogative.

If one make a Feoffment of Land to an infant, on condition he shall not alien to any person; this is a good condition during the minority of the infant, but not afterwards. In like manner as if one make a Feoffment to a husband and wife, on condition they shall not alien; this condition to some intent is good, *i.* to restrain alienation by Feoffment or deed, and to some intent repugnant and void, *i.* to restrain alienation by fine, for that is lawfull.

So

So if a gift be made in tail, on condition that the Tenant in tail may alien for the profit of his issues; this is a good condition. And so if Land be given in tail, upon condition that the Tenant in Tail or his Heirs shall not alien in Fee-simple, Fee-tail, nor for the Term of any others life, but for their own lives; this condition is good *Co. super Litt.* 224. 10 H. 7. 11. 13 H. 7. 23. *Co.* 10. 30. *Perk. sett.* 739. 21 H. 6. 33.

But if Lands be given in tail on condition, that the Tenant in tail, or his Heirs in tail shall not suffer a common Recovery, levy a fine with Proclamations according to the Statutes of 4 H. 7. and 31 H. 8. to bar the issues, or on condition that he shall not make Copyhold estates of Copyhold Land, according to the custome of the place; or make Leases according to the Statute of 31 H. 8. ca. 28. these conditions are held to be repugnant, and for that cause void. And yet see, for the last of these cases the opinion in *Co. super Litt.* 223. to be contrary, and that a condition to restrain the making of such leases is good; for this power is not incident to the estate, but given to him collaterally by the Statute, and *Quilibet potest renunciare juri pro se introducto*. But *contra curia* in *Mary Portingtons* case is against him. If a man make a gift in tail to A the remainder to him and his Heirs, on condition that he shall not alien; this condition as to the estate tail is good, and void as to the other. And therefore if an alienation be, he shall defeat it only as to the estate tail. And if a man make a gift in Tail on condition that the Donee or his Heirs shall not alien; this is a good condition to some intents, and void to others; and therefore if he make a Feoffment in Fee, or any other estate by which the reversion is discontinued tortiously, the Donor shall enter; otherwise if he suffer a common recovery. And a gift in tail, on condition that the Tenant in tail shall not make a Lease for his own life, is not a good condition, by *Co.* 6: 43. against *Co. super Litt.* 223. If one seised in Fee of Land, and make a Lease of it for years or life, on condition that the Lessee shall not alien the Land leased, or any part thereof during the Term, or on condition that he shall not alien it, or any part of it, during the Term without licence of the Lessor; these are good conditions. So if one be seised in Fee of a Manor, and he make a Lease of years of it to I. S. on condition that he shall not make voluntary estates by copy; this is a good condition. But in a Feoffment in Fee such a condition is repugnant and void. And if one be possessed of a Lease for years, or of a house, or of any other chattel reall or personall, and he give or sell all his interest therein, upon condition that the Donee or Vendee shall not alien the same; this condition is void for repugnancy, and the gift or sale is absolute. *Dier.* 48. *Co.* 6. 43. *Co. super Litt.* *Idem Dier.* 227. *Co.* 6. 43. *Co.* 6. 43. 4. 84. *super Litt.* 223.

If one make a Feoffment of Land in Fee, on condition that the Feoffor shall retain the Land for twenty years without interruption; it seems this is a good condition and not repugnant. *Co.* 1. 72. *Dier.* 318.

If I grant Land to another for life, if it shall please me so long to suffer him; it seems this condition is repugnant and void. *Dier.* 94.

If a Feoffment be made of Land in Fee, on condition that the Feoffee shall not enjoy the Land, or shall not take the profits of the Land, or on condition that the Heir of the Feoffee shall not inherit the Land, or condition that the Feoffee shall not doe waite, or condition that his wife shall not be endowed; in all these and the like cases the condition is void as repugnant to the estate. *Co.* 10. 39. *super Litt.* 206. *Plow.* 77. 133. 21 H. 7. 8. 8 H. 7. 10. *Perk. Sett.* 731.

If a gift in tail be made, on condition that the Donee or his issues shall not take the profits of the Land, or on condition that if the Donee die, his estate shall go unto another, or on condition that their Wives shall not be endowed, or on condition that they shall not do waite, or on condition that warranty and assets or a collaterall warranty shall not bar the issues in tail; all these conditions are repugnant and void. *Co.* 6. 41. 184. *super Litt.* 224.

If Lands be given or granted to two and their Heirs, on condition that the survivor shall have the whole notwithstanding partition, or on condition that the survivor shall not have the whole albeit there be no severance; these conditions are repugnant and void. *Co.* 1. 84.

If one make a Lease for life, on condition that the Lessee shall not doe fealty; this condition is not good. *Perk. felf. 71.*

If Lands be given to one and the Heirs males of his body, provided that if he die without Heirs, Females of his body, that the Donor shall reenter; this condition is repugnant and void. *Co. Super. Litt. 264.*

If one have Land in possession, or reversion, and he grant a Rent out of it, on condition that the grant shall not charge the person of the Grantor; this is a good condition, and not repugnant. But if a man grant a bare Annuity, or grant a Rent charge, out of another mans Land with such a condition, or if one grant a Rent charge, on condition that the Grantee shall not distrain nor charge the person of the Grantor, or if one grant a Rent out of Land, on condition that the Land shall not be charged with it; all these conditions are repugnant and void. So if two grant a Rent charge out of Land, provided that it shall not extend to one of them; this condition is repugnant and void. *Co. Super. Litt. 146. 10 H. 7. 8. 6. 41. 5. H. 7. 7. H. 8. 44. Perk. felf. 732.*

If a man seised in Fee of Land make a Lease for years rendring Rent, and after the Lessee makes a Lease to the Lessor of other Land, on condition that he shall not distrain for his Rent in the former Lease made to this Lessee; this is a good condition, and not repugnant. *Perk. felf. 733.*

If one make a Feoffment in Fee, or Lease for life, with warranty, on condition that the Feoffee or Lessee shall not vouch to warrant, nor recover in value, or if the lease be made without impeachment of waste, on condition that if the Lessee do waste the Lessor shall reenter; these are good conditions and not repugnant. *Perk. felf. 734. Dier 47.*

Conditions against Law.

All Conditions annexed to estates being compulsory, to compel a man to doe any thing that is in its nature good, or indifferent, or being restrictive, to restrain or forbid the doing of any thing which in its nature is *malum in se*, as to kill a man, or the like, or *malum prohibitum*, being a thing forbidden by any Statute, on the like; all such conditions are good, and may stand with the estates. But if the matter of the condition tend to provoke or further the doing of some unlawfull act, or to restrain or forbid a man the doing of his duty; the condition for the most part is void.

And therefore if Lands be given or granted to a man, upon condition, that he shall kill a man, or upon condition that he shall burn his neighbours house, or upon condition that he shall forswear himself, or upon condition that he shall save and keep harmless the Grantor whatsoever he shall doe, or that if he doe not these things, the grant shall be void; this condition is void. Or if Lands be given or granted to an Officer, upon condition that he shall not duly execute his Office; this condition is against Law, and void: *Et sic de similibus*. So if a gift be made in tail, upon condition that the Donee shall discontinue, or one give or grant Land on condition that the Grantee shall be a foretaller against the Statutes; these and such like conditions are void. And hereupon it is, that conditions annexed to Land, that the profits thereof shall be employed to superstitious uses are void. And hence also it is that such conditions as are against the Liberty of Law, as that a man shall not marry or the like, are void. And hence also such as are against the publique good. And therefore it seems if one grant his Land to I. upon condition that he (being a husbandman) shall not sow his errable Land this condition is void. And in all these cases if the condition be subsequent to the estate, the condition only is void, and the estate good and absolute; if the condition be precedent, the condition and estate both are void; for an estate can neither commence nor encrease upon an unlawfull condition. *see Brownl. 2 part 138. 139. Co. Super. Litt. 223. 224. 207. Perk. felf. 722. 723. Perk. felf. 727. Co. 1. 24. 6. 43. Dier. 343. Co. Super. Litt. 206. Co. 11. 53. 7 E. 3. 60. Perk. felf. 722. 725.*

Conditions impossible.

All conditions annexed to estates that contain in them matter at the time of making of them impossible to be done are void. *Co. 6. 41. Super. Litt. 207. 219. 206. Dier. 252. 262. Plow. 152. Perk. felf. 935. 729. Plow. 272. 286. Co. 1. 84. Super. Litt. 207.*

And

And therefore if one give or grant land on condition, that a man shall go to Rome in three days, or condition that a man shall infeoffe a corporation, when there is none such, or if one give lands in tail, on condition that the estate shall cease, as if the tenant in tail be dead, or if one grant lands, on condition that a man shall infeoffe his wife, all these and such like conditions are void. And in these cases also, if the condition be subsequent, the condition is void onely, and the estate is absolute, and if the condition be precedent, the condition and the estate both are void, for an estate can neither commence, nor increase upon an impossible condition. And if the thing to be done by the condition be possible at the time of the making of the condition, and doe afterwards by the act of God become impossible, the condition is become void, and the estate absolute, as if a feoffment be made, on condition that the feoffee shall before Easter following infeoffe the feoffor, and the feoffee die before the day, or on condition that the feoffee shall appear in such a Court before or at Easter, and he die before the time; in these cases the condition is gone, and the estate is absolute.

And the same Law is for the most part of Limitations, if they be repugnant, impossible, or against Law, as is before shewed to be of Conditions. See more in the next division following. Co. 41. 1. 84.

Limitation.

It is a general rule, That such conditions annexed to estates as goe in defeasance, and tend to the destruction of the estate being odious to the Law, are taken strictly, and shall not be extended beyond their words, unless it be in some speciall cases. And therefore if a lease be made, on condition that, if such a thing be not done, the lessor [without any words of heirs, executors &c.] shall reenter and avoid it; in this case regularly the heir, executor &c. shall not take advantage of this condition. So if one make a lease for years of a house, on condition that if the lessor shall be minded to dwell in the house, and shall give notice to the lessee, that hee shall depart; in this case if the lessor die, his heir, executor, &c. shall not have the like advantage and power as the lessor himself, for the condition shall not be extended to them. And hence it is, that if a lease for years be made, on condition that the lessee shall not alien without the licence of the lessor; in this case the restraint shall continue only during the lives of the lessor and the lessee, and no longer. And yet this rule hath an exception, for if a man mortgage his land to W. upon condition that if the mortgagor and J. S. pay 20s. such a day to the mortgagee, that then he shall reenter, and the mortgagor die before the day; in this case J. S. may pay the money and perform the condition. But otherwise it is whiles the mortgagor doth live, for in that time J. S. alone without him may not tender it, and if he do, this tender is no performance of the condition. And in case where a condition doth tend to create an estate, there it shall have the most favourable exposition that may be, and therefore in that case albeit the words be not satisfied, yet if the intent be satisfied, it sufficeth. And therefore if one make a feoffment in fee, on condition that the feoffee shall make an estate back again in tail to the feoffor and his wife before such a day, and before that day the feoffor die; in this case the condition shall be performed as neer to the intent as may be; & therefore if the condition be, that he shall make the estate to them two *Habendum* to them and the heirs of their two bodies engendred, the remainder to the right heirs of the feoffor, the estate shall be made to the wife for life without impeachment of waste, the remainder to the heirs of the body of the husband begotten on the wife. And if A. infeoffe B. on condition that B. shall make an estate in frankmarriage to C. with such a one the daughter of the feoffor; in this case albeit an estate in frankmarriage may not be made, yet an estate shall be made to them for their lives. *Et sic de similibus. Condicio beneficiæ quæ statim constituit benigne secundum verborum intentionem est interpretanda, odiosa autem quæ statim destruit stricte secundum verborum proprietatem est accipienda.* Brownl. 1. part. 135. Co. 890 super Litt. 219. 27. H. 8. 14. Dier. 66. Co. super Litt. 219. Litt. Sect. 352 Co. super Litt. 219. Co. 860.

8. How a condition in deed or a limitation shall be taken and expounded. And how it must & ought to be performed.

1. In respect of persons.

Not to alien.

To pay money.

To make an estate.

2. In respect of time.

In all cases where a time is set for the doing or performance of the matter contained in the condition, be it to pay money, make an estate, or the like, it must be done at the time agreed upon; and set down in the condition. And

And in cases where it is to be done before a time certain, it must be done before that time, or else the condition is broken. *Co. super Litt.* 109. 208. 219. *Ca.* 2. 79. 6. 31. *Litt.* 353: *Plow.* 30: *Perk. Sett.* 155. 779. 794. 787. 793. 789. 788. 38. *Ed.* 3. 111: *Dier.* 311.

But in all cases where no time is set for the doing of the thing contained in the condition, be it to pay money, make an estate, or the like, if the act to be done, bee to be done to the party that doth make the estate; or be to be done to him and a stranger, and be such a thing as is for the benefit of him that doth make the estate, and for his benefit only, there regularly the party that is to do the thing shall have time to do it during his life, unless the party, feoffor, &c. that doth make the first estate, wherunto the condition is annexed, doth hasten the doing thereof by request: for if he request the doing thereof and set no time, it must be done within a convenient time after that request; and if he request and prefix a time convenient when he doth desire to have it done, it must be done at that time; and in these cases the condition cannot be broken without a request, so long as he to whom the estate upon condition is made be living. And therefore in this case it is not like to a condition made by a Will, for if one devise his land to *I S.* so as he pay the twenty pound to *I D.* the Testator doth owe him, and no time is set for the payment thereof; in this case he must pay it as soon as it is demanded, or he doth forfeit the land, and the heir may enter. But if the thing to be done, be to be done to a stranger, and be for the profit and benefit of a stranger only: as if a feoffment be made on condition that the feoffee shall marry the daughter of the feoffor, or on condition that the feoffee shall infeoff a stranger, and no time is set for the doing hereof, in these cases the feoffee shall not have time during his life to do it, but he must do it in a reasonable time, and that without any request at all, or else he doth break the condition. And in some special cases when the act to be done is to be done to the party himself, the party shall not have time to do it during his life, as if one grant land to *I S.* on condition that he shall grant an Advowson to the grantor for his life, or on condition that he shall grant a rent charge to the grantor during his life, to be paid at Michaelmas and our Lady day; in these cases the grant of the Advowson must be before the Advowson fall, and the grant of the rent must be before either of the dates of payment come, and that without request, else the condition is broken. And if the condition be that if *I S.* do such an act, that then the feoffee shall pay ten pound to the feoffor, else that the feoffor shall reenter, and no time is set when the feoffee must pay this ten pound; in this case it seems the payment must be as soon as the same act is done, and that without any request at all. And in case where the feoffee &c. or a stranger be to do an act, and he alone is to do it, and it doth nothing concern the feoffor &c. as to goe to Rome, or the like, there the feoffee &c. or stranger shall have time during his life to do the thing, and it cannot be hastened by request. *Perk. Sett.* 9. 798: *Co. super Litt.* 209.

If lands be granted, on condition that the grantee shall make a lease for life of other lands to the grantor, the remainder to a stranger: in this case the feoffee shall have all the time of his life to do it, if hee be not hastened by request. But if the condition be to make a gift in taile to a stranger, the remainder to the feoffor; in this case it must be done in time convenient without request. *Co. super Litt.* 210. 222.

If the King licence his tenant to infeoff *A.* and *B.* so as they give the land again to the feoffor, and the heirs males of his body, and he make a feoffment accordingly, in this case it must bee reconveyed before the death of the feoffor, or else the condition is broken.

If *A.* infeoff *B.* of black acre, on condition that if *C.* infeoff *B.* of white acre *A.* shall reenter; in this case *C.* shall have time to do this during his life, if *B.* doe not hasten it by request. *Co. super Litt.* 208.

If a lessee grant his estate to a stranger, on condition that the grantee doe get the good will of the lessor, and no time is set when he shall get his good will; it seems in this case he shall have time to get his good will during the terme, and that although he deny it at the first, yet if he grant it afterwards, that this is sufficient. *Perk. Sett.* 795.

When

To pay money.
Testament.

To marry *I S.*
To infeoff.

To grant an
Advowson or
a rent.

To pay money:

To make a lease.

To infeoff.

To get the
good will of
d. S.

When a time is set in certain for the payment of money, or the doing of any other thing generally; neither agent nor patient are bound to attend any other time. And if the thing be to be done on a day certaine, but no houre of the day is set down wherein the same shall be done; in this case they must attend such a distance of time before the Sun set, as may be convenient to doe that work in. And if the condition be to pay money at a place certain, at any time during life; in this case the money may not be tendered at any time in the place, in the absence of him that should receive it, but he that is to pay it must give notice to the other party before-hand what time he will tender it, that the other may be ready to receive it. Or if at any time the parties happen to meet at the place, a payment or tender then at that place is sufficient. And the same law is for the most part in conditions of obligations. *Lit. Sect. 342. Co. Supp. Litt. 213.*

To pay money

Obligation.

3. In respect of place.

In cases where a place is set down for the doing of the thing contained in the condition, there it must always be done at that place, unless by some agreement made between the parties, afterwards another place be appointed, otherwise the condition is not performed, and the parties are not bound to attend in any other place. But in cases where there is no place set down for the doing of the thing contained in the condition; if the thing to be done be a corporall service, as to pay money, or any such like thing, the party that is to do it must at his perill seek out the person to whom it is to be done, if he be *intraregium Anglia*: but if he be not within the kingdom, he is not bound to seek him, and yet the condition is not broken. And if the thing to be done be either locall, such a thing as must be done in or at a place certain, as the making of a feoffment of land, payment of rent, or the like; in this case the thing must be done at that very place, and a tender of doing it in that place is a sufficient performance of the condition; as for example, if a feoffment be made on condition that the feoffee shall pay to the feoffor twenty pound on Easter day at Dale; and the feoffee tender the twenty pound the same day at Sale: And albeit the feoffor be at Sale, and he tender the twenty pound to his person there the same day, yet this is no performance of the condition. And if a feoffment be made in mortgage, on condition for the payment of money at a day, and no place is set for the payment thereof, in this case the mortgagor must seek the mortgagee and tender it to his person at his perill: and tender of the money upon the land mortgaged, is not a sufficient performance of the condition. And if a feoffment be made, on condition that the feoffee shall infeoffe the feoffor of white acre in Dale; in this case the feoffment, or the tender of it must be in Dale, and cannot be elsewhere, and a tender of it there is sufficient to perform the condition. So if the condition be, that the feoffee shall in Easter Terme next acknowledge satisfaction upon a Judgement in the Kings Bench; this must be done there, and cannot be done elsewhere. So if a feoffment in fee be made of white acre, rendering rent to the feoffor and his heirs, on condition that if the rent be not paid, the feoffment to be void, and no place is set for the payment of it; in this case the feoffee is not bound to tender his rent any where for the saving of the condition, but upon the land, and a tender there is sufficient. And if a man make a feoffment in fee, without any reservation of rent precedent in the deed, on condition that the feoffee and his heirs shall render a yearly rent of twenty shillings a year to the feoffor and his heirs, and if they fail, that the feoffor shall reenter; in this case also it seems the payment or tender must be upon the land. But if the condition be, that he shall render twenty shillings a year to a stranger, and his heirs; this is no rent, nor in the nature of a rent, and therefore in this case the feoffee must render it to the person of the stranger where he can find him at the day, or else hee doth break the condition, and tender upon the ground is not sufficient. But in these cases if the nature of the thing to be done be such as will not admit of such a carriage from place to place to seek out the person of the feoffor &c. there albeit the thing to be done be corporall or transient, and not a locall thing, yet he that is to do it shall not be bound to seek out the person of the other; as for example. If an estate be made, on condition that the grantee shall deliver twenty quarters of wheat, or twenty load of wood to the grantor at such a time, and no place is set for the doing thereof; in this case the grantee is not

To pay money

To infeoffe

To acknowledge satisfaction.

To deliver wood or corn:

not bound to cary the same about to seek the Feoffor or Grantor, as he is bound to cary money; but before the day, the Grantee is to know of the Grantor where he will appoint to receive it, and there it must be tendered. And the like Law, is for the most part in conditions of obligations. *Co. super Litt.* 210. 211. 213. *Litt. sect.* 243. 345. *Bro. Condition* 60.

Obligation.
A Caveat.

It is best therefore in all these cases, and herein be that is to be the agent is to take care to have certainty of time and place set down in the condition for the doing of the thing that is to be done, and the more certain it is, the better it is for him.

4 In respect of
other matters
To pay money.

If a Lease be made, on condition that the Lessee shall pay to the Lessor all such sums of money as the Lessor shall lay out in such a business; in this case the Lessor must first tender to the Lessee a note of the charges before the Lessee is bound to pay, and untill this be done the condition cannot be broken. And after a note is given also, he shall have some reasonable time to provide the money. And if he tender him a note of more then in truth he doth lay out, the Lessee if he know it, may pay so much as is laid out, and he may refuse to pay any more. *Per Just. Bridgeman.*

To make an
estate.

If Lands be granted, upon condition that A shall make an estate of Lands at the charges of B; in this case A must doe the first act. *viz.* notifie to B what assurance he will make before B is bound to tender the charges. *Co.* 5. 22.

To deliver
household
stufte, or pay
money.

If a Feoffment be made, on condition that the Feoffee shall give so much household stufte to the Feoffor, or so much money for it as it shall be rated at by two indifferent persons to this end to be chosen; it seems in this case the election of the two men must be by the Feoffee; but if the words be by two persons to be indifferently chosen, then the election shall be by both parties, for in the first case the word Indifferent doth goe to the praising, not to the persons, *Pasche* 17. *Jac. B. R.*

To cleanse
ditches.
To dwell in
the house.

If a Feoffment be made of a ground, on condition that the Feoffee shall rake the ditches, in this case if the Feoffee doe it once, it is a sufficient performance of the condition. And yet if a man grant a house for life, on condition that the Lessee shall dwell and be resident in the house during the said Terme; in this case it is not sufficient that he dwell in it once during the Terme, but must doe so all the Terme, or else the condition is broken. *27 H. 8, 1. Plow. Colshirfts case.* 21.

To give goods.

If an Annuity be granted of Ten marks *per Annum* to a man, on condition, or till he be promoted to a benefice by the Grantor, and it is not said of what value the benefice shall be, in this case it shall be taken for a benefice of as great value, and of as good an estate as the Annuity is, otherwise the Grantee may refuse it, and yet his Annuity shall continue. *Perk. sect.* 804.

If a Feoffment be made on condition that the Feoffee shall give all his goods *si qua fuerint*, or give all his Pikes in his pond *si qua fuerint*; in this case the words shall be taken in the present tense, for the goods and Pikes that are at the time of the grant. But if a Feoffment be on condition that the Feoffee shall give all his goods in London *si qua fuerint*, that did belong to J. S. in this case the words shall be taken in the preterperfect tense. *Perk. sect.* 742.

Not to disturb
the Lessor in
raking the
wood.

If one make a Lease of the Manor of Dale (wherein is a wood called Dale wood) excepting all the woods and underwoods growing in Dale wood and all the great trees growing elsewhere, and this is upon condition that if the Lessee shall disturbe the Lessor to cut and sell the wood and underwood excepted the Lease to be void; in this case it seems the condition shall extend only to the wood and underwood in Dale wood, and not to the trees elsewhere, but if the words of the condition be [shall disturbe, &c. to cut &c. the wood and underwood on the premises] *contra Howard & Fulchers case. Hil. 3. Car. B. R.*

To pay Rent,

If one grant Land rendring Rent at the Feasts of S. Michael and our Lady or within a Moneth after, on condition that if it be behind after the Feasts and daies limited by the space of eight weeks that the Lease shall be void; in this case the eight weeks shall be accounted from the Moneth which is the twenty eight day after the Feast. *Dirr* 142.

If the condition be made in the Copulative and consist of divers parts, every part must be observed, or the condition will not be performed. But when it is made

made in the disjunctive, if any part of it be observed it is a sufficient performance of the condition. And therefore if a feoffment be made, on condition to reinfeoffe and pay twenty pound, and the feoffee do reinfeoffe but not pay the twenty pound; in this case the condition is broken. But if the condition be to reinfeoffe or pay twenty pound and the feoffee doe one of them; it is a good performance of the condition. And when it is made in the copulative and disjunctive both, it shall be taken in the disjunctive only, as if a lease be made to *A.* and *B.* his wife, on condition that the said *A.* and *B.* or any child between them shall so long live; this shall be taken in this sense, if the husband wife or child shall so long live, so that the lease shall not be determined by the death of the husband or wife alone. If there be two provisos in two severall indentures of conveyance of severall Manors to *A.* and *B.* that if the feoffor pay or tender twenty shillings to *A.* and *B.* or the heirs of *A.* that the Conveyance shall be void, and *A.* die; in this case tender to *B.* is not sufficient, and it must be made to the heir of *A.* and it must be twenty shillings for every proviso: but otherwise it is of a collaterall act. 12.H.7.10.

If the words of a condition be thus, that upon such a contingent the party shall enter and retaine the land untill the thing be done &c. in this case and by these words the estate is not determined, as it is by these words, [that the estate shall be void, or that the grantor shall reenter, or the like.] And in these words there is a difference also to be observed: for if the words be, that upon such a contingent the estate shall cease and be void, and it be a lease for years to which the condition is annexed, the estate is *ipso facto* void without entry or claime, and can never be affirmed afterwards; but if the words of the close of the condition be, that the feoffor, lessor, &c. shall reenter, without any other words, albeit it be in a lease for years, yet the lease is not void untill he hath made an actuall reentry. But in both cases if the estate to be avoided be an estate in fee, or for life, it is only voidable by the breach of the condition, and must be made void by entry or claime, and untill this be done the grantor can make no new estate of the land. But in the first case before the party shall retaine the land and take the profits of it in the nature of a pledge untill the thing be done agreed upon in the condition, and then the other party shall have the land againe. See more in the next questions. And in *Obligation Numb. 7. Covenant Numb. 6. Co. 3. 64. super Litt. 203, 204. Dier. 6. 127: 11. H. 7. 21.*

The words of a condition may be performed and not the intent, and the intent may be performed and not the words; and then for the most part a condition is performed when the intent and meaning of it is observed. And therefore if a feoffment be made, on condition that the feoffee or his heirs shall make an estate to the feoffor and his wife in taile before such a day, and before the day the husband die, and then he make an estate as neere it as he may, *viz.* to the wife for life without impeachment of waite and after to the heirs of the body of the husband; this is a good performance of the condition. And if the condition be that the grantee shall make a feoffment of land; and he make a lease of the land first, and then a release to the lessee and his heirs; this is *tantamount* and a good performance of the condition. *Co. 8. 90. Litt. Sect 352. Co. 3. 64. 282. 2 H. 4. 11.*

If a feoffment be made, on condition that if the feoffor or his heirs pay ten pound by a day the feoffment to be void, and the feoffor before the day doth commit treason and is executed and so dieth without heire, and after before the day the heire is restored, and he at the day doth pay the money; in this case this is a good performance notwithstanding there was once a disability. So as if heretofore one had made a feoffment, on condition to reinfeoffe by a day; and before the day the feoffee had entred into Religion, and then had been dearraigned, and at the day had made the feoffment; this had been a good performance of the condition. *Co. super Litt. 222. Perk. sect. 803, 803.*

If a Feoffment be made, upon condition that if the Feoffee shall pay to the Feoffor Ten pound such a day, that then he shall have the land to him and his heirs, otherwise that the Feoffor shall re-enter, or if it be made on condition that the

9. When and how a Condition or limitation shall be said to be performed; Or not

1. When the act is to be done between the parties themselves. To make an estate.

To pay money

By, and to whom money shall be paid upon a condition.

feoffee shall pay ten pound to the feoffor such a day; and before the day the feoffee sell the land; in this case the seller or the buyer either of them may tender the money at the day, and this will be a good performance of the condition, for he that hath interest in the land on the one side, or in the condition as party or privy on the other side may tender and performe the condition to save the estate. *Co. 5. 96* & *super Litt. 208. 209*:

Testament.

If lands be mortgaged, (or which is al one) if a feoffment be made of lands on condition that if the mortgagor or feoffor pay ten pound to the feoffee such a day that then the estate shall be void, and before the day the mortgagor or feoffor die; in this case the heire or executor of the feoffor, the Ordinary, the Gardian in Chivalry or Socage of the heire of the feoffor, or any other by either of their commandement precedent, or assent subsequent may pay this money at the day, and payment or tender of it by either of them at the day is a good performance of the condition. And so also it seemes is the law upon a devise of land to *I. S.* paying to *I. D.* twenty pound; if *I. S.* die his heire or executor may pay twenty pound, and this is a good performance of the condition. But in these cases if a stranger of his owne head without any such commandement or agreement pay the ten pound; this will be no good performance of the condition. And yet perhaps if the party that is to pay it be an Ideot; the payment or tender by any one in his behalfe shall be a good performance of the condition. And if a feoffment be made, on condition that if the feoffor pay ten pound to the feoffee that the estate shall be void, and no time is set for the payment of this money, and the feoffor die before any payment or tender made; in this case his heire cannot tender it and so perform the condition. *Litt. Sess. 534. 537. 15. H. 7. 2. Co. super Litt. 206. Litt. Bro. Sess. 125. Litt. Sess. 337.*

If a feoffment be made, on condition that if the feoffor and *I. S.* pay ten pound such a day, the feoffment to be void, and the feoffor die before the day and *I. S.* alone pay it; this is a good performance of the condition. *Co. super Litt. 207. Bro. Condition 109.*

If a feoffment be made, on condition that if the feoffor pay to the feoffee or his heirs ten pound such a day, and before the day the feoffee doth grant the land away to another; in this case the money may be paid to the feoffee himself, or if he be dead to his heirs, and this payment is a good performance of the condition. And if the words of the condition be [That if he pay to the feoffee, his heirs or assignes &c.] in this case payment to either of them is a good performance of the condition; so as if in this case the feoffee make a feoffment over, it is in the election of the first feoffor to pay the money to the first or second feoffee, and if the first feoffee die, to pay it to his heire or second feoffee: But payment to an executor or administrator in this case is not a good performance. And yet if the words of the condition be, that if he pay to the feoffee [without words, heirs, executors &c.] ten pound such a day, in this case the payment may be made to the executor or administrator of the feoffee after his death, and such a payment is a sufficient performance of the condition: And if the words of the condition be [that if the feoffor pay to the feoffee, his heirs, executors or administrators &c.] in this case payment to either of them is a good performance of the condition. But payment to an assignee in this case is not good. And if the words be, that if he pay to the feoffee and his heirs &c. in this case payment to his executors or to his assignes is not a good performance of the condition. So that in all these cases it seemes for the person to whom payment is to be made the words of the condition are precisely to be pursued. *Co. super Litt. 110. 5. 96. Dir. 181. 101. Co. 6. 69. Litt. Sess. 339.*

To tender money.

If a feoffment be made, on condition that if the feoffor shall tender twelve pence to the feoffee such a day the feoffment to be void, and afterwards the feoffee is disseised of the land, and after the feoffor doth tender the twelve pence to the feoffee at the day; this is a good performance of the condition. *Paf. 9. Jac. 5. Sir Richard Lass case.*

If

If a feoffment be made to two men, on condition that they shall reinfesse the feoffor, or make a lease to him by a day, and before the day one of them die, and the survivor doth reinfesse, or make the lease; this is a good performance of the condition. And so also it seemes the law is if both the feoffees be living, for by his owne acceptance it seemes he hath dispensed with the condition and so cannot enter for the breach of it, *Dier. 69. 41. E. 3. 25.*

To reinfesse.

If a feoffment be made on condition that the feoffee shall infesse the feoffor of the Manor of Dale by such a time, and before the time appointed the feoffee doth grant a rent charge out of the Manor to a stranger, and then at the time appointed makes a feoffment of the Manor according to the condition; in this case this is a good performance of the condition. But if in this case the feoffee before the time appointed grant away to a stranger twenty acres parcell of the Manor, and then doth make a feoffment of the Manor according to the condition; this is no good performance of the condition. And if a feoffment be made on condition that the feoffees or lessees in trust of such land shall grant an Annuity out of it, and some of them only doe grant this Annuity; this is no good performance of the condition. *Plow. 23. 3 H. 7. 4. 21 H. 6. 101*

If there be a feoffment made, upon condition that the feoffee shall make a lease of land to the feoffor for life, the remainder to I. S. in fee, and the feoffee make a lease to the feoffor for life, and after by another deed doth grant the reversion to I. S. this is a good performance of the condition. *44 E. 3. 22.*

To make a lease.

If a feoffment be made upon condition that the feoffee shall purchase lands or tenements to the value of twenty pound *per Annum*, and he purchase a rent common, or any such like thing to that value; this is a good performance of the condition. But if in this case the feoffee and another purchase so much land together jointly this is no good performance of the condition. So if the feoffee alone purchase lands to the value of twenty pound *per Annum*, and there is a rent issuing of it which must be deducted; this is no good performance. And yet in these cases, if the stranger Jointenant release to the feoffee all his right in the land, or the grantee of the rent release to him the rent before the time of the performing of the condition the condition is well performed in both cases. *Tantum valet terra quantum vendi potest.*

To purchase lands.

And if one make a feoffment in fee, on condition that if the feoffee purchase land to the value of twenty shillings, the feoffment shall be void, and after the feoffee disseise another man of land to that value: it is said that by this the condition is performed, *Sed quere.* And that if he recover so much land in value in an action: that this is no performance of the condition. *Sed quere.* For this seemes to me a better performance of the condition then the former. *Perk. f. 807, 808. 21 H. 6. 28. Dier. 15. Perk. f. 812.*

Payment.

If lands be granted, on condition to pay money, and the money is tendred according to the condition, but either no body is ready to receive it, or it is refused: this is a good performance of the condition. And after a man hath once refused the money so tendred to him according to the condition, he hath no remedy in law to recover it except it be money lent upon a mortgage. *Dier. 181. Lit. f. 334, 335. 338. Co. super Litt. 209. Termes of the law six. Coine.*

To pay money: Tender.

And if the payment be made part of it with counterfeit Coine, and the party accept it and put it up, this is a good payment and consequently a good performance of the condition. *Co. super Litt. 212. Fitz. Barre 343.*

And if at the day of payment the parties doe account together, and he to whom the money is to be paid being indebted to the other, that debt by agreement is allowed, and the residue is paid and accepted: this is a good performance of the condition. *Co. super Litt. 212.*

Acceptance.

So if the party that is to receive it accept and take new security by bond or statute for the money: this is a good performance of the condition. *Dier. 45. Co. 5: 96.*

And so in most cases, when by a condition a thing is to be done one way; and to be done to the party to the condition himself and not to a stranger, and

he doth accept it another way: this is a good performance of the condition. *Volenti non fit iniuria*. But if the thing to be done be to be to a stranger, and one that is no party to the condition, and it be done in any other manner, and he accept thereof: this is no performance of the condition. And so also if the time of doing the thing be past, as if one make a feoffment to me, on condition that if he pay me ten pound such a day the feoffment shall be void, and he doth not pay me at the day, but doth die, and after by agreement between his heire and me he doth pay me the ten pound, and I receive and accept it, and thereupon I suffer him to enter and hold the land: in this case the condition is not performed, but I may enter upon him and out him notwithstanding. *Perk. Sect. 392.*

If the mortgagor pay the money according to the condition, and after the mortgage deliver it to the mortgagor as his own money, the condition is performed, and the mortgage discharged notwithstanding. *Adjudge Mich 40. & 41. Eliz. B.R. Powel versus Bartholomew.*

If a feoffment be made to *I. S.* on condition that if the feoffor pay to the executors or administrators of *I. S.* ten pound the feoffment shall be void; and *I. S.* die, and the ten pound is paid to the executors of *I. S.* according to the condition, but it is covinously done, i. there is a private agreement that the feoffor shall have all, or part of his money againe: this payment in this case is no good performance of the condition, but that payment that must be a performance of a condition in this case to fetch lands out of the hands of an heir must be real, full and effectually. *Brownl. part. 64.*

To get the good will of *I. S.*

If a lease be made, on condition that the lessee shall get the good will of *I. S.* and the lessor doth come to *I. S.* first and aske his good will, and he denie it him, and after when the lessee doth aske it he doth grant it him; in this case the condition is performed. So if the condition be, that he shall get his good will by such a day, and at the first being desired he denieth it, but afterwards and before the day he doth grant it. And yet if no day be set, and he desire his good will and *I. S.* denieth it and afterwards he doth get his good will; it seemes this is no performance of the condition. *14 H. 8. 17.*

If there be two things in the copulative to be done by the condition, both must be done, otherwise the condition will not be performed. *Perk. Sect. 746, see before.*

2. When the act is to be done by a stranger, to pay money.
3. When the act is to be done to a stranger. To make an estate. Tender.

If a feoffment be made, on condition that if the feoffor and *I. S.* pay ten pound at Michaelmas the feoffment shall be void; and before the day the feoffor die, and *I. S.* pay the money; this is a good performance of the condition. But if the feoffor beliving, *contra. Co. super Lit 219.*

If a feoffment be made on condition to make an estate to a stranger by a day, and before the day he die; in this case if an estate be made as neere the condition as may be, it is sufficient. *Plow. 133. Co. 3. 64.*

If a feoffment be made to *I. S.* on condition that he shall infeoffe *I. D.* and his heirs; and *I. S.* doth tender the feoffment to *I. D.* and he doth refuse to take it; this is no performance of the condition in this case. But if it be to be done to the feoffor himself, *contra.* And so also it is, if the condition be to make an estate taile, or any lesser estate to a stranger, and he tender it and the stranger refuse it; this is no good performance of the condition. And if a feoffment be made, on condition to reinfeoffe the feoffor and his wife in tail the remainder to *W.* in fee, and he tender it to the wife only and not to him in remainder; this is no good performance of the condition. *Co. super Litt. 209. 19 H. 6. 67. Perk. Sect. 815, 816. 2 E. 4. 2. 19. H. 6. 67.*

10. What act shall be a breach of a Condition in deed And when a condition in deed shall be said to be broken, Or not.

And the same law for the most part is in conditions of obligations. See more in *Obligations at Numb. 9.*

If a feoffment be made, on condition that the feoffee shall not infeoffe *I. S.* of the land; and the feoffee doth make a feoffment to *I. S.* and *I. D.*, this is a breach of the condition. And so also it is if the feoffee make a feoffment to *I. D.* to the intent that he shall alien to *I. S.* *Quando aliquid prohibetur fieri, directè prohibetur & per obliquum.*

And

And yet if the Feoffee in the case before alien to *I. D.* and after he doth alien to *I. S.* this is no breach of the condition. And if the condition be, that the Feoffee shall not infeoffe *I. S.* and he die, and his Heir infeoffe *I. S.* this is no breach of the condition. *Co. super Litt. 222. Dier. 45. 46.* Not to alien.

If a Lease for years be made, on condition that the Lessee shall not assigne, or alien, the Term, or the Land during his life without the licence of the Lessor, the Lessee doth give it by his will without licence; this is a breach of the condition and forfeiture of the estate. But if he make an executor of his will only, this is no breach. And if the condition be that the Lessee shall not alien, and he die, and his executor alien, this is no breach of the condition. And if the condition be that the Lessee shall not alien, but to his children, and the Lessee by will devise it to his executors; it seems this is a breach of the condition. So if he devise that *A.* his son shall have his Term after his wife, & doth make *A.* his son his executor, it seems this is a breach of the condition. But if he do not make *A.* his executor, *contra.* And in cases of devise albeit the executors doe not assent yet the condition is broken, as in case where a reversion is granted on condition that the Grantee shall not alien it, and he doth alien it, but no attornment is to this grant; yet it seems this is a breach of the condition. And if a Lease for years be made, on condition that the Lessee or his assignes shall not alien, and the Lessee doth make his wife his Executrix, and she doth take another husband, and he doth alien it; it seems this is a breach of the condition and a forfeiture of the estate. But if a lease be made on condition that the Lessee shall not alien without the licence of the Lessor, and after the Lessor die, and the Lessee assigne, or the Lessee die and his executors or administrators assigne; this is no breach of the condition in either of these cases. So if a Lease be made, on condition that the Lessee shall not alien the terme during his life, and he makes an executor, but doth not devise it to him; this is no breach of the condition. And if a Lease be made, on condition that the Lessee his executors or assignes shall not alien the Terme to any persons without the licence of the Lessor but to the wife or one of the children of the Lessee, and the Lessee die, and his Executors alien to one of the children of the Lessee and he alien to a stranger without licence; this is no breach of the condition. And if one make a Lease of a house and Land, on condition that the Lessee shall not parcell out the Land or any part of it from the house, and the Lessee doth grant all his Terme in the house and part of the Land, and doth keep the rest, and after doth Lease that part also; this is a breach of the condition. If a Lease be made to *I. S.* for years on condition, that if he shall devise other then for a year, that the Lessor may reenter, and after he devise it by will; this is a Forfeiture, *Gouldsb. 184. Dier 45. 65. Per. 3. Justices B. R. 3. Jac. Dier 6. Dier 152. Co. 4. 120. Hil. 38. El. Marb versus Curtis.*

If a Lease be made of a house, on condition that the Lessee shall not suffer any woman great with child to harbour or lodge in the house six daies after notice given by the Lessor, and the Lessee doe suffer any such person after notice given, albeit the Lessor consent to it; yet the condition is broken. But if the Lessor doe *volens volens* keep such a woman there against the mind of the Lessee; this is no breach of the condition. *Co. 892.*

Not to suffer a woman with child in the house.

If a Lease be made on condition that if any waft be done the Lessor shall re-enter; in this case if the house fall by a tempest, this is no breach of the condition, for this is not waft: but if it be uncovered by tempest, and the Tenant hath a convenient time to repair it, and doth not, but doth suffer the timber to perish for want of covering; this is a breach of the condition and the Lessor may enter and put out the Lessee. And if a Lease be made on condition that the Lessee shall not doe waft, and he suffer waft to be made in decay of the houses, &c. it seems the condition is broken. *Sed quare. 12 H. 4. 5. Bro. Condition. 40. Per Dier and Walsh Justices. Dier. 281.*

Not to doe waft.

If a Lease be made, on condition that if the Lessee be minded to sell his estate the Lessor shall have the first offer thereof, giving as much as another will give; in this case if the Lessee doth not give notice when he is minded to sell it, he doth

Not to sell till the Lessor refuse it to any other,

doth break the condition : but if when he is minded to sell he doth tell the Lessor of his purpose and what he is offered for it, and the Lessor doth either say he will not have it, or that he will not give so much for it, or doth not accept it, but doth delay, &c. and then the Lessee doth sell it to another: this is no breach of the condition, neither is he bound to wait upon him in this case. *Dier* 13.

To make an estate.

If a Feoffment be made, on condition that the Feoffee shall make a Feoffment in Fee, gift in taile, lease for life, or years of the Land to the Feoffor, or to a stranger by a day ; and before the day the Feoffee doth disable himself to doe it, either by making some estate of the same thing to some other person in taile, for life, years in present or future, or for one year, or by taking a wife whereby she may be entitled to dower, or by suffering a recovery of the Land, or by granting of any Rent, Common, or the like, or by entring into any Statute, &c. or by suffering any Judgement to be had against him, or by doing any other such like act, whereby he cannot convey the Land according to the condition in the same plight, quality and freedom it was at the time of the conveyance made : in either of these cases the condition is *ipso facto* broken. And albeit the Land be afterward discharged and the party againe enabled before the day to performe the condition, yet this will not save the breach. And so also it is of a limitation. But when the condition is to be performed of the part of the Feoffor or Grantor, there disability before the time will not hurt so as he be againe enabled at the time. And so also it is when the condition is to be performed of the part of the Feoffee, and there is no certain day set for the performance of the thing, for in this case albeit he be once disabled, yet if he be afterwards againe enabled, and doe it within the time that the Law doth give him to do it ; in this case the condition is not broken. And so also it is, if the Feoffee be disseised, and during the disseisin, he doe any such act as before ; in this case before his entry this is no breach of the condition, for till then the charge doth not bind the Land. And so likewise it is when the disability doth proceed from another cause, as where one doth make a Feoffment on condition that the Feoffee shall re-enseoffe before such a day, and before the day the Feoffor disseise the Feoffee and keep him out till the day be past, or one doth make a Feoffment, on condition the Feoffee shall marry B. before such a day, and before the day the Feoffor himself doth marry her so that the Feoffee cannot perform the condition ; in these cases the condition is not broken. *Co. super Litt.* 221. 222. *Co.* 2. 58. *Perk* sect. 80. 803. *Litt. sect.* 355. *Co. super Litt.* 206.

To employ the profits to charitable uses.

If one make an estate of Lands (held in *Capite*) on condition that he to whom it is made shall employ the profits thereof to divers charitable uses, and he die his Heir within age, by reason whereof the King hath the Land during the minority of the Heir, so that the profits cannot be employed ; this is no breach of the condition. *Trin.* 13 *lac. Slade versus Tompson.* B. R.

To re-enseoffe.

If one make a Feoffment of Land, on condition to re-enseoffe in convenient time, and the Feoffee doth not so but doth make a Lease to another ; this is a double breach of the condition. And the same Law is of a Devise by will in this manner. *Co.* 1. in *Porters case*.

To make an estate.

If a Feoffment be made, upon condition that the Feoffee shall make some estate to the Feoffor, or some other by a day, and the Feoffee before the day say to him to whom the estate is to be made, that he will never make the estate, notwithstanding he doth make the estate before the day according to the condition ; in this case it is said the condition is broken. *Sed quere* of this, for it seemes if he really deny it before, and actually performe it at the day, that this is a good performance of the condition.

To suffer one to take his goods.

As if a Lease be made of a house, on condition that the Lessee shal not disturbe the Lessor in the taking away of his goods out of the house, and when the party doth come or send to fetch them the Lessee doth only forbid them ; this in this case is no breach of the condition, and it was agreed in this case that words without some deeds, as shutting the dore against them, forcible resistance or laying of hands upon them, or the like are no breach of such a condition.

And

And if a Lease be made, on condition that the Lessor shall be four times a year in the house demised without being ousted by the Lessee, and the Lessee seeing him comming doth shut the dores or windows against him; this hath been thought to be no breach of this condition. *Brownl. 2 part. 277. Perk. sect. 796: Co. 8. 90.*

To suffer one to come into a house.

If a Lease be made, on condition that the Lessee shall pay yearly to the Lessor during the Terme ten pound; in this case if he faile of payment once, the condition is broken and estate forfeit. So if one make a Feoffment in Fee of Land, on condition to pay ten pound yearly to I. S. if he faile once, the condition is broken. *Dier 33. 3 H. 4. 8.*

To pay a yearly Rent or sum.

If a Lease be made of a Manor in which are divers Copyholders, on condition that the Lessee shall not molest, vex, or put out any Copyholder paying his duties and services, in this case if the Lessee enter upon, and put out any one Copyholder, this is a breach of the condition. But if he enter *vi & armis* upon a Copyholders Tenements, and there beat him only, or the like: this is no breach of the condition. *Penner versus Glover 37. & 38 El. Mich. B. R. per curiam.*

Not to molest Copyholders.

If there be a condition to pay Rent, and the Lessee let part of the Land to other undertenants, or let all the Land to another for part of the time, and he undertake the Rent still, and faile of payment: in this case the condition is broken and estate forfeit. But if there be any covin and practise in the case between the first Lessor and the Lessee, the undertenants may perhaps have relief in equity. *Crompt. Jur. 65:*

To pay Rent.

Equity.

If one make a Lease for years of Land, and then also make a Feoffment in Fee of the Lands on condition that if the Lessee be disturbed in his Terme that he shall have the Fee-simple, and he is disturbed by the Feoffor or by his means; in this case the condition is broken and the Lessee shall have the Fee-simple. But if the disturbance be by a stranger and not by the Feoffor or by his means or consent; this is no breach of the condition. *Co. 8. 90.*

Not to disturb

If a Lease be made on condition that the Lessee shall not be outlawed, and he is outlawed without proclamation; it seems this is no breach of the condition, because the outlawry is not good. *Per 2 Justices H. 7 Jac. B. R.*

Not to be outlawed.

If a condition possible at the time of creation become after impossible in part by the act of God, and the party doe not performe that which is possible, the condition is broken. *Litt. sect. 352. Co. 2. 59:*

If a man make a Lease for years on condition, and the Lessee doth not know of it, and after the Lessor doth by will give the Land to the Lessee without condition, and the Lessee doth such an act as is a breach of the condition; in this case the condition is not broken, for the Lessee must have notice of the condition ere he can break him. *Co. 8. 92.*

If a Lease be made rendring Rent, on condition, that if the Rent be not paid within twenty daies the Lessor shall re-enter, and the Rent is not paid; in this case the condition is broken, but the Lessor cannot enter untill he hath made a legall demand, and if he die before he doe it, his Heir shall never take advantage of that breach, but it is discharged for ever. *Doe. and Sen. 35. 13 H. 4. 17.*

To pay Rent.

When an act is to be done in time convenient, or otherwise, and the party doe it not by the time appointed by Law; the condition is broken. *Litt. sect. 353. Plow. 30:*

If one grant an Annuity *pro consilio impenso & impendendo*, and the grantor require advise, and the Grantee refuse or neglect to give it: this is a breach of the condition and a forfeiture of the estate. And if the deed be, that he shall goe to such a place, to give counsell, and he require him to goe thither, and he refuse it, this is a forfeiture of the estate. But if he refuse to goe with him to another place, or give counsell to his adversary being not required to give counsell to him, this is no breach of the condition nor forfeiture of his Annuity. And if one had heretofore demised his Land to be sold by his executors, and to have been distributed for his soule, and the executors had not sold it in time convenient, or had taken the profits to their own use: this had been a breach of the condition.

To give advise

See

11. When a condition in Law shall be said to be broken. Or not. Forfeiture.

Infant. Women-covert.

12. Who may enter for a condition broken. And what persons shall take advantage of a condition or a limitation. And what not.

See more in the last foregoing division, and in *Obligation Numb. 10: Covenant Numb. 7.* The same Law is for the most part of conditions of obligations. See *Obligation Numb. 10. 21 E. 3. 7. 8 H. 6. 24. Dier 369. Litt. Sect. 381.*

Every particular estate hath a condition in Law Annexed to it, and therefore if Tenant for life in Dower, by the courtesie, or after possibility of issue extinct, Lessee for years, Tenant by statute merchant, elegit or the like make any absolute or conditional estate of the Lands they hold in Fee-simple, Fee-tail, or for life, and give livery of seisin thereupon or levy a fine *Sur connissance de drois* or suffer a recovery of the Land, or the like; this is a breach of the condition in Law and a forfeiture of their estate. Also if any such Tenant (except tenant in tail after possibility of issue extinct) doe wast in the Lands they doe so hold; this is a breach of the condition in Law, and a forfeiture of their estate in so much as the wast is committed. But if an Infant or feme covert that hath such an estate shall make any such estate, &c. this is no breach of the condition in Law. And yet if such a person doe wast, this is a breach of the condition in Law. And so also if any such person be an Officer and doe any thing which is a cause of forfeiture in another; this will be a forfeiture in him or her also. *Co. 2. 15. 8. 44. super Litt. 233.*

If any keeper of a Park without warrant kill any Deer, fell or cut any wood and convert it to his own use, pull down the lodge or any house with the Park used for hay for the Deer, or the like; this is a breach of the condition in Law. So also if a keeper shall not look to the Game, but the Deer be killed by his default, and damage come to the Lord; by this also the condition is broken. But the not attending upon such an Office for two or three dayes if the Lord have no special loss thereby, is no cause of forfeiture. *Co. super Litt. 223.*

Offices that are for the Administration of Justice, or of clerkship in any Court of Record, or concerning the Kings Treasure, Revenue, Account, Alnage, Auditorship, &c. have also conditions in Law annexed to them, and therefore if such Officers shall sell their Offices or misdeameane themselves in their Offices, by this the condition in Law may be broken, and they may forfeit them. *Co. super Litt. 234.*

As no man may create or annex a condition to an estate, but he that doth create the estate it self, so neither can a man give or reserve the power, title or benefit of re-entry and avoidance of an estate upon the breach of a condition to any other but to him or them, or at least to one of them that doth make the estate, his or their Heirs, Executors or Administrators, &c. for it is a Rule of the common Law, That none may take advantage of a condition but parties and privies in Right and representation, as Heirs, Executors, &c. of naturall persons, and the successors of politique persons: and that neither Privies nor Assignes in Law, as Lords by Escheate, nor in deed, as Grantees of Reversions, nor Privies in estate, as he to whom a remainder is limited, shall take benefit of entry or re-entry by force of a condition. *Litt. Sect. 347. Plow. 175. Co. 2. 62. 347. 556. Dier. 131. Co. super. Litt. 214. 215. Doct. & Stud. 93. Perk. sect. 830. 831. 833. 835. Plow. 488. 489.*

And therefore if a man had made a Lease for life reserving Rent, on condition that if the Rent be behind, the Lessor, his Heirs and assignes shall re-enter, and after had granted the Reversion to a stranger; this Grantee should not by the common Law have had benefit by his condition. But if the Lessor had died, his Heir or the Gardian in Chivalry or Socage of such an Heir if he had been an Infant and in ward might have taken advantage by the condition. And if one had been possessed of a Lease for years, and had granted his Terme upon condition and had died; his Executors or Administrators might have had advantage of this condition. *Brownl. 1 part. 149. 2 part 56. 224. &c.*

And at this day the Law is still the same as touching Privies in blood, for an Heir shall take advantage of a condition, though no estate descend to him from the Ancestor. And therefore if one be seised of Land of the part of his mother, and he make a Feoffment in Fee of it, on condition, and die, and the condition is broken; in this case the Heir of the part of the Father shall enter, but as soon as he hath entred, the Heir of the part of the mother shall enter upon him and enjoy the Land.

And

And if a man be Seised of Land in the right of his wife, and he make a Feoffment in Fee of it, upon condition, and die; the Heire of the husband shall enter for the condition Broken, but the wife shall have the Land. And so also is the Law as touching Privies in right and representation, for Executors and Administrators shall take advantage of a condition now as heretofore. And so also shall the Successors of a Deane and Chapter, Bishop, Arch-deacon, Parson, Prebend, or any body Politique or Corporate, Ecclesiasticall or Temporall; these shall take advantage of conditions as heretofore they did. So also the Law is the same as touching Privies in Law, for they shall no more take advantage of a condition now then heretofore. But as touching Grantees of reversions and Privies in estate, there is some alteration made of the Law, for by a new Law it is provided, That all persons which shall have any Grant of the King of any reversion of any lands &c. which pertained to Monasteries &c. as also all other persons being Grantees or assignees &c. to or by any other person or persons, and their Heirs, Executors, Successors and assignees, shall have like advantage against the Feoffees &c. by entry for not payment of Rent, or for doing Waste, or for other Forfeiture &c. as the said Lessors or Grantors themselves ought or might have had. *Sat. 31. H. 8. Cap. 34.*

And for the true understanding of the sense of this Statute and the ancient Common Law further touching this point, 1. These Diversities must be observed to be taken before the Statute which take place still. *Co. super Lit. 214. Plow. 27.*

1. Between a condition that doth require a Reentry, and a limitation that doth *ipso facto* determine the estate without Entry, for albeit a stranger might not take advantage of the first, yet he might take advantage of the last by the Common Law. And therefore if a man at this day make a Lease to another *quousque*, or until I, S. come from Rome, or if a man make a Lease to a woman *quoadm in casta vixeris*, or if a man make a Lease to a widow *si tantum in pura viduitate viveret*, or if a man make a Lease to another for one hundred years if he live so long, and then the lessor doth grant the reversion to a stranger; in all these and such like cases the grantee of the reversion may take advantage of the limitation, for after the estate is ended by the limitation he may enter. *Co. 10. 36. F. N. B. 301.*

2. Between a condition annexed to a freehold and a condition annexed to a lease for years, for if before the Statute a man had made a gift in taile, or lease for life, on condition that if the donee or lessee did not pay tenne pounds by such a day the gift or lease should be void or cease; in this case the grantee of the reversion could not by the common law have taken advantage of the condition, for it could not be void or cease, but by entry which could not be transferred to another. But if a lease for years had been made on such a condition; a grantee of the reversion might by the common law have taken advantage of this condition, for the estate in this case was by the breach of the condition *ipso facto* void without entrie. But now the grantee of the reversion shall have advantage of the condition in both these cases. *Co. 3. 64, 65. Co. super Lit. 214. 11 H. 7. 17. Plow. 136.*

3. Between a condition in deed and a condition in law, for by the very common law not only the grantee of the reversion, but also the Lord by Escheat, may either of them have advantage of a condition in law for any breach in his owne time. *Co. super Lit. 214.*

2. These Resolutions and Judgements upon the Statute must be marked. 1. That the Statute is general, and the grantee of the reversion of every common person as well as the King may take advantage of conditions. 2. That the Statute doth extend to grants made to the successor of the King as well as to the King, albeit he only be named in the Statute. 3. That he that comes to the reversion by fine, feoffment, grant, limitation of use, common recovery, or bargain and sale, is such a grantee as is within the intendment of the Statute. 4. That where the Statute doth speak of Feoffees &c. that it doth not extend to gifts in taile, and therefore if a gift in taile be upon condition, and after the donor doth grant the reversion; this grantee shall never have any benefit of this condition. *Co. super Lit. 214: Co 5. 13*

5. That where the Statute doth speak of grantees and assignees of the reversion; that hereby an assignee of part of the state of the reversion may take advantage of the condition, as if lessee for life be, and the reversion is granted for life &c. or if lessee for years be &c. and the reversion is granted for years &c. in these cases the grantees of the reversion shall have advantage of the conditions.

So if a lessee for one hundred years make a lease for tenne years, rendring rent, with condition of reentry, and the first lessee doth afterward grant his terme and estate to *I. S.*: in this case *I. S.* is such a grantee and assignee of the reversion as shall take advantage of the condition. *Davie and Mathews case per 2 Justices Trin. 14 Jac. B. R.*

6. That as well mediate as immediate grantees *i. e.* The grantees of grantees *in infinitum* are intended within this Statute. *Co. 5. 112. 113. Co. super Litt. 214.*

Prerogative.
Apportion-
ment.

7. That a grantee of part of the reversion cannot take advantage of a condition by this Statute. And therefore if a lease be made of three acres reserving rent upon condition, and the reversion is granted of two of the three acres; in this case the rent shall bee apportioned, but the condition is destroyed except it be in the Kings case. And yet a condition may be apportioned by the act of law, or by the wrong of the lessee. As if a lease be made of two acres (the one of the nature of Burrough English, and the other at the Common law) upon condition, and the lessor having issue two sons die; in this case each of them shall enter for the condition broken, And if the lessee upon condition make a feoffment of part of the land, this doth not destroy the condition. There is therefore herein a difference between a condition that is compulsory, and a power of revocation that is voluntary: for he that hath such a power may by his own act extinguish it in part, by levying a fine of part of the land or otherwise, and yet his power may remaine for the residue as in the case of a limitation; but in the case of a condition he cannot do so. *Co. 5. 113, 114. Co. 8. 92.*

Power of Re-
vocation.

8. Such grantees as shall have advantage by this Statute, must be complete grantees, and therefore grantees of reversions by fine, or deed, must have attornment ere they can take advantage of the condition. And yet if a reversion be granted by fine to one that hath an no attornment, and he grant it to another that hath attornment; in this case the second grantee shall take advantage of the condition, albeit the first grantee shall not. And the lessee must have notice of the grant of the reversion, ere he in reversion can take any advantage of a condition. And therefore it is, that if the lessor bargain and sell the land by deed indented and inrolled (in which case there needs no attornment); or if the lessor make a feoffment of the land, and so out the lessee, and the lessee reenter (which is an attornment in law); the grantee or feoffee in these cases cannot take advantage of any condition before he hath given notice to the lessee of this grant of the reversion. *Co. super Litt. 214. Pasche. 7 Jac. Co. B. per 2 Justices.*

9. Such as come in merely by act of law, or paramount, as the Lord of a Villain, the Lord by escheat, the Lord that doth enter for Mortmain, or the like, cannot take advantage of a condition within this Statute. And hence it seems it is that if the lessee for forty yeares make a lease for thirty seven years on condition, and after surrender his estate to his lessor, that the surrenderee shall not have advantage of this condition. *Co. super Litt. 215. Dier. 309. Curia in Leeks case. Pasche 7 Jac. Co. B.*

10. Albeit the words of the Statute be generall, yet grantees and assignees shall not take benefit of every forfeiture by force of a condition, nor yet of all conditions but onely of such as are inherent. Such as are either incident to the reversion, as for payment of rent, or for the benefit of the State, as for restraining of waite, for causing of reparations, making of fences, skowring of ditches, preserving of woods, and the like. And of conditions that are collateral, such grantees shall not take benefit. And therefore if the condition be for payment of a sum of money in grosse, to restraine alienation, for the delivery of corn, wood, or the like, the grantee of the reversion of the land shall not have advantage of it by this Statute, for these remain as they were before the Statute at the Common law. *Per Justice Bridgman.*

11. Such

11. Such conditions as are on the part of the Lessor, it seems are not within this Statute; And therefore if one make a Lease for years, on condition that if the Lessor his Heirs or assigns, pay ten pound to the Lessee at our Lady day, the Lease to be void, and the Lessor doth grant the reversion to a stranger before the day; it seems the Grantee shall not take advantage of this; but the condition is gone.

If one make a Lease for years rendring Rent to him and his Heirs, on condition that if it be not paid within fourteen days, that he and his Heirs shall reenter, and the Rent is behind, and the Lessor doth demand it, and then die; in this case the Heir may enter. But if he die before demand, the Heir cannot make a demand, and so take advantage of that breach of the condition, which was in the time of his Ancestor. *Doct. & Sr. 25. 13 H. 4. 17.*

If a man be possessed of Land for twenty years in the right of his wife, and he make a Lease of it for ten years rendring Rent, with condition of reentry for default of payment, and after the husband die; in this case the wife shall have the Rent, but it seems she shall not take advantage of the condition. *Perk. sect. 834.*

If a lease be made to *I. S.* on condition that if such a thing be, or be not done that the Land shall remain to *I. D.* or that *I. D.* shall enter; in this case *I. D.* shall never take advantage of this condition, either by the Common Law or by this Statute. *Co. 1. 85. super Litt. 379. Dier. 127. 117.*

Regularly where a man will take advantage of a condition, if he may enter, he must enter, and when he cannot enter, he must make a claim; for an estate of freehold or inheritance will not cease without entry or claim. And he that is to have advantage by the condition, may waive his advantage if he will. And untill such entry or claim made, the party that should enter can make no good estate of the thing to any other. But herein a difference is to be observed in the penning of a condition, and between a Lease for years and a Lease for life or a greater estate; for if a Lease for years be made, on condition that upon such a contingent the estate shall cease, or the Lease shall be void; in this case when the thing doth happen, the Lease is *ipso facto* void without entry or claim. But otherwise it is of a Lease for life, albeit there be the same words in the condition. And if one make a Lease for years, on condition that if such a thing be done, the Lessor shall re-enter; in this case an entry is needfull to avoid the estate. *Co. super Litt. 218. 237.*

If one make a Feoffment in Fee, gift in taile, or Lease for life, on condition that upon such a contingent the estate shall be void; in this case there must be an entry made after the condition is broken to avoid the estate. So if one bargain and sell his Land by deed indented and inrolled, with proviso that if the bargainor pay &c. then the estate shall cease and be void, and he doth pay the money; in this case the estate is not reverted in the bargainor before an actual re-entry is made. And so it is also if Lands be devised to a man and his Heirs, on condition that if the Devisee doe not pay twenty pound at a day, his estate shall cease and be void; in this case the estate is not void untill an actual re-entry be made. And so also it is if a reversion, Remainder, Advowson, Rent, Common, or the like, be devised on such a condition; in these cases there must be a claim before the estate will be determined. And therefore if a man grant such a thing to another and his Heirs, on condition that if the Grantor pay twenty pound on such a day, the state of the Grantee shall cease or be void, and the grantor doth pay the money according to the condition; in this case the state is not reverted in the Grantor before a claim made at the Church in case of an Advowson, and in the other cases upon the Land. But in case where a man cannot make an entry or claim, there the Law will not compell him to it. And therefore if one grant Land to another for five years, on condition that if he pay to the Grantor within the two first years forty marks, that then he shall have the Fee, otherwise but for term of five years, and livery of seisin is made accordingly, and the Grantee doth not pay this money; in this case after the two years are past, the freehold shall be in the Grantor without entry or claim, for as this case is, he cannot enter, but he must out the Lessee of his term. So if I grant a Rent charge out of my Land upon condition; when the condition is broken, the Rent is extinct, and here needs no claim.

13. Where entry or claim is needfull, to avoid an estate on condition. And where a man may take advantage of a condition without entry or claim. And where not.

Rent.

14. When a condition broken shall make the estate, &c. void *ab initio*. And when not. And to what intents the Lessor, Feoffor, &c. shall be adjudged by his reentry to be in of his first estate. And to what intents not.

Supposed if a man make a Feoffment in Fee of the Land to me in Fee, on condition that I shall pay him twenty pound such a day, &c. and before the day I let the Land to him for years, rendering Rent, and after the condition is broken; in this case he may retain the Land without entry or claim, and the Rent is extinct. So if one covenant to stand seised to the use of himself for life or otherwise, and then after to the use of others, with a proviso of revocation &c. and after he doth revoke it; in this case all the estates are revested in him without entry or claim.

So if a man make a Feoffment of Land to me in Fee, on condition that I shall pay him twenty pound such a day, &c. and before the day I let the Land to him for years, rendering Rent, and after the condition is broken; in this case he may retain the Land without entry or claim, and the Rent is extinct. So if one covenant to stand seised to the use of himself for life or otherwise, and then after to the use of others, with a proviso of revocation &c. and after he doth revoke it; in this case all the estates are revested in him without entry or claim.

It is generally true that he that doth enter for a condition broken, doth make the estate void *ab initio*, and that he shall be in of his first estate in the same course and manner as it was when he departed with the possession, and at the time of the making of the condition. *Co. 4. 120. Perk. sect. 840. Plow. 186. 482. 14 H. 8. 17.*

And hence it is, that if there be any charge or incumbrance on the Land, as if Lessee of Land upon condition grant a Rent charge out of the Land, or enter into a Statute or Recognisance, and the Comisee have the Land in Execution and this charge is after the condition is made; in this case when the condition is broken, and the party doth re-enter, he shall by relation avoid the Rent, statute, and recognisances, and hold the Land freed from them all. And if an estate be to pass by way of increase, upon condition, or a Lease is to be made upon a condition precedent, when the condition is performed, the party shall hold his estate free from all after charges and clogs. *Co. super Litt. 234. Perk. sect. 843. 844. Co. super Litt. 233.* And if a man enter for breach of a condition in Law, he shall avoid all charges and acts done after that thing is done which doth produce the forfeiture, but he shall not avoid any thing done before that time; for he must take the thing as he findes it: as if a house or Land belong to an Officer in respect of his Office, and he grant a Rent out of it for his life, and then he doth forfeit it; in this case the Rent shall continue. And if Lessee for life of Land grant a Rent out of it, and then make a Feoffment in Fee of the Land; in this case the Rent shall continue and the Lessor cannot avoid.

But if Lessee for life of Land make a Feoffment in Fee of it, and then grant a Rent out of the Land; in this case the Lessor shall avoid it. And if a Lessee grant a Rent out of his Land, and then doe wast, and the Lessor recover the Land, he cannot avoid this Rent, but shall hold the Land charged with it. But if the Lessee doe wast first, and then he grant a Rent charge to a stranger out of the Land, and after the Lessor recover the place wasted; in this case he shall hold the Land discharged. And if Lessee for life make a Lease for years and after enter upon the Lessee for years, and make a Feoffment in Fee; this shall not avoid the Lease for years. *Crompt. Jur. 64. 65.*

And if a man make a Lease for years; rendering Rent with clause of entry for non payment and the Lessee doth make under-leases of part of this Land, and after the Rent is unpaid, and the Lessor doth enter, in this case he shall have all the Land, and avoid all the under leases.

Equity.

But if there be any covinous practise in the case, the under-tenants may have remedy in Equity *Co. 10. 41.*

And if a Lease be made for life, the remainder in taile on condition; in this case if the condition be broken, both the estates be avoided. *Et sic de similibus.*

But this generall rule doth faile in divers particulars: as if a man be seised of Land in the right of his wife, and he maketh a Feoffment in Fee by deed indented, upon condition that the Feoffee shall devise the Land to the Feoffor for life, &c. and the husband dieth, and then the condition is broken; in this case the Heir of the husband shall enter, and yet he shall not have the estate of the Feoffor, for this doth presently after his entry vanish away. *Co. super Litt. 202. Perk. sect. 242. 843. 842.*

So if a Tenant in speciall taile hath issue, and his wife dieth, and Tenant in taile maketh a Feoffment in Fee upon condition, the issue dieth, the condition is broken, and then the Feoffor doth reenter; in this case he shall have but an estate for life as Tenant in Taile after possibility of issue extinct.

So if a lessee for life or years make a feoffment in fee on condition, and after doth enter for the condition broken; in this case he shall not be in the same course, for now his estate is subject to entry for forfeiture though he be tenant for life still. So if a disseisor be of certain land, and he die seised thereof, and his heir is in by descent, and the disseisee enter upon the heir, and infeoffe a stranger upon condition, and the heir of the disseisor doth enter upon the feoffee, and the disseisee doth sue a writ of entry *sur disseisin*, against the heir of the disseisor, and doth recover and bath execution, and the feoffee on condition doth reenter, and after the condition is broken; in this case the feoffor is not in the same case, for now the disseisor cannot enter upon him as he might before. And in some cases the feoffor by his reentry shall be in his former estate, but not in respect of some collateral qualities: as if tenant by homage Ancestrell, make a feoffment of the land he doth so hold in fee, on condition, and entret for the condition broken; in this case it shall never be held in homage Ancestrel again. And so if a copyhold escheat be, and the Lord make a feoffment in fee upon condition, and entret for the condition broken; in this case the custome annexed to that land is gone. So if there be Lord and tenant by fealty and rent, and the Lord is in seisin of the rent, and granteth his Seigniorie to another and his heirs on condition, and the tenant doth attorn and payeth his rent to the grantee, the condition is broken; if the Lord distraineth for his rent, and rescous is made; in this case the former seisin shall not enable him to have an assise without new seisin. If there be Lord and tenant, and the Lord disseise the tenant of the tenancy, and thereof doth enfeoffe a stranger on condition, and after the condition is broken, and the Lord enter; and the tenant doth enter upon him; in this case the Seigniorie is not revived.

If tenant in tail make a feoffment in fee on condition, and dieth, and the issue in tail within age doth enter for the condition broken; in this case he shall be in first as tenant in fee simple, and heir to his father, and then shall be presently remitted: but if he be of full age he shall not be remitted.

If one make a feoffment of white acre and black acre, on condition &c. and that he shall enter into black acre onely; in this case upon breach of the condition, he shall enter into that part onely. *Co. super Litts.* 202, 203.

If the words of a condition be, That if such a thing be not done, the feoffor or lessor shall enter into the land, and take the profits thereof untill the thing be done, or to the like effect; in this case if the feoffor or lessor enter upon the breach of the condition, hee doth not avoid the estate, or get any thing by his entry, but the possession onely in the nature of a pledge, or a distresse untill the thing be done: And if the condition be for the payment of the rent, he shall hold the land untill he be paid the rent.

And if the words be (That the Feoffor, &c. shall enter and take the profits, untill thereof he be satisfied, or untill he be satisfied or paid the Rent) in the first case as soon as he is paid, either by receiving of the profits, or payment of the Rent behind, or both together; and in the last case as soon as he is paid the Rent by the Feoffee or Lessee, the Feoffee or Lessee may enter again into the land.

If a condition be possible in his creation, and after become impossible by the act of God, the condition is discharged and gone for ever, and the estate is absolute. As if a feoffment be made to me, on condition that I shall reinfeoffe the feoffor before a day, or on condition that I shall appear at *Westminster* in the Kings Bench such a day, or on condition that I shall go to *Paris* about the affairs of the feoffor before such a day, and before the day appointed it doth happen that I die; in all these cases the condition is discharged. So if the condition of a feoffment be that if the feoffor or his heirs pay ten pound to the feoffee such a day, and before the day the feoffor dieth without heirs; in this case the condition is gone. And if the condition become impossible in part onely, then it is discharged for so much onely. *see Goldsb.* 181. *Co. super Litt.* 207. 219. 15. *H. 7. 13 Dier.* 262.

If there be Lord and tenant, and the tenant doth enfeoffe a stranger on condition and the feoffee die without heir, so that the tenancy escheat; in this case the condition doth continue, and the Lord must hold it subject to the condition. *Perk. Sect.* 819.

15. When and by what means a condition shall be discharged and extinguished for ever, or suspended for a time, or not.
1. By the act of God.
Conditions impossible.

Albeit

2. By the Act
of Law.

Albeit a condition cannot be divided by the act of the parties, but it will be destroyed, yet it may be divided by the act of law; and therefore if a lease for years be made of two acres of land (the one of the nature of Burrough English, and the other at the Common law) on condition, and the lessor having issue two sons dieth, in this case albeit the condition be divided, yet it is not gone, but doth continue still, and each of them may enter for the condition broken. But if one that hath a condition knit unto his reversion, grant part of his reversion to a stranger; the condition is destroyed in all, for it cannot be apportioned by the act of the parties, as it may by the act of the law, or the wrong of the lessee. *Co. super Litt.* 215. *Co.* 41. 120.

3. By the Act
of the parties.

A condition may be destroyed in the very creation of it; as if one devise lands for life with expresse words of a condition, and not words of limitation, or words that may be so taken, the remainder over to a stranger; in this case the stranger cannot enter, neither is the remainder good, nor the condition effectually. *Co.* 2. 59. *the Lord Cromwells case*, *Dier.* 309. *Co. super Litt.* 265. 379. *CA.* 101. 41.

Or it may be discharged by *matters ex post facto*: as in the examples following. If one make a feoffment in fee of land upon condition, and after and before the condition broken, he doth make an absolute feoffment, or levy a fine of all or part of the land to the feoffee, or any other; by this the condition is gone and discharged for ever. And yet if one grant a rent out of his land, upon condition, and after make a feoffment of this land, this doth not extinguish the condition. And if a fine in this case be levied in pursuance of a former agreement; as if one by Indenture bargain and sell his land to another, and in the Indenture there is a covenant that all other assurances shall be to the use of the bargainee, according to the first agreement, and the bargain and sale hath a condition annexed that the bargainee shall make a feoffment of part of the land to the bargainor, and after the bargainor doth levy a fine to the bargainee in corroboration of the first bargain; in this case the condition is not extinct, but saved by the original agreement. And if one make a feoffment in fee of land upon condition, and after and before the condition broken, he doth make a lease for years onely of the land, or part of it to the feoffee or any other; by this the condition is suspended for that time. And if the feoffor after a feoffment made of land upon condition, enter upon all or part of the land and be impleaded, and lose it; by this the condition is gone for ever. *Co.* 2. 59. *Perk.* *Sett.* 819, 820. 163. *Litt. Bro. Sett.* 212. *Co. super Litt.* 219.

And if he enter and hold the possession onely, by this the condition is suspended during his possession, and if he hold the possession so long that the feoffee cannot perform the condition, the condition is discharged for ever. And if one make a feoffment of land upon condition, and after and before the condition broken, the feoffee doth make a feoffment of all or part of the land to the feoffor, by this the condition is gone for ever. *Co.* 7. 14. 4. 52. *Litt. Bro. Sett.* 21. 85. *Co. super Litt.* 218.

And if the feoffee make a lease for life or yeares onely of part of the land; by this the condition is suspended for that time. But if the feoffee make a feoffment in fee, lease for life, or years to a stranger; this is no extinguishment nor suspension of the condition. And if the condition be to pay money, or do any such collateral thing; if in this case the feoffee make a lease to the feoffor, this doth not suspend the condition. *Brownl.* 2. *part.* 224. 225. 56.

Release.

If the feoffor or lessor release to the feoffee or lessee all conditions, or all demands in the land, or confirm the estate of the feoffee without condition &c; by either of these means the condition is destroyed and gone for ever. *Perk.* *Sett.* 823. *Co.* 1. 147. *See Release and confirmation.*

If one make a lease for life or years of land on condition, and after grant the reversion of part of this land; hereby the condition is destroyed for ever. And if he make a lease of part of it onely; by this the condition is suspended. *Co.* 2. 59. *Perk.* *Sett.* 163. *Co.* 4. 119.

A condition may be extinct or suspended by the intermarriage of the parties to the condition ; as if a Feoffment be made by a woman on condition to pay ten pound, or on condition to infeoffe her by a day certain, and before the day they two do intermarry, and the marriage doth continue untill after the day ; in this case the condition is gone. And if the condition be to reenter for not payment of Rent ; the condition shall be suspended and no Rent be paid during the coverture. *Perk. fect. 763. 765. 764.*

If a Lease be made for years, on condition that the Lessee or his assignes shall not alien without the licence of the Lessor, and the Lessor licence the Lessee alone to alien, or licence him to alien a part of the Land, or licence him to alien all the Land for a time, or if the lease be to three on such a condition, and the Lessor licence one of them to alien in all these cases the condition is gone for ever. *Co. 4. 119. 51. 34. 2. 59. 714. Dier 309.*

If one had Enfeoffed me, on condition that I should pay him ten pound at Easter, and before the time he had entred into Religion, and made me his executor, and had not been deraigned ; in this case the condition had been gone for ever. *Perk. fect. 766.*

If I be seised of Land in Fee, and take a Wife, and during the marriage enfeoffe a stranger on condition and die, and the Feoffee endow my wife of her third part ; in this case the condition is not destroyed, and yet the third part is freed from the condition, but the reversion of that third part is not freed from the condition. And if shee grant her estate again to the Feoffee, the condition is revived. So if there be Lord and Tenant, and the Tenant make a Feoffment in Fee upon condition, and the Feoffee is attainted of Felony, &c. so that the Tenancie doth escheate ; in this case the condition is not gone, but the tenancy is charged with it. *Perk. fect. 812.*

If a Feoffment, or Lease be made rendering Rent, on condition for not payment a reentry, and the Feoffor, or Lessor after the breach of the condition doth distrain or bring an assise for the Rent, or doth accept the Rent at another day ; hereby the condition is not destroyed but it is discharged for that time, so that the Feoffor or Lessor cannot take any advantage of that breach : and if the act to be done by the condition be a collateral act, as not to alien, or the like ; and the condition is broken, and the Feoffor not having notice thereof doth accept the Rent ; in this case also and by this means the condition is not discharged. *Co. 3. 64. super Litt. 211.*

If one disseise the Feoffee, or the heir of the Disseisor, or any other that hath Lands by a just title, and thereof enfeoffe a stranger on condition, and the Land is lawfully recovered from him by him that hath the title ; hereby the condition is destroyed for ever. And if a Disseisor make a Feoffment in Fee on condition, and after the Disseisor doth enter upon the Feoffee on condition ; this doth extinguish the condition. But if the Disseisor release to the Feoffee on condition ; this Release doth not discharge the condition. But if a Disseisor make a Lease for life, and the Lessee for life make a Feoffment in Fee on condition, and the Disseisor release to the Feoffee of the Tenant for life, by this the condition in Law is destroyed. And if the Feoffee upon condition make a Feoffment over without condition, and the Disseisor release to the second Feoffee ; by this the condition is destroyed, be the release before the condition broken or after. And if Feoffee on condition make a Lease for life, and the Feoffor release to the Feoffee on condition or Lessee for life all conditions, or all demands to the Land ; by this the condition is discharged. And if the Feoffee on condition make a Feoffment to another on condition, and after the first Feoffor doth enter for breach of the condition, hereby the second Feoffment and the condition also is gone for ever. *Litt. fect. 476. 477. Co. super Litt. 277. Perk. fect. 823. 821.*

4. By the Act of a stranger.

Release.

If a man seised of Land in Fee let it to a stranger for years, and one that hath no right doth oust the Lessee, and thereof die seised, and his Heir is in by descent, and he doth make a Feoffment to a stranger upon condition, upon whom the Lessee for years doth enter within the terme claiming his terme ; in this case the Lessee shall hold the land discharged of the condition. *Perk. fect. 820.*

CHAP. LI.

Of a Contempt, and Coopers.

Contempt,
what.

His word *Contempt* is used for a kind of Misdemeanor, by doing what one is forbidden, or omitting to do what one is commanded: As where a Sheriff shall not obey the command of a Court in the Return of some Writ directed to him; and the third Refusal by him herein, is esteemed a Contempt. And a special miscarriage also in the face of a Court is esteemed a Contempt. This, however it be but in the nature of a Trespass; yet it is sometimes a greater, and sometimes a lesser offence; and accordingly the punishment is greater or less, sometimes by Fine and Imprisonment both, and sometimes by one of these, *Co. 8. eo. Dyr 177, 128. 2 Ed. 4. 1. 36 H. 6. 27. Bro. Contempts*, throughout.

Of Coopers.

Coopers.

AS to Coopers, these things only are here to be known.

1. That Justices and Head-Officers in Corporate-Towns must set the Prices for Ale, Beer, and Sops; *Stat. 8 Eliz. th. 9.*

2. Coopers must make their Vessels of good Wood, and put their own Marks upon them; *23 H. 8. 4.*

3. The Barrel he doth sell for Beer, must contain thirty six Gallons; the Kilderkin for Beer, eighteen Gallons; the Firkin for Beer, nine Gallons of the Kings Standard-gallon. And for Ale, the Barrel thirty two Gallons, the Kilderkin sixteen Gallons, and the Firkin eight Gallons.

Vessels.

4. No Cooper must make any Vessel of any other measure, unless he set down upon it a Mark of the certain Content of it.

5. The Cooper must also put his own Mark upon the Vessels he sells.

6. Sops makers Vessels must be according to the Content of the Statute.

7. In London, the Wardens of Coopers must search to see if their Vessels be so: And out of London, Head Officers of Corporations and Constables of Towns must search and see to it.

8. No Vessel thus made, must be after diminished.

9. An Ale-Brewer or Beer-Brewer may keep a Cooper in his house to amend his Vessels; *37. 23 H. 8. r. 4.*

9. Vessels brought from beyond Sea must be gauged, if they be for Beer or Ale, *31 Eliz. 8. See 17 James Abridgment of the Statutes, Tit. Coopers.*

CHAP. LII.

Of a Copibolder and a Copibold.



He Copibold-Estate is that, for which a man hath nothing to shew but the Copy of the Rolls made by the Steward of the Lords Court. For the manner is, that the Steward doth write out a Remembrance of this (amongst other things) That such a one is admitted to such an Estate; and this commonly is transcribed in Parchment, which Transcript is called the Court-Roll, the Copy whereof the Tenant hath under the Stewards hand: And this is all his Evidence, and he can make no title but by this Roll.

1. Copibold, what.

Rolls of the Court, what.

Copibolder, what.

The Copibolder is he which is admitted Tenant of any Lands within any Manor, which time out of mind by use and custom of the Manor hath been demised and demisable to such as will take the same in Fee-simple, Fee-tail for life, years, or at will (as the custom is) according to the custom of the said Manor, by Copy of Court-Roll of the said Manor, *West. 1 Symb. l. 2. sect. 646. Co. 4. 25. Lit. sect. 13.*

So that to make a Copibold estate, two things are requisite.

Seft. 1.

1. It must be a parcel of a Manor.
2. It must be demised or demisable time out of mind, &c. And if either of these fail, the Copibold-tenure is gone. For this cause the Tenure cannot be made at this day, unless it be made by Act of Parliament, *Stat. 35 H. 8. 13. Co. 1 par. Inst. fol. 58.*

These Tenants in most places are called Copibolders and Customary Tenants; but in some places they are called Tenants by the Verge, Base-tenants, or Bond-tenants, &c. and so are the Lands called Base-lands, Bond-land, &c.

Tenants by the Verge.

The Grant of this Tenant is at the Will of the Lord. So the Tenant was antiently a Bondman, and his Tenure a Base-tenure: But time hath changed both, and now he and his Estate both are so far free, that if he pay his Rent, and do his Services according to the custom of the place, the Lord cannot hurt him or his Estate, *Co. 4. 29.* And if he or any other evict him, he shall have relief against them. Whereof see afterwards.

If any of the Tenants will transfer or alien any of their Copibold-lands, it must be done by way of Surrender to the Lord or his Steward, or some of the Tenants according to the custom of the place, to the use of such person who is to have it for the time agreed upon between them; and then the party is to pay his Fine, and to have it from the Lord according to the Surrender, and to have it entred, and a Copy thereof according to the custom of the place: And if the Lord after surrender refuse to admit, or die, or his Estate end before admittance, he or his Successor shall be compelled to make the admittance. And by Deed or otherwise such a Tenant cannot alien his Land without committing a Forfeiture, no, not by way of Exchange with another Tenant. And if the Copibolder will devise it, he must surrender it to the use of his last Will, and declare his intent, *Co. of Copibolds, f. 35.*

2. How the Copibolder may grant his Land, Surrender.

Admission. Alienation. Forfeiture.

And for this the Tenant need not allege a Custom; for this is the Common-Law; so neither for a Surrender out of Court into the Lords hands. But to surrender to three of the Tenants, or to the Bailiff or Reeve out of the Court, to make this Surrender good, there must be a special Custom alleged for it, *Co. 1 par. f. 59.* And yet by a Deed of Release he may extinguish his Right to a Copibold whereinto another is before admitted, and hath such an Estate as upon which the Release may enure. As if a Surrender be made out of Court to the use of *7. S.* and it is not duly presented according to custom, and therefore void; yet *7. S.* is admitted according, and after he that hath the right doth by Dred release all his right to *7. S.* this will bar him, and make good the Estate. *Contra*, where the Estate to pass by the Release,

Custom. Release.

S f

doth

doth pass by way of Enlargement: As if a Copiholder by Licence lease for years, and then doth release to the Lessee for years. But I may surrender my Reversion into the Lords hands, and he may grant it to the Lessee, *Co. of Copiholds, f. 300.* So where no precedent Estate is by Admittance, as if one disseise the Copiholder, and the Copiholder release to the Disseisor, these Releases are void, *Co. 4. 125.*

One Copiholder being ousted by another, cannot release to him. If a Copiholder be ousted, and the Lord admit him that ousted him, by his Release the Copiholder may extinguish his Right, *Co. c. 114.* And yet if a Surrender be made out of Court upon Condition, and presented as absolute, and so the Admittance is made, the Surrenderer by Release may make it good, *Co. of Copiholds, fol. 101.* But if I be ousted, and the Lord admit him according to the custom, I may release to him. If a Copiholder doth bargain and sell his Copihold-land to his Lord without any Surrender, it is said this will pass it: But if his Estate be an Estate of Inheritance, *contra per curiam Mich. 2 Jac. B.R.*

2. Considered according to the Common-Law.

Ejectione firma.

These states are in some cases ruled according to the Common-Law, and in some cases according to the Custom. And therefore if such a Copiholder be put out of his land by his Lord or any other, heretofore he had no remedy but in the Lords Court, or in Chancery: yet at this day he may have remedy against his Lord or any other by *Ejectione firma*, or Trespass, or in Chancery, as a man that hath such an Estate by Deed, *Co. 4. 21. 29. 22, &c.* And if he make a Lease rendering Rent, he may bring Debt for it; and if one cut his Trees, he may have an Action of Trespass.

He shall be barred by a Fine and Non-claim in seven years, as another man shall be, *Brownl. 1 par. 181.*

If the Copiholder make a Lease for years by the Lords licence, he may after surrender the Reversion after this Lease for years; for it is the Copiholders, not the Lords Lease. And yet perhaps if the Copiholder forfeit, the Lease may be made good, *Hob. Rep. pl. 159.*

Señ. 2. Estates in Fee-simple, Tail, or for life.

The same words which will make Estates in Fee-simple, Fee-tail for life, &c. upon a Deed, will make Estates by Copy. And therefore if a Surrender be to the use of *f. s.* without limitation of any Estate, hereby *f. s.* shall have an Estate for his life only: And yet by custom in some places it is otherwise:

Freehold.

Descent.

Entail Custom. Descent.

Escheat.

And if a Copiholder in Fee surrender *Habendum*, after his decease to the use of his child *in ventre sa mter*, (i. e.) in the mothers womb, and the heirs of this child; and if it die before marriage or full age, then to the use of *f. s.* and his heirs: By this the father hath an Estate for life, and the limitation to the child is void, and so it seems is the Remainder also, *Co. 4. 21, 22, &c.* For a Freehold cannot commence *in futuro*, nor one Fee depend on another, *Simpsons Case adjudged Mich. 13 Jac. B.R.*

And Descents of this Land, as well as the Creation of the Estate, shall be guided by the Rules of the Common-Law; except there be any special custom in the place to the contrary, the eldest son shall inherit. *Possessio fratris facit sororem esse heredem* of the lands in a Fee-simple; otherwise it is the Issue of a Copiholder in tail: This land may be entailed by Custom, *Co. of Copiholds, f. 136.* and the Issue shall have a *Formedon in Descender*. If one have issue a son and daughter by one venter, and a son by another, and the eldest purchase a Copihold in Fee, and die without issue, the daughter shall have the land, *Co. of Copiholds, f. 143.* But a Descent of a Copihold shall not take away an Entry, *March. 6. pl. 13.*

If one have a Copihold-estate to the heir of the mothers side, and he die without issue, it shall go to the heirs of the mothers side, and shall rather escheat then go to the heirs of the fathers side. But if I purchase Copihold-lands, and die without issue, and have no heirs of my fathers side, it shall go to the heirs of my mothers side. If there be father, uncle and son, and the son purchase this land and die, it shall go to the uncle, not to the father. So if there be three brothers, and the middle purchase this land and die without issue, the eldest shall have it. And if there be two Partners or Tenants in common of this land, and one die having issue, his Heir shall inherit, not the Survivor. *Contra* of Jointenants. *Co. of Copiholds, fol. 50. Calthrop, fol. 88, 89, 92, 93.*

But

But in other things they differ from other Inheritances, and the Rules of the Common-Law. And therefore these Inheritances (except there be a special Custom for it in the place) have not these Collateral qualities which concern not Descent, as other Inheritances have. For such land so descended shall not be accounted Assets in the Heirs hands to charge him upon any Obligation; the Wife shall not be endowed, the Husband not Tenant by the courtlesie; Descent shall not take away Entry, *Co. 4. 13. A.*

A Surrender made by a Tenant in tail of this land, (admitting it may be entailed) or by a Husband of the Copihold he hath in the right of his wife, makes no Discontinuance, *Co. libm of Copiholds, f. 144. Brownl. 1 par. 121.* For as an Estate-tail may be created by Custom, so it may be barred or discontinued by Surrender by Custom, and so hath it been adjudged, 27 *Eliz.* for the Manor of North-hall in the County of Essex, *Brownl. 2 par. 121.*

If the Lord enter into a Statute, or take a Wife, and after the Copihold become void, and in the Lords hand by Surrender, Forfeiture or Escheat, whiles it is in his hands it is liable to this charge. But if he grant it *de novo* according to the Custom, the Copiholder shall hold his Estate discharged of both, *Co. 8. 63. 4. 23.* The true reason is, because when the Copiholder is once admitted, he is in by Custom, which is Paramount the Grant; therefore if the Lord grant a Rent-charge, and then grant the Copy, yet shall the Copiholder hold the land discharged of the Rent, as it seemeth, though then he be not his Tenant, 8 *Rep. 63. b.*

The Lord of a Manor where Copiholders are for life, grants a Rent-charge forth of the Manor; one Copihold escheats, and the Lord grants again the same by Copy; in this case it was judged that the Copiholder shall hold it discharged of the Rent, and so of Statutes, Recognizances, Dowers. But if the Grant were out of twenty Acres by name in the occupation of such a Copiholder, there perhaps in such a case the Copiholder may hold it charged, *Brownl. 2 par. 208.*

Copihold-land is not extendable upon a Statute-Statple; but upon the Statute of Bankrupts it is extendable, *Brownl. 1 par. 34.*

If the Feoffee of a Manor on Condition, before the Condition broken, make Copihold-Estates, they are good, *Co. 4. 24.* If the Copiholder acknowledg a Statute, and then surrender, the Land is not liable, *Calth. f. 98.*

If Tenant in tail (without a special custom) or Copiholder in the right of his wife surrender, this is no Discontinuance, *Co. 4. 23. Dyer 263.* So if the Lord make a Lease for years of the Manor, excepting all Woods and Underwoods, and the Lessee make Grants by Copy according to the custom; the Copiholder shall have wood in these Woods according to the custom, *Co. 8. 107.* So if the Copiholder be used to have Common of Pasture or Estovers in the Lords Wastes or Woods, and the Lord alien the Woods or Wastes to another in Fee, and after make a Copihold-estate according to the custom, the Copiholder will have Common there as hath been used, *Co. 8. 63.* The Copiholders have been used to lop for Repair and for Fire, and the Lord lease the Manor (excepting the Trees) for years; the Lessee makes an Estate according to Custom: In this case the Copiholder may cut the Trees as he hath used to do; and if the Lord cut down all the Trees, the Copiholder may have an Action of the Case. So if the Lord sell his Waste, and the Copiholder die, and the Lord grant a new Copy, this Copiholder will have Common there, *Brownl. 1 par. 231.* But in this case the Custom in pleading must be laid specially: Otherwise it is of a Lease for life by Deed.

As long as a Copihold of Inheritance is in the Tenants hands, it is not liable to any Estate or Charge of the Lord; as *Dower, Courtlesie, Elegit, Statute, &c.* But when it is in the Lords hands, it is liable, *Co. 4. 22.* But a Custom in this case may make it chargeable, *Calth. 88, 89. 92, 93.*

Diverse things are requisite to make a good Grant of a Copihold-estate. As, 1. There must of necessity be a good Manor and Court continuing: For a Copihold-estate cannot be made without a Court, and a Court cannot be without a Manor; and then there must be a Custom for the allowance thereof, and this Custom must be of and in the same Manor. A Lord to give the Copihold; a Tenant of

3. Considered according to Custom.

Affets.
Dower.
Courtlesie.

Tail.

Discontinuance.

Statute.

Charge.

Condition.

Discontinuance.
Grant.
Exception.

Common.

Estovers.
Action of the Case.

Sec. 3.

4. What Grant of a Copihold estate shall be good, or not. 1. In respect of the Manor of the which the Land is parcel, and of the Court in which the Estate is granted.

capacity to take, and the thing to be granted, which must be grantable, and may be held according to the tenure. But for the opening of these things, it must be known touching a Manor,

1. That a Manor cannot be made at this day.

Manor destroyed.

2. Albeit it cannot be made at this day, yet it may be marred: For a Manor may be dissolved many ways. As first, if the Court-Baron (which is incident to every Manor) be destroyed; for the Court and Manor stand and fall together. And therefore if all the Freeholders but one escheat to, or be purchased by the Lord, hereby the Manor is destroyed: For there must be two Freeholders at least to support the Court-Baron, and two Copiholders at least to support the Customary Court. So if the Lord suffer all his Copiholds but one to fall in his hand, or make a Feoffment of all but one, hereby the Manor is dissolved.

Extinguishment

Courts.

But here this difference must be heeded; That there being (as we have shewed before) in every Manor where are Freeholders and Copiholders, two Courts: A Court of Freeholders, which is by Common-Law for the Trial of Actions wherein they are Judges; and a Court of Copiholders, which is for the surrendring and granting of Eittates, and making Admittances, and wherein the Lord or his Steward is Judg; that one of these may stand without the other. And therefore if the Lord sell the Reversion of all his Copiholds in Fee to one man, this man hath a Manor and a Court to this purpose, and may do all touching Copihold-estates which the Seller might have done; and he that sels may do all that belongs to the Freehold-Court, as he did before, *Co. 4. 26. 6. 64. Co. 1. par. 58.*

Judg.

So if the Lord make a Lease for years of all his Copihold-lands, it seems the Lessee for the time of the Lease may keep Courts, and grant Eittates. But if the Lord make a Feoffment or Lease of one, or of some of the Copiholds only, it seems this Feoffee or Lessee cannot keep Courts; and therefore the Manor, as to this parcel, is destroyed.

If the Demesns be once by the Act of the party severed from the Services in Fee-simple, or the Copiholds from the Manor, hereby the Manor is destroyed for ever, *Co. 4. 26. 6. 24.*

If one have a Manor, and grant the Moyety of it to another, hereby the Manor is destroyed, by Just. Jones opinion: *Sed quare.* So if the Lord sell away the Inheritance of all the Copiholds to several persons, hereby the Manor and Court of Copiholders are dissolved.

And if the Severance be but for an instant, and without any transmutation of Possession, yet the Manor is destroyed. But by Act of the Law a Manor may be divided: As when a Manor descends, and is divided between two Partners, that one have one part of the Demesns and Services, and another the other part; each of them have a Manor and a Court.

Franchise lost.

If one Manor held of another escheat, they are united, and continue both. And yet if a Court-Leet, Waif, Stray, Wreck, and the like be together by Prescription, albeit the Manor be destroyed, yet the Leet, Waifs, &c. continue. *Calthrop fol. 13.*

Suspension.

2. As a Manor may be dissolved, so it may be suspended for a time, and revived again: As if a Manor come to Parceners, and one upon the Division hath all the Services, and the other all the Demesns, and after one of them die without Issue, so that his part cometh to the other also; by this the Manor is revived again. *Fortior est dispositio legis quam hominis, Co. 4. 26.*

The Court must be kept on some part of that which is within the Manor; for if it be holden out of the Manor, it is void; except by Custom, he having two Manors, have time out of mind kept one Court for both. *Coke upon Littleton, fol. 38.*

2. In respect of the Lord of the Manor and his Estate.

The second thing required to the making of a good Grant by Copy of Copihold-Land, is, a good Lord; that is, the party that makes the Grant must be seised, that is, he must be in possession in, and have a good right or title to the Manor, of part whereof the Estate is made. For the opening whereof, these things are to be known.

That

That any person who may be a good Grantor in a Deed, may be a good Grantee of a Copihold-Estate. For this any person, man or woman, that hath a lawful Estate in a Manor for a time, may be a good Lord to grant Copiholds, take Surrenders, make Estates and Admittances according to the Custom of the Manor, notwithstanding the disability of his person, or exility of his estate. And therefore it is held, that a Lunatick or a man *non compos mentis*, an Infant, an Excommunicate person, a person outlawed in an Action personal; a Felon before his Attainder by Outlawry, Verdict or Confession, being Lord of a Manor, may grant Copihold-Estates for any time according to the Custom of the Manor, as another man may do, and Estates made by them are unavoidable. So a Villain Purchasor of a Manor, and Alienee in Mortmain, may make Copihold-Estates till the Lord do make his Entry, *Co. of Copiholds* f 89.

Disability of
Infant, &c.

A Tenant in tail for life, years, in Dower, by the Courtesie, by Statute or *Eligit* of the Manor, may make Copihold-Estates, as well as a Tenant in Fee-simple. So may a Tenant at will of a Manor, by Copihold, or at Common-Law; and this of Copiholds in Reversion, as well as Copiholds in Possession. And therefore if a Tenant for life of a Manor grant a Copy in Reversion according to Custom, and die before the Copiholder; this is a good Copy in Reversion against all the succeeding Lords. Adjudged 29 *Eliz. B. R.* Sir Peter Carews Case. *Brownlow*, 1 par 231.

Self. 4.

If one seised of a Manor for life, wherein are Copiholds of Inheritance, and a Copiholder doth surrender to the use of a stranger in Fee, the Lord may grant and admit accordingly, and this will bind him in Reversion. But if the Copihold be only grantable for lives, it is said then, the Lord upon Surrender cannot grant more then for the life of the Grantor. But if the Lord of a Manor, for or during the Minority of a Ward, of which the Copihold is demisable for three lives successively, and not severally; if there the Copiholder dieth, the Lord may grant it being void for three lives at his pleasure, and this shall bind him in Reversion, or his Heir at full age, *Calthrop Read* 50. But *quære* of this.

If a Copiholder in Fee surrender to the use of the Lord for life, the Remainder to a stranger in Fee, or keepeth the Reversion to himself, the Lord cannot grant this in Fee by Copy. *Nemo potest plus juris in alium transferre, quam ipse habet.*

X
Grantee on
Condition.

So may a Feoffee or Lessee of a Manor on Condition, till the Condition be broken. And yet a Lease for life by Deed in this case will be avoided: And it is held by some, that if a Lease be made for life on Condition, and the Lessee after the Condition broken, and before Entry of the Lessor, make Copihold-Estates, that these are good, because this Lease is not void, but voidable at the pleasure of the Lessor, *Co. of Copiholds* 89.

If the Feoffor or Lessor, after the Condition broken, keep Court and make Copihold-Estates, these are good; for the keeping of the Court is an Entry in Law, *Calthrop Read* 94.

If a Feoffee of a Manor on Condition, enfeoff another of it, and the next day, or the same day after he hath the Manor, make Copihold-estates, they are good; for it sufficeth if he be lawful Lord for the time. But if a Tenant for life of a Manor, make a Lease for years of it and dieth, and then the Lessee for years maketh Copihold-Estates, these are voidable by the first Lessor. So if a Lessee for years of a Manor grant a Copihold in Reversion, and before the Reversion happen the Term is expired, the Grant is void; and so it is if the Lessee surrender his Term, and before the Lease should have ended, the Reversion happen, yet the Grant is not good, *Co. of Copiholds* 88.

A Gardein in Chivalry that hath a Manor of the Wards, may make Copihold-Estates upon it. The Husband and Wife, within a Manor he hath in right of his Wife, but not the Wife alone, may make Copihold-Estates; nor may the Husband alone (as it seems) make Estates.

Gardein.

If the Husband and Wife in free marriage make Copihold-Estates, and they be afterwards divorced, the Estates made before the Divorce are good; so if the Wife be after divorced for Infancy.

Husband and
Wife.

If

Devisee.

If one seised in Fee of a Manor, by his Will in Writing devise, that his Executors shall sell or make Copihold-estates according to the Custom, for payment of his debts or the like, they may make good estates accordingly, *Co. upon Lir. 58.* And yet if the Lord devise that his friends shall keep Courts, or make Copiholds, and no more, this is not good, *Calthrop, f. 95.*

So if one die seised of a Manor, having a daughter, his wife privily with child of a son, the daughter may make Copihold-estates till the son is born.

Body Politick.

A Corporation, Bishop or Prebend seised of a Manor, may make Copihold-estates.

Parson.

If a Parson that hath a Manor after institution, and before induction, make Copihold-estates, it seems these are not good: So if after induction he had not read the Articles, and he be after removed for this. But if he be deprived after for any crime, his Grants before are good, *Co. of Copiholds, f. 89, 90.*

Tenant by
Statute.
Tenant in
Dower.

If the Lord acknowledg a Statute, and after make a Copihold-estate, and then it is extended, this will not hurt the estate. So if the Lord take a wife, and then make Copihold-estates, and then dieth, the wives Dower will not hurt the estate, though she be endowed of the Manor. And yet if an Heir after the Lords death make Copihold-estates, and after the Manor is assigned to his wife, she may happily avoid this, *Co. of Copiholds, 84.*

If the Lord make a Feoffment in Fee, Lease for life or years of all his Copiholds, the Feoffee or Lessee may make Copihold-estates, take Surrenders, Admittances, &c. But if the Lord grant the Reversion of one Copihold, neither he nor the Grantee, nor both of them together are able to grant any Copihold-estate of this land.

If the Lord release all the Services of the Freeholders of the Manor, or all the Freeholds escheat, yet the Lord doth continue a good Lord, and able to make Copihold-estates of the Copihold-lands.

Disseisor.
Abator.

In all cases where the Lord may make Copihold-estates *de novo*, he may take Surrenders, and make Admittances. But in these cases, and these persons, a Disseisor, Abator, or Intruder in a Manor, the Heir or Feoffee of a Disseisor, Grantee of a Tenant in tail, one that holdeth after his Estate is ended as a Feoffee or Lessee upon Condition, after the Condition is broken; one that hath no Estate at all, or no good Estate, or the Copihold is destroyed; these cannot make any Copihold-estate by way of voluntary Grant, or take Surrenders and make new Grants accordingly. And yet it is thought, that a Disseisor of a Manor, or any such Lord that hath possession only of a Manor, may make Admittances upon Defeasants, or do any such like act, and that this will bind him that hath right, *Co. 4. 27. 8. 63, 64. 1 par. 58. 74. Calthrop fol. 98. 94. 90. 91. Co. of Copiholds 36. 80. 87. Dyer 375.*

Admittances.

And yet if the Custom be destroyed by granting away the Reversion, or where there is one Copiholder only left; in this case he cannot make Admittances, or do any thing as Lord, *Co. 4. 27.*

Self. 3.
3. In respect of
the Steward.
Ability.

To make a good Grant of Copihold-land, there must be a good Steward of the Court wherein the Estate is granted. And as touching this point, these things are to be known.

1. Any man may be a Steward: And therefore if an Infant, Lunatick, *Non compos mentis*, Outlawed or Excommunicated person be made Steward, all Acts that he doth according to his Office are good.

2. He may be retained by word, as well as by Patent: Otherwise it is if it be a Stewardship of the Kings Court. And any colourable authority may be sufficient to make a man a Steward to this purpose: Yea, it is held, that a Copihold granted by an Under-Steward without any authority from the Lord or High-Steward, is good, *Co. 4. 3. Of Copihold 126. 27. Calthrop f. 73.*

Judg.

3. His authority is derived wholly from the Lord, whose person he doth represent; and under him in his absence he is Judg of the Court.

4. He must do all in the Lords name: As if he take Surrenders, make Grants or Admittances, or give licence to alien where he hath special power from the Lord, or is enabled by special custom so to do; he must do this in the Lords name, *Co. of Copiholds 125.*

5. The

5. The Steward cannot do so much as the Lord himself: For the Lord himself may make Grants or Advancements in what place he please without as well as within the Manor; but the Steward cannot do so without the Minor: And the Lord may give licence to his Tenant to alien his land by Deed; but it is doubted whether the Steward can so do or not in Court, without a special custom of the place, or a special authority from the Lord to enable him thereto, *Co. of Copiholds, f. 124.* Licence.
Advancement.

6. This Office may be forfeit many ways: 1. By Abuser; as if the Steward burn the Court-Rolls, or be corrupt in his Office, or the like. 2. Non-user; as when he is bound by his Patent to keep Courts at certain times in the year without request, and the Lord be prejudiced by this omission. 3. Refuser; as if he be bound to keep Court upon demand, and do not, albeit the Lord have no prejudice by it, yet it is a Forfeiture, *Co. of Copiholds, f. 119.* Forfeit.

7. The Steward may appoint an Under-steward. See for this, *Co. of Copiholds, fol. 132.* Under-steward.

Any one that may be a good Grantor in a Deed at Common-Law, may make a good Surrender or Grant of Copihold-land. And as to this point, these things are to be known.

1. Any Body-Corporate or Politick, being Lord, may make a Grant; or being Tenant, may make a Surrender of Copihold-land.

2. Grants by Lords, and Surrenders by other Tenants, as Felons before Attinder, Bastard, Hereticks, Lepers, deaf, dumb, or blind men, are good. Ability.

3. He that is not a good Grantor, cannot make a good Grant or Surrender of Copihold-land without a special Custom to enable him thereunto. And hence it is, that Surrenders made by Infants, Aliens, Idiots, such as are born-deaf, dumb, or blind, and Women covert, Wives without Husbands, are not good. And yet it is held, that a Woman-covert being Jointenant with another, may surrender her own part to the use of her Husband. But I doubt much of this. *Co. 4. 26, 27. Co. 1 part. f. 42. of Copiholds f. 96. Calthrop f. 93.*

4. A Woman covert cannot surrender with her Husband, but she must be first examined by the Lord or his Steward; and this cannot be by the Tenants, *Calthrop 86, 87.*

5. Such persons as may grant or surrender, cannot grant more then they have. And therefore if the Copiholder be a Jointenant, he cannot grant but his own part: He that is Copiholder for life only, can surrender but for this life. And yet if there be two Jointenants of a Manor, and a Copihold escheat, and one of the Lords grant this Copihold alone; this is good to bind his Companion. *Co. of Copiholds, fol. 91.* Jointenants.

Any one that may be a good Grantee by Deed, may be a good Grantee by Copy, and a good Copiholder. And herein these things are to be known.

1. A Surrender or Grant of Copihold-land may be made to a Lunatick, Bastard, man not of a sound memory, person attaint of Felony, Major and Commonalty, Infant, Outlawed or Excommunicate person, Bondman or Feme-covert. But a Monk or Friar cannot be a Copiholder; and it is doubted whether an Alien born may be a good Copiholder, or not. *Perk. fol. 32. Co. of Copiholds 97. Calth. f. 52.* 5. In respect of the person to whom, or to whose use it is made.
Ability.

2. The Surrender to the use of a Feme-covert is good, till her Husband disagree to it. Uncertainty.

3. In case of an Infant or Feme-covert, as to the Lords service; for the Infant, it must be done by the Gardein or Prochein-amy; and for the Wife, by the Husband. Infant.

4. The Lord shall retain the land of the Idiot or Lunatick, till he come to himself. So some say for the Infants lands till he be of age, *Calth. f. 52. 65.*

5. A Surrender may be of Copihold-land to the use of the Lord himself, and he may have a Copihold to his own use, *Co. of Copiholds, f. 94.* Doubted by *Calthrop, fol. 92.*

6. The Husband may surrender to the use of his Wife, and by a special Custom the Wife may surrender to the use of the Husband, *Co. 4. 21. 30. Of Copiholds, fol. 94.* Husband and Wife.

7. One

Jointenant.

7. One Jointenant may surrender to the use of another Jointenant.
 8. A Surrender may be of Copibold-land to the use of him that shall be Heir of J.S. or the next Child of J.S. or next Wife of J.S. or to him that J.S. shall name, is good; for nothing passeth till admittance. Otherwise it were of such a Grant by Deed, *Co. of Copibolds, f. 97. 98. Quare*. And a Surrender to the use of the right heirs of J.S. being alive, is void.
 9. A good Grantee may take by Attorney, *Co. of Copibold, f. 95.*
 10. A Grant of Copibold-land may be to two or more, and they shall be Joint-tenants, *Kirsh, f. 11.*

6. In respect of the place where it is done.

7. In respect of the thing granted and surrendered.

The Lord of a Manor himself in person may make any Grant of Copibold-land, or take a Surrender, or make any Admittance thereof, or a Surrender or Descent in any place as well without as within the Manor, and as well without as within the Court. But the Steward must do it within the Manor, and in Court, or it is not good. And yet by a special Custom of the place, a Surrender may be made to the Steward, or to some of the Tenants out of Court; and this is good.
 The thing granted or surrendered, must be at the time of the thing done, parcel of the Manor. For the opening of which point, these things are to be known.

1. A Customary Manor which hath Copibolds within it, may be held of another Manor, and be granted by Copy as other Land may be, *Co. 11. 18.* So may Houses, Lands, Meadows or Pastures, and whatsoever doth concern them which is of perpetuity and parcel of the Manor, as a Common, Advowson, or Fair appendant, the Vesture or Herbage of Land, Underwoods, out of a great Wood, and that without the Soil, if they have been usually demised for Copy. And if the thing granted be incertain, it may be made certain by Election, as in other cases of Grants at Common-Law, *Co. 1 par. Inst. fol. 98. of Copibolds 117, 118. Co. 4 31. 37. Idem 120.*

But such things as lie not in Tenure, as a Rent, Bailiwick, or Stewardship, Commons, or Advowsons in gross, which are incorporate Hereditaments, out of which no Rent can issue, are not grantable by Copy; so the Lords Demesnes never let by Copy, are not grantable by Copy. And yet if in this case the Lord grant them by Copy, he himself cannot avoid the Grant, but it will be good against him for his life. *Quare* how he shall plead it, as Grant by Copy, or by Lease-parcel.

Sec. 6.
Parcel of the Manor.

2. The thing granted must be at the time of the Grant made, parcel of the Manor; otherwise the Grant will not be good. And therefore if the Lord make a Lease for years of the Reversion of one of his Copibold-Tenements, this Tenement during this Term is no part of the Manor, and therefore cannot be granted by Copy in the Lords Court. (*Quare 1 Inst. 325. a. Plow. Com. 103 b.*) But this happily may be in time reunited to the Manor, and then grantable. But if a Feoffment be made with or without a Deed by the Lord of a Manor, of one Copibold-Tenement; by this the same is divided for ever from the Manor, and cannot be granted by Copy: And yet the Grant made before the severance, is good. So if one grant his Manor, except one Acre, and after grant this Acre by Copy; this is not good, because at the time of the Grant it was not parcel of the Manor, *Co. super Lit. 324. 325. Of Copibold 81. Dyer 281.*

Demised or demisable by Copy.

3. The thing granted must be demised, or demisable time out of mind by Copy; (that is) it is either let by Copy at the present, or capable of being let by Copy; having been so let, and not by Lease, time out of mind. And if when it were last let, it was let by Copy, and be now come into the Lords hands, and he never let it for many years together by Deed or otherwise, this hindereth not but that it may be let by Copy.

And in this case it matters not how it came into the Lords hands, whether by Escheat or Forfeiture, or Surrender. And yet if the Lord purchase the Copibold of the Tenant, or it escheat, some have doubted if it be not extinct, and so not grantable again. (But upon little reason, as I conceive.) *Calshrop, fol. 16. 86. 91. 90. Idem 55. Co. super Lit. f. 58.*

And

And if a Copiholder forfeit his Land by Waste, and a Seifure is awarded, but the Lord suffereth the Tenant to occupy the Land twenty years together, without receiving Rent, he may after grant it by Copy; but if after Seifure awarded, a stranger, enter, disseise him, and make a Feoffment in Fee, and then the Lord re- enter, and grant it by Copy; this is not good by *Calthrop, fol. 25. Quere* for a disseising, and Feoffment, cannot alter the nature of the Land.

If a man will overthrow a Copihold Estate, under pretence that it hath been let by Indenture, or otherwise then by Copy, he must shew it to be within the time of mans memory: For if it hath been let by Copy for fifty or sixty years, it will hardly be admitted to the contrary, *Calthrop, fol. 19: 85.*

The Heir of a Copiholder in Fee, hath before his Admission, such an Estate in the Land, that he may surrender it, or bring Trespass; and if he die, his Heir shall have it by descent. *Dyer 292. 302. Co. of Copihold. 4. 21.*

If a Copiholder surrender his Land, to the intent that a stranger may have a Rent out of it; this is not a good Copihold-Rent, by *Calthrop, fol. 92.*

No Copihold-Land can pass from the Lord to his Tenant, nor from one Tenant to another, but by way of Grant, or Surrender in the Court of the Mannor, according to the custom of the place; and as touching this point, these things are to be known.

1. In some Grants a Surrender is sufficient without Presentment, or Admittance; in some an Admittance without a Surrender, or Presentment; in some a Surrender and Admittance, are both necessary, and in some a Surrender Presentment, and Admittance are all necessary: As if the Copiholder Surrender to the Lords use, there needs no Admittance: And if a Lord make a voluntary Grant of a Copihold in his hands, no Surrender is needful, but Admittance onely. If the Copiholder surrender in Court to the use of a stranger; besides the Surrender, Admittance is requisite. And if the Surrender be made out of Court, to the Lord himself, which the general Custom will Warrant, or into the hands of the Bailiff, or of two of the Tenants (which by special Custom onely is warrantable.) In this case there must be, besides the Surrender, a true Presentment of the Surrender in Court, by the same persons, into whose hands the Surrender was made, and an Admittance of the Lord, according to the effect of the Surrender, and Presentment. *Co. of Copihold. Sect. 38.*

8. In respect of the manner, and order of the Grant, and of Grants, Surrenders.

Presentments, and Admittances.

2. A Grant may be of Copihold-Land in Fee-simple, Fee-tail, for life, or years, in Possession or Reversion, as the Custom expressly, or interpretatively will warrant it. *Co. of Copihold. Sect. 47.* But the Lord without a custom, cannot grant a Copihold in Reversion. *15 Car. B. R.*

3. If the Lord having Copihold-Land in his hand, grant it by Deed, or Issue, to hold at Will, according to the Custom of the Mannor; this is not good to make a Copihold-Estate. *Calthrop, fol. 47.*

4. In all good Grants of Copihold-Estates, it seems the Antient-Rent must be reserved, not onely in quantity, but in all beneficial qualities: And therefore it is held, That if the Antient-Rent were in Gold, and the new be in Silver; or the old were payable at four days, and the new be payable at two days: These are not good Copihold Grants. But this it seems is to be understood of Copiholds of Inheritances, and Admittances into them. *Co. of Copiholds, fol. 109, 110. Calthrop, fol. 88, 89, 81.*

Ancient Rent.

A Surrender is the giving up of the Land by the Tenant to the Lord, according to the Custom: And this is entred in this manner, *Ad hanc curiam venit A. de B. & sursum reddidit in eadem curia unum Mesuagium, & in manus domini ad usum C. de D. & heredum suorum (vel heredum de corpore suo exeuntium,) vel pro termino vite sue, &c. Et super hoc venit pradietus C. de D. & cepit de domino in eadem curia Mesuagium pradiitum, &c. Habendum & Tenendum sibi & heredibus suis (vel sibi & heredibus de corpore suo exeuntibus, vel sibi ad terminum vite, &c.) ad voluntatem domini secundum consuetudinem manerii, faciendo & reddendo inde redditum, servitia & consuetudines, inde prius debita, & consueta, & dat' domino pro fine, &c. & fecit domina fidelitatem, &c.* Herein are many things to be known.

Sect. 7. Surrender.

T t

1. This

1. This may be Absolute, or upon Condition; and it may be rendering Rent on condition of Re-entry for non payment. Co. 4. 21, 30. And if he enter for the Condition broken, it is in him as at the first, without Admission.

Custom.

2. It may be to the Lord himself, or his Steward, or his Tenants, or his Reeve, or his Bailiff, as the custom is. And it may be to the Lord out of Court, but it cannot be to the Steward out of Court, without a special Custom to enable it. Mich. 37, 38 *Eliz. Bright's case*.

3. It is in some Cases necessary, and in some Cases not. See for this afterwards.

4. When it is necessary, it must be made,

First, By a Copiholder, and Admission, otherwise it will not help.

Secondly, It must be made to the Lord, that can make Copihold-Estates, or some other to his use, as the Custom is.

Thirdly, If it be out of Court, it must be presented at the next Court according to Custom.

Fourthly, The Lord must admit accordingly, or else (as some say) the Surrender is void. *Kitch. 82. 60. Co. 4. 27. Co. 1 part. 61, 62. Calthrop. f. 97.*

Words of Surrender.

Fifthly, This cannot well be made by any other word, but by the word *Surrender*, and therefore if it pass in the Court by the word, give, grant, bargain, or sell; this will not pass it, but the Heir of the Copiholder may avoid it. Co. of Copihold 103. And yet if a Copiholder come into the Court, and desire the Lord to admit his Son into his Copihold; some think this is a good Surrender to the use of his Son. *Calthrop. fol. 57.* But if the Tenant come to the Lord, and tell him that he is willing for his Sons preferment, that he shall have his Land presently, and desire the Lords agreement; who doth so, it is said this is no good Surrender. And yet if the Homage do after present it for a Surrender, it is more questionable. *Calthrop. f. 59.* If a Copiholder in the presence of other Copiholders of the Manor, say, He is content to surrender his Copihold, to the use of J. S. This is not a good Surrender. But if he say he doth surrender into the hands of the Lord, to the use of J. S. if the Lord will thereunto agree; this is a good Surrender, whether the Lord will or not. So if the Tenant resign his Interest in the Court, into the Lords hands therewithal, for him to do what he will; it seems that this is a good Surrender. If the Copiholder say in the Court, he will be no longer Tenant to the Lord, and thin be recorded; this is no Surrender. If a Copiholder for life, take a new Estate for life; this is a Surrender of his first Estate for life, but if the second be by Deed. *Quere Calthrop. fol. 59.*

Attorney.

5. A Surrender may be made of a Copihold, by Attorney, if there be no Custom in the place against it; it is not of necessity that the Copiholder be present in Court. But if this power be by special Custom, it cannot be done by Attorney: As if a Copiholder have a power to make a Lease for twenty years after his death; or an Infant have power to make a Lease at years of discretion, or a man may Surrender out of Court to the Tenants: These things cannot be done by Attorney. Co. of Copihold 93. 649. 76.

Infant.

6. If a Copiholder in Fee, Surrender to the use of himself for life, and after to the use of J. his Son for life, and after to the use of his last Will; this is a good Surrender, and the Estate may be made accordingly. Co. 4. 23. But a Surrender after a mans death, to the use of a mans last Will, is not good. If a Copiholder in Fee, Surrender to the intent that the Lord shall re-grant to him for his life; the Remainder to his Wife, till his Son come to one and twenty years of age, and after to his Son in Tail; this is a good Surrender, and is to be executed accordingly. *Dyer 251.* And if two Jointenants be, and one surrender his part out of Court, into the Lords hands to the use of his last Will, and by his Will devise his part to a stranger in Fee, and die, and at the next Court this is presented; this is a good Surrender, and by this the Joynture is severed. Co. 1 part. 39.

Jointenants.

7. If a Surrender be to the Lord generally, without saying to whose use, it is good enough. *Kitch. 81.*

8. If the Copiholder Surrender to the use of another, and the Lord grant it to the T^hey *que use* not naming the Surrender; this is good enough by *Calthrop. f. 98.*

9. In a Surrender it matters not, whether the Partee to whose it be, be precisely expressed, if by any circumstance he may be known: And therefore a Surrender to the Archbishop of *Canterbury*, Major of *London*, next of his Kin, or next of his Blood, his Brother, his Sister, or his Son may be good; and it may be made certain by Averment. So if it be to a mans Wife without waiting of her, or to the high Sheriff of *Norfolk*: But a Surrender to the use of ones Cousin or Friend, is void for incertainty; so if it be to the use of three or four of *Dale*, or to the use of *A. B. or C. D. Co. 4. 29. of Copibold 96.* Incertainly.

10. The Surrender bindes the Land immediately, so as the Lord cannot avoid, or prevent the intention, nor prejudice him, that is to have it, by any act that he can do: And yet it is rather a manifesting of the parties intention, then the passing of an Interest. For till Admittance, the Surrenderer is Tenant to the Land, and shall receive the profits to his own use, and he must perform the Services: And yet he cannot pass the Land to any other, or make it subject to any incumbrance of his; nor hath the Grantee any interest to punish Trespass, Surrender, &c. And yet he cannot be defeated of it; and he may compel the Lord to admit him, *Co. 4. 26, 29. of Copibold, fol. 106.* If I make a Surrender to the Lord *Ea intentione*, that he shall grant the Land to *? S.* and the Lord refuse to grant it accordingly; in this case I may re-enter upon the Lord: But *? S.* hath no remedy, as in case where the Surrender is made to the use of *? S.* by *Calthrop. f. 61.* SeB. 8.
The operation
of a Surrender.

11. A Surrender is not Countermendable by the Surrenderer; and yet if a Copibolder languishing in extremity, surrendreth his Land out of Court to the use of his Cousin, in consideration of Blood, or to the use of his Son in consideration of natural love, and after recover before Presentment; happily this may be revoked. But if it be upon good consideration, as for payment of debts, and for any sum of money paid; though it be made out of Court, yet it is as binding, as if it were made in the Court. *Co. of Copibold, f. 106.* Countermend.

The Presentment made out of Court, must be afterwards duly presented at the Court, according to the Custom of the Manor, in which these things are to be known. Presentment.

1. This Presentment is the Information of men, sworn to the Lord or Steward, touching some things done out of Court.

2. This is either general, viz. of all things, and by the whole homage; or it is special, viz. by some Tenants, or of one, or some things onely.

3. This by the General Custom, is to be made the next Court after the Surrender, but by the Custom of some Manors, may be the second or third Court after the Surrender; and if it be not then presented according to the Custom, it is void. *Co. 1 part. 61, 62.* Custom.

4. This also must be made in all things according to the Surrender, otherwise it is not good: And therefore if the Surrender be Conditional, and the Presentment absolute, all is nought; and yet if the Surrender be rightly presented, and the Entry of the Condition be omitted by the Steward; this upon proof may be holpen. *Co. 1 part. 61, 62. of Copibold, f. 107.*

5. No death will hurt the Presentment, and therefore if the Surrenderer die, yet the Presentment may be made after his death: And if he to whose use the Surrender is made, die before Presentment, the Presentment may be made thereof after his death; and thereupon his Heir shall be admitted. So if *? S.* Surrender to the use of *A.* for life, the Remainder to *B.* and *? S.* die, and *A.* die before the Presentment made; and after the Presentment is made; in this case he in Remainder shall be admitted. So if two Surrender to the use of two jointly, and one of them die before Presentment; in this case the other shall be admitted to the whole. So likewise if the Tenants that take this Surrender, die, the Lord may notwithstanding upon the proof of it, take in the Tenant by Admittance. *Co. 4. 39. of Copibold. SeB. 40. fol. 107. Co. 4. 28, 29.* And yet if a Surrender be made to the Lord in the presence of Tenants out of Court, and there the Lord doth grant it, but he dieth before this is presented, or the Tenant admitted; this it seemeth is not good. *Calthrop, fol. 46.*

Admittance
upon Grant or
Surrender.

To the Perfection of the Copiholders Estate, admission, as that without which no Estate passeth by the Surrender, is necessary; as touching which, these things are to be known.

1. This is the receiving of the Tenant into the Copihold by the Lord, or his Steward, according to the Custom of the place; and it is thus entred, *Ad hanc curiam J. S. petit admitti, &c. Quem dominus per seneschallum admisit, & unde admissus est tenens.* Co. of Copihold, f. 115. Calth. f. 62.

2. Some make it exprefs, and implied, (i.) by acceptance of Rent, &c. Calth. f. 62. It is also either upon a voluntary Grant or Surrender, or upon a Descent. Co. 1. 140.

3. It is a Judicial Act of the Lords, and in case of a voluntary Admittance, he is but an Instrument, and may be compelled according to the Custom to do it; for he is not esteemed as owner to any purpose, and therefore he cannot prejudice the Surrender in any case: And therefore as to this Act, the Lords Title to the Manor, whether he hath it by right or wrong, is not much considerable. Co. of Copihold, f. 110.

4. This is necessary, for upon voluntary Grants and Surrenders, the Tenant hath nothing in the Land till Admittance, and upon Descents he is not perfect Tenant till his Admittance. Co. of Copihold, f. 112, 113. Yet in this case of a Surrender to the Lords use, no Admittance is needful; and where there is an implicate Admittance, there needs no Exprefs Admittance: And where Tenant in possession is admitted, he in the Remainder on the same Copy, need not to be admitted: and yet the Heirs of a Copartner must be admitted into a moyety, Calth. f. 63, 64. And he that enters for a Condition broken, needs no Admittance. Calth. f. 61. If a Copiholder for years, die, the Executor needs not be admitted, so neither the Husband of the Wife, Copiholder for years after her death, Calth. f. 95.

5. The Steward it is said, may do it out of Court any where within the Manor, except there be any Custom against it. Kirch. 82. Co. of Copihold, f. 123.

SeB. 9.

6. The Admission must pursue the Surrender; yet in some cases albeit it do differ from it, it is good enough; and therefore if the Surrender be to the use of J. S. for life, or to the use of J. S. generally, and the Lord doth admit him in Fee; this is a good Admittance for his life only. And yet if the Surrender be on Condition, and the Lord omit the Condition, it is all void, Co. of Copihold, f. 112. So if the Surrender be to the use of J. D. alone, and the new Grant and Admittance are to J. D. and J. B. This is good for J. D. and void for J. B. Co. of Copihold, f. 111, 112. So if the Surrender be reserving ten shillings, and the Admittance be reserving twenty shillings, it is good for the ten shillings. But if the Surrender be reserving twenty shillings, and the Admittance reserving ten shillings, it is all naught; the contrary seems to be deduced from the case of *Westwick*, 4. Rep. 28. a. b. So if the Surrender be to the use of J. S. and the Lord admit J. G. and after admit J. S. It is said in this case J. S. and J. G. shall have the Land together. But if the Surrender be to the use of J. S. alone, and the Lord admit J. G. alone; this is all void. Co. 4. 28. of Copihold, f. 111. If the Surrender be to the use of A. for life, the Remainder to B. and A. is admitted; this is good for him in Remainder, Co. 4. 23, 24.

Rent.

7. The Admission must be according to the Custom, yet if the Custom will warrant the Womans estate *durante viduitate* only, and the Lord admit for life, or the Lord admit not reserving the Antient Rent in quantity or quality; this will not prejudice the Heir, but that he may avoid it. Co. of Copihold, f. 109.

8. Admittance cannot make a bad Estate good, nor change the Custom. Kirch. 82. 86. See more of this after at *Fine*. Numb. 9. 10.

Upon a De-
scend.

The Heir of a Copiholder in Fee hath such a Possession, and is such a Tenant before Admittance, that he may (paying the Lord his Fine, which may be afterwards) enter, take the profits, Surrender, or bring an Action of Trespass; and if he die, the Heir shall have the Land, and there shall be a *possessio fratris* upon his Entry. And yet it hath been doubted, if a Copihold descend to a Feme-Covert, and the Husband take the profits, but suffer a Court day to pass without Admittance, whether he shall be Tenant by the Courtsey, or not. Dyer 291, 292. Calth. 60. But in Admittances upon a Grant, or Surrender; as if one Surrender to the Lord to the use of J. S. and the Lord grant it accordingly, it is otherwise; for there the Tenant hath nothing till

Admit-

Admittance. But the Heir of a Copiholder shall not be sworn of the Homage, nor bring a Plaint in the nature of an Assize, till Admittance. So that an Admittance in this case, is rather for the benefit of the Lord to help him to his Fine, then to strengthen the Title of the Heir: But the Heir is in most places bound, under pain of Forfeiture of his Estate, or some other great penalty to be admitted, and therefore he must be admitted. *Co. 4. 23. Dyer 291. Co. of Copibold, f. 113, 114, 117. Calth. f. 62.*

9. Upon every Admittance there is fealty due to the party admitting, by the party admitted; a thing inseparable to the person, which cannot be done by deputy; and yet if the Lord will accept it, or dispence with it altogether, it is willenough. *Co. of Copibold, f. 95. 10.* There is also a Fine due upon every Admittance: See after.

There is in most places a Ceremony used in the passing of the Lands; in some places there is the giving and taking of a Turff, and a Twig; in some places the giving and taking of a Glove; in some places the giving and taking of a Straw; in some places the giving and taking of the Hand; but in most places the Ceremony is by giving and taking of a Rod: And albeit the Grant, or Surrender may be good without this Ceremony, yet it is not safe to omit this. This the Copiholder that doth surrender, doth use to give to the Steward, or Bailiff, to deliver over to the party, to whose use the Surrender is made in the name of seising; and herein, *Consuetudo loci est observanda.*

1. If a Surrender be made to the Lord in general, without expressing to what use, it shall be taken to the Lords use, *Kitch. 81.*

How Grants
and Surrenders
shall be taken.

2. The same construction (for the most part) which the Law maketh upon words in a Deed, it will make upon a Copy; and therefore it is, that a Copibold Estate made to one, and his Heirs-males, or Heirs-females, is accounted a Fee-simple, though it be otherwise in the Kings Grant, *Co. 4. 29. of Copibold, f. 139.* So of a Grant to one & *sanguini suo hereditabili*, or to a Major, or Commonalty, or other Corporation, where no estate is named. So if I Surrender to one and his Heirs, and he reciting this; doth surrender it to my use in the same manner as I surrendered to him. So if I surrender to *J. S.* as large an estate as he hath in the Manor of *Dale*; and he hath a Fee-simple in that Manor; in all these cases, the Law will construe it to be a Fee-simple, *Co. 4. 29. of Copibold, f. 139.*

Fee-simple.

If a Copibold be surrendered to a man & *femini suo hereditabili de corpore*, or to a man & *heredibus ex ipso procreatis*, or to a man in frank-marriage with his Wife; in the first of these cases, an Estate-Tail passeth without the word Heirs, in the second without the word Body, and in the third without either; *Co. 4. 29. of Copibold, f. 139.*

Fee-tail.

If a Copibold be granted to man in a Fee-simple, or to a man & *sanguini suo imperpetuum*, or *sibi & assignatis suis imperpetuum*, without the word Heirs, that is onely an Estate for life: So if such a Grant had been to an Abbot, and his Heirs; so to *J. S.* and his Heirs, so long as *J. D.* shall live. And yet if the Grant be to *J. S.* and his Heirs, so long as such a Tree shall grow in such a ground, this shall be a Fee-simple. *Co. as before.*

Set. 10.

If this Land be granted to two men & *heredibus* without *suis*; by this no Inheritance is made, and they are Joyntenants for life onely; yet if it be granted to *J. S.* & *heredibus* without *suis*; hereby *J. S.* hath a Fee-simple, and not an Estate-tail. And if it be granted to a man & *liberis aut pueris suis de corpore*; this is no Estate-tail for lack of the word Heirs. *Co. as before.*

Joyntenants.

If the Grant be to a man, and the Issues-males of his Body; by this is made an Estate for life.

If this Land be granted to three *habendum successive*; by this they are Joyntenants, and shall take together, unless the Custom (as in most places it doth) do otherwise construe it. *Co. as before.*

If there be Copiholder for life, the Remainder to another in Fee, and the Copiholder for life, doth surrender to the use of another in Fee, and the Lord admit accordingly; by this there passeth an Estate for life onely. *Co. of Copibold, f. 91.* So if the Surrender be to the use of a stranger for life, and the Lord grant in Fee; this

is

is good for life onely, *Calth. f. 61.* So if the Lord grant a Copihold for life, where an Estate in Fee is warrantable; and this Grantee doth surrender in Fee, to the use of a stranger, and the Lord admit him accordingly; by this it is said the Fee doth not pass, *Co. of Copihold, f. 91.* If the Surrender be to the use of the last Will, and the Surrender deviseth it to two, and one of them onely is admitted according to the Will; by this both of them shall have it, *Co. of Copihold, f. 98.*

If one Copihold be between two Joyntenants in Fee, and one of them surrender his part out of Court to the Lord according to the Custom, to the use of his last Will, by which he doth devise it to the use of a stranger in Fee, and dieth; and this is presented at the next Court, hereby the Joynture is severed, and the Devisee must be admitted to a moyety of the Lands, *Co. super Littl. 59.*

Descent.

If a Copiholder surrender to the use of his Wife for life, the Remainder to the right Heirs of the Husband and Wife, the Wife dies, and the Husband doth survive; in this case, if he hath no Issue by his Wife, his Heir shall have it, by the opinion of *Calthrop, f. 82.* And yet if the Wife hath Issue by another Husband, it is doubted, and it is said, That the Husband and the Heirs shall have the Land; yet if the Husband had first two Sons, the Heirs of the Husband, and Heirs of the Wife, shall have the Land in Common after the decease of the Wife, *Calth. f. 83.*

If Land be given for life, the Remainder to two men and their Heirs; in this case they cannot have one Heir; and therefore if the Tenant of life, die before them in Remainder, they shall be Joyntenants. But if neither of them be alive when the Tenant for life dies, then the Heirs of them in Remainder, shall hold in Common. *Calth. f. 84.*

If a Copihold be surrendered to the use of *J. S.* and his Heirs, till he marry *A. G.* and then to the use of them two in special Tail; this is good, and shall endure accordingly. *Calth. f. 22.*

If a Copiholder surrender to the use of a stranger, in consideration that the stranger shall marry his Daughter before such a day; in this case, if the marriage succeeds not, the stranger shall take nothing by the Surrender. But if the consideration be that the stranger shall pay such a sum of money, at such a day; albeit the money be not paid, yet the Surrender is good. *Calth. f. 37.*

If the Copiholder in consideration of twenty pound to be paid by *J. S.* doth make a Surrender of his Land to *N. R.* This Surrender shall be to the use of *J. S.* and not to the use of *N. R.* But if in the Copy the use be expressed to *N. R.* and no consideration mentioned, the use expressed shall stand against any Consideration to be averred, *Calth. f. 37.*

If a Copiholder surrender his Land to the use of *J. S.* so that *J. S.* pay twenty pound at such a day, if he please; this is an absolute, not a conditional Surrender, *Calth. f. 39.*

9. In respect of the payment of the Fine, and of a Fine.

The payment of the Fine by the Tenant, is necessary to the continuance, but not to the creation of the Estate, for the Estate is made perfect without the Fine payment; But for the more full understanding hereof, these things are to be known.

1. A Fine is a sum of money to be paid of Common right to the Lord for an In-come into the Lands; and this is sometimes by the change, or alteration of the Lord, and sometimes by the change of the Tenant, the change of the Lord cannot produce a Fine, except it be by the act of God; but by the change of the Tenant, be it either by the act of God, or by the act of the party a Fine may be due.

2. This in some places is certain, and in other places incertain; and where it is certain, the Lord cannot increase it, and where it is incertain, yet it must be reasonable.

Custom, Admittances.

3. By general Custom this is to be paid onely upon Admittances, but it may be also by special Custom upon Licences granted to Demise by Indenture.

4. The Fine is to be paid upon Admittances, in these cases following, *viz.* Where the Lord after a Copihold come into his hands, and he make a voluntary Admittance; and where a Copiholder doth Surrender to the use of a stranger, and the Lord doth admit

admit him, so whose use the Surrender is made, and where a Copihold of Inheritance descendeth, and the Heir is to be admitted: So where the Wife is to come in as Tenant in Dower, or the Husband as Tenant by the Courtessie: And so also, where one doth enter as a general, or special Occupant. And so also where the Copihold Lands of a Bankrupt are to be sold upon the Statute of the 13 Eliz. 1. In all these cases the Tenant is to be admitted and to pay a Fine. So also if a Copihold be surrendered to the use of one for life, the Remainder to the use of another, and the Tenant for life die, he in Remainder must pay Fine upon his Admittance; so where the *habendum* of the Grant is successive, and one of them die, the next must be admitted, and pay Fine.

So if two Copartners or Tenants in Common be, and one die, and the whole descend to the other, there must be Fine upon the Admittance. But if there be two Joyntennants, and one of them die, and the other come to the whole by Survivorship, or one takes a Wife, a Copiholder in Fee, or marry with the Termor of a Copiholder, or a Copiholder be disseised, or then enter upon the Disseisor, or recover by Plaint in the nature of an Assize; or a Copiholder in Fee, surrender for life, reserving the Reversion, and the Lessee for life dieth; or a Copihold be granted on Condition, and the Condition is broken, and the Granter re-entred; or the Lord enter upon a Villain that hath purchased a Copihold; or the Bailiff is by Custom so have the Wardship of an Infant: In all these cases there needs no Admittance, and therefore no Fine is to be paid.

Sess. 11.

And yet if a Copiholder die seized, and a stranger abatech, and the Heir recovereth by Plaint, in the nature of an Assize of *Mort Dancer*; upon this Recovery an Admittance is to be made, and therefore a Fine is to be made. *Co. of Copihold, Sess. 56: in nov.* The reasonableness or unreasonable of the Fine must be set down and determined by the Judges, and not by a Jury; and therefore if it be unreasonable, it must be set forth in the pleading by the Tenant, *Hobbar. pl. 179.*

5. The Lord must demand his Fine, as he must his Rent, at the time, or after it doth become due before any forfeiture can be, *Hobbar. pl. 180.*

6. If the Lord use to take for his Fine, sometimes two pence, sometimes four pence, sometimes six pence an Acre; this is so uncertain; that it shall be said to be Arbitrary, *Calthrop. f. 25.*

The Steward of the Court must take care to Record, and Introl all the Conveyance of Estates; for some have held, That if the Lord in open Court grant a Copihold Estate, and no Entry is made hereof in the Court Rolls; that the Grant is not good, and that no Collateral proof will make it good. *Calthrop. f. 47.* But if the Tenant have no Copy, or lose his Copy, the Roll of the Court is a good Evidence. And if these Rolls be lost, it is thought clearly it may be supplied by proof, *Calib. f. 47.*

10. In respect of Entry in the Rolls of the Court.

And yet if By-laws be made and entered on the Rolls, and the Rolls be lost, the By-laws are gone, otherwise it is of Customs and Priviledges, inrolled and lost. *Idem.*

By-Laws, Customs.

That the Grant made by Copy of Court Roll may be good, it must be made according to the Custom of the Mannor, and that Custom must be according to Law: but as touching Customs, those things are to be known.

11. In respect of Custom, and of Customs.

1. A Custom is a Law, or Right not written, which being established by long use, and the consent of our Ancestors hath been, and is daily practised.

Custom. What:

2. Though Customs, Prescription, Usage, and Limitation, be much of Affinity, and one of them broken breaketh another, yet they differ much: For

Prescription:

1. Custom can have no beginning since mans memory; but Prescription may.
2. Custom toucheth many men in Common; that they by continuance of time have gotten a Right; and this is alleged thus, That in such a place is such a Custom, but Prescription toucheth this or that man, when he by continuance of time hath obtained a Right against another man; and this is Personal; and alleged in the name of some person in Certein; thus. That he and his Ancestors, and those whose Estates he hath time out of mind, &c.

3. Usage

Usage.

3. Usage is the Efficient cause, or life of both, for both lose their being, if Usage fail. *Calthrop. f. 17. Co. of Copihold, Sect. 33.*

Limitation.

4. Limitation is where a Right may be obtained by reason of a Non-claim, by the space of a certain number of years, differing in account of time from Custom and Prescription.

1. The measure whereof is so long, as mans memory cannot remember the contrary, that is, That no man alive hath heard, or knoweth any thing to the contrary. But Limitation hath a certain time of beginning and end.

2. Customs are either general, as which is part of the Common Law used in all places alike; or particular, which are used onely in some places; as in *Kent, North-Wales, Gavelkind, Burrough-English*. And these again are either disallowing what general Customs do allow: As that the Copiholder shall not sell his Land to a stranger, and compel the Lord to admit him; till he hath first offered it to the next of blood, or the next of kin, or next neighbor *ab oriente solis*; who giving as much as the party to whom the surrender is made, shall have it: Or else they be such as do allow what general Customs do disallow. As for a Copiholder to let his Land by Deed for longer time than a year without Licence, which by the Custom of some Mannors he may do. *Consuetudo ex certa causa rationabilis usitata privat Commune legem. Co. of Copihold. Sect. 33.*

Sect. 12.

3. To know what Customs are good, and what not, these Rules must first be taken.

First, Customs and Prescriptions must be reasonable, *2 Ed. 4. 24.*

Secondly, They must be according to Common Right, *42 Ed. 3. 4.*

Thirdly, They must be upon good consideration, *5 Hen. 7. 9.*

Fourthly, They must be compulsory, not voluntary, *42 Ed. 3. Avowry 66.*

Fifthly, They must be certain. *13 Ed. 3. 46.*

Sixthly, They must be beneficial to them that claim them, *31 Ed. 3. Prescription 40. 28.*

Seventhly, It cannot help a man to that which is gained onely by matter of Record.

Eightly, It cannot extend to a thing newly created.

Ninthly, They need not be used daily and hourly, but according to time and occasion, *Calthrop. f. 22. 21.*

Tenthly, *Non user*, as if the Lord hath been used to have Work-days, and have not had them for twenty years together; this will not hurt the Custom. *Calthrop. f. 25.*

Eleventhly, Custom may oppose the Common Law, but not a Statute Law. *Calthrop. f. 87.*

Hence it is, that these following Customs are not allowed to be good, *viz.* That no Tenant shall use his Common by putting in of his Cattle in *Campus seminatus*, after severance of the Corn, till the Lord put in his Cattle; for he may chuse, if he will, to put in at all.

To have a
Fine for a
Trespas, or
other Cause.

That if any mans Beasts be taken Damage-Fesant on the Lords Demeans, he may keep them till the owner give him such as he shall please; for this is to make him Judg in his own case: And if the Custom be, that if the Copiholder Trespas him, and it be presented at Court, that this shall be a forfeiture is good. *Calthrop. fol. 29.*

That every Copiholder shall pay the Lord a certain sum of money for every Court he keeps; or that he shall never keep a Court, till when it please him; for this Court being to do Justice, must be *gratis*. And yet such a Custom alleged to be for the keeping of an extraordinary Court, is good.

That every stranger that shall make a pound breach, shall pay one pound; and yet it is held, that a Custom laid, that every Tenant that shall make a pound breach, shall forfeit five pounds. *Calthrop. f. 31.*

That every one that rides through the Kings High-way, within the Mannor, must pay the Lord such a sum of money. And yet if it be, that every one that passeth over such a Bridg within the Mannor, which the Lord doth maintain; it is good enough.

That

That every Copi-holder that doth marry, or shall marry his Daughter, shall pay so much to the Lord for a Fine; and yet where the Custom doth admit the Husband Tenant by the Courtesie, and Wife to be Tenant in Dower, or to have Widows estate of the Copihold; that in these Cases they shall pay a Fine, is a good Custom.

That every Copi-holder shall hold his Land, without paying any Rent, or Service to his Lord: And yet it is held a good Custom to prescribe by Fealty, for all manner of Services is held good. *Calthrop, f. 29.* So a Custom may be good to exempt one Tenant from that, which all the rest of the Tenants do bear, and good. *Calthrop, f. 77.*

That every Copiholder shall give to the Lord, so much in the time of War, every moneth to bear his charges: And yet if it be that he shall pay so much to the Lord, for this purpose it is good; the reason of the difference is, because a payment is Compulsory, a Gift voluntary. *Incertainty: 1*

That when one Copiholder dieth, another of the Copiholders (and say not which) shall hold the Land for the year following: And yet if it be, that if a Copiholder die without Heir, the eldest Tenant of that name within the Manor shall have the Land; this is good. *Calthrop, f. 31.*

A Custom, that if any Copiholder commit Felony, and it be presented by the Homage, that the Lord may take and seise the Land, was ruled good. *Brownl. 2 part. 217.*

See a Custom, That a married Wife, Copiholder, might surrender to the use of her last Will, and after might devise to her Husband, was adjudged good. *24 Eliz. Skyes case. Brown. 2 part. 218.*

That the Lord shall have for his Fine, two pence Rent an Acre, and when he please, four pence an Acre: And yet happily if the Lord prescribe to have two pence an Acre Rent, in time of peace, and four pence in time of War; this may be certain enough, and good. *For Fine.*

That a Copiholder shall cut down what Timber he pleaseth, fire, pull down, or destroy the houses, or let them fall; and yet happily a Custom, that the Tenant shall have necessary Fire-wood, &c: That he may fell Under-woods and Shrouds; may be good. *To do Waste.*

That every Tenant shall pay a Fine at every Alienation of the Lord: And yet if it be, that every Tenant shall pay a reasonable Fine at the Lords death; or that a Fine shall be paid at every death, or alienation of the Tenant; or that the Lord shall admit without Fine; if the Usage have been so: *Calthrop, fol. 40.* *To pay a Fine.*

That if the Copiholder do not repair, he shall be amerced, and it shall be levied by Distress, is a good Custom; but that for this, he shall distrain any mans Cattle, besides his own, upon the Land, is somewhat doubtful. *March 161.*

That the Copiholder may lop the Trees, growing upon his Copihold for necessary fire, and Reparations is good: And if he hath been used to do so, it is good; and he may do it without alleging a special Custom for it. *Brownl. 1 part. 231. 87.*

These, and the like Customs as before are allowed to be good; but these following Customs are not disallowed, viz.

That the Wife of a Copiholder shall during her life, or Widows Estate hold all the Land.

That the Tenant shall have Common in the Lords Wastes.

That if he that hath Right, claim not the Land within a year, and a day after the Ancestors death, he shall lose it; and yet this will not binde an Infant. *Self. 13.*

That the Lord may grant for one two or three lives in Reversion.

That a Surrender may be made to the Bailiff, or Reeve, or two or more Tenants out of Court.

That the Surrender made by the Tenant in Tail, shall bar the Issue in Tail.

That the Lord may keep his Court at another of the Manors.

That the Lords Steward, or Bailiff, may grant Copihold-Estates to the Tenants. *To make Surrender.*

That a Feme-Covert may grant her Copihold-Estate to her Husband by Surrender.

That an Infant of years of discretion may Surrender.

That a new Tenant shall pay a Fine to the Lord, as he can agree upon his Admittance.

That Proclamation be made three Courts one after another; and if the Heir come not, and pay his Fine for Admittance, he shall lose the Land. *M. 7 Jac. B. R. Lyfords case.*

That the Copiholder may let for longer time, then one year without License.

To Surrender
out of Court.

That an Inheritance shall pass by Surrender in the Lords Court, without his leave, and be delivered over by the Bailiff to the Feoffee, according to the Deed to be enrolled in Court.

If the Lord prescribe, that whosoever take a Distress within his Manor, he must have him in his pound for a time; this is not good, for it is no benefit to him. But if he adde further, that the Lord is to have so much for the impounding, it is good.

To grant Copi-
hold Estates.

A Custom to grant Copihold-Estates in Reversion, is good; for without such a Custom, it seems Copiholds are not grantable in Reversion. *March 6. pl. 13.*

Prescription.

The Lord may not prescribe to have Felons Goods, Fugitives Goods, Deodands, because they cannot be forfeit, till they appear of Record. But Waifs, Estrayes, Wreck, and such like things, may be gained to the Lord by Prescription; for they may be gained by Usage, without matter of Record.

That the Wife of the Copiholder shall be Tenant in Dower, Husband Tenant by the Courtessie (a *querre* may as well be made of this, as of Intrailling Copiholds; since this Tenant by Elegit, &c. commenced by Statute, which is within the memory of man) or a stranger Tenant, by Statute merchant (and so no Custom can be of it. *Co. of Copihold Sect. 47.*) or Staple of the Land in the hand of the Copiholder, are good Customs, *Co. of Copihold, 136.*

To make
Leases.

That the Tenant may make a Lease for twenty years after his death, is a good Custom. *Co. of Copihold. f. 93.*

To pay Rent,

That the Tenants shall pay the Lord every fourth year, the double Rent, and every sixth year an half years Rent, is a good Custom. So that when they sow their Land, they shall pay their Rent in Corn, and when they feed it, in money, is a good Custom. *Calthrop. f. 25. Goldsb. pl. 8.*

It is a good Custom to Demise for longer time then a year, but without such a Custom, the Copiholder cannot let for longer time then for one year without Licence of the Lord, *Brownl. 1 part. 133.*

they shall
be taken.
To make
Estates.

All Customs, especially such as are in derogation of the Common Law, are taken strictly, but not literally. And therefore where a Custom is, that a man may grant in Fee; by this he may grant in Tail, or for life: So where the Custom is, that the Lord may grant for life, by this he may grant *Durante viduitate cui licet quod maritus, non debet quod minus est non licere, sed non e converso.* But where the Custom is, that the Wife of the first taker shall have her Widow-hood; by this the Wife of the second shall not have it. *Co. 4. 30. of Copihold. 70. 77.*

If the Custom be, that the Copihold-Land may be leased by the Lord, *Vel supervisor, vel deputas supervisor*, the Lord cannot by this Testament, appoint, authorise one to keep Courts, and make Estates. *Ca. 4. 30. of Copihold, fol. 35.*

To pay
Money.

If there be a Custom, that for every house in the Manor two shillings Fine shall be paid. If the Tenant maketh one house into two houses, or maketh a new house, no Fine shall be paid for these new houses.

Common.

So if I have Estovers Appendant to my house, and I build a new house, I shall not have Estovers to this new house. But if I onely change the Rooms, my Estovers do continue.

Proof of it.

So it is of a Water-course to a Fulling-Mill, converted to a Corn-Mill, or of a Light in an Hall, converted to a Parlor. *Co. 4. 32. Little Sect. 74.*

The proof of these Customs and due president, as to prove Leases, may be made for longer time then a year, to shew one Lease, is no proof of a Custom.

In Custom there is *Ufer*.

Loft.

1. When according to time and occasion it is used.

2. *Nov. Ufer*; i. When for want of time and occasion, through negligence, or forgetfulness it is not used; this will not hurt the Custom: And therefore if there be a Custom that the Tenants shall do work for the Lord yearly, and it hath not been done for divers years; yet the Custom remaineth, if any man living can remember it hath been done. And so it is, if one have a Market one day a week, and do not keep it.

3. If the Tenant use to pay the Lord when they sowe their Land, Rent-Corn, and when they seed it, money, or to pay the Lord every fourth year a double Rent, and every sixth year an half Rent; this is a good Interuser. For payment of Rent.

4. Abuser is where the Tenant doth put in other Cattle, or more Cattle in the Lords Soil than he ought; this doth not destroy the Custom, but this is finable at the Lords Court. And so it is, if the Lord hath a Fair or Market one day of the week, and he keep it another day; this is not a forfeiture of the Custom. And yet if he hath it two days, and keep it three days; this is held to be a Forfeiture. *Calsh. f. 43, 44.* See more to this in the next *Question*.

For the clearing of this point, these things are to be known.

1. The Copihold is destroyed and gone in all these cases following. i. When the Copihold is either by act of Law, or act of the Lord, or the Copiholder, or Tenant, become not demisable by Copy: As for example, If the Lord by Fine, or Feoffment, or otherwise, by Deed grant the Reversion of one, or some of the Copihold Tenements, of the Manor in Fee, or for Lease to me; by this it is gone. And in this case also it is so gone, that no Acceptance of Rent, or Admittance of the Tenant, after will revive it. But if the Lord grant the Reversion of all his Copihold Tenements; by this the Manor is not destroyed. *Co. 4. 27. of Copihold, f. 176.*

5. When and how a Copihold shall be said to be destroyed or suspended:

Or, if when the Copihold is come into the Lords hand, he do by Fine, Feoffment, or Recovery, pass away the Fee, or make a Lease for life, or years of the Land, or suffer it to be extended on a Statute, or Elegit of his own acknowledgment; or if after it come into the Lords hands he die, and if it be afterward assigned to his Wife in Dower; by this in these cases, the Custom is destroyed for this Land. *Co. 2. 17. Calsh. 91. Goldsb. 206. pl. 246.*

If one that hath a Manor of Copiholds, doth grant away one Copihold for life; it seems the Custom is gone for this Copihold, *March. 206. pl. 246.* So if the Lord by Deed do grant and confirm to the Copiholder, his Estate by Copy is gone, *Brownl. 1 part. 220.* Or if the Lord or his Lessee of the Manor, doth make Lease of the Copihold to the Copiholder, or make a Feoffment absolute or conditional to the Copiholder of the Copihold; the which he doth accept. If the Lord make a Lease for years to the Copiholder himself; this doth determine the Copihold. But if he make a Lease for years to another, and he assign it to the Copiholder, it is doubted. *Goldsb. 249. March 206. pl. 246. Goldsb. 249. pl. 9.* Or if the Lord make a Lease of the Manor to the Tenant for life, the Remainder to a stranger; by either of these also it is gone, *Dyr. 114. Kitch. 82.* Or (as some say) if the Copihold come into the Lords hand by Escheat, or the Lord purchase the Copihold; but this opinion is disallowed. *Calsh. 90. 88. 91.* But if the Lord grant part of the Copiholds onely, by this it is clear the Manor is gone, and Custom destroyed. Adjudged, *29 Eliz. Calsh. 90.* And where the Copihold is extinguished, the Land can never be afterward granted by Copy. If there be a Lease for years of the Manor, and one of the Copiholders doth purchase the Reversion in Fee; by this the Copihold is destroyed, and the Lessee of the Manor shall out the Copiholder, and have the Land for the time. *Calsh. f. 99.* And yet if the Copiholder accept a Lease for years of the Manor, or marry with the Wife of the Lord; by this the Copihold is not extinct, but it is suspended. And if a Copihold be in hand, and the Lord alien by Fine, or Feoffment, or make a Lease of the Manor for years; by this it is extinct. *A.* was seized of a Manor in which were Copiholds, and he took to Wife *M.* and died seized, and she sued for Dower by the name of a hundred Mesuages, and one hundred Acres of Land, &c. and was endowed accordingly of part of the Demefins, and part of the Copihold

Services; in this case it was adjudged, the Copihold was gone, at least, during her Estate, and that she could not grant Copihold Estates upon the Copihold Land: But perhaps if she had demanded and recovered by the name of a third part of a Manor, it had been otherwise, and she might have had a Manor. *Goldsb. 37. pl.* For the Grant of a Copihold cannot be without a Manor. And if a Copihold be granted to three for their lives, and the first of them take an Estate by Deed, with Livery of Seisin from the Lord; by this, the Copihold for that life is at least suspended. *Dyer 30. Co. 4. 31.* But the Copihold is neither extinct, nor suspended in these following cases: *viz.*

2. *Self. 14.*

Where the Copihold is Surrendred, Forfeited, or doth Escheat into the Lords hands, and the Lord doth keep it in his own hands, or let it at Will onely; or the Tenant having Licence from the Lord, make a Lease to a stranger according to his Licence, or without Licence make a Lease to the Lord, *Co. 4. 30.* So where the impediment is tortious, as if the Lord be disseised, and the Disseisor die seized; or the Land be recovered by false Verdict, or erroneous Judgment, and afterwards is recontinued. *Quod contra legem fit pro infecto habetur; non valet impedimentum, quod de jure non sortitur effectum. Co. 4. 31.* of Copihold, f. 178.

But in all the cases before where the Copihold is gone, by Grant of the Reverſion, it is not so gone, but that the Tenant shall hold his Estate still, and subject to Forfeiture as before; and he must still perform the same services (Suit of Court excepted) as before, and the Customs incident to the Land, as if it be Burrow-English or Gavelkinde continue still. But Fine upon Alienation and Admittance is gone, and the Tenant cannot now surrender or pass his Estate by any way, but by a Decree in Chancery; and this will binde the person onely. *Co. 4. 25.* of Copihold, fol. 17. 6.

6. What Acts amount to the Forfeiture of a Copihold Estate, and how.

Of Acts which amount to a Forfeiture, some are Forfeitures *ipso facto*, & *eo instanti*, that they are done, such are offences apparent, and notorious; of which the Lord by common presumption, cannot but have notice: Some are no Forfeitures, till a Presentment be made thereof. Other Acts there are which are offences, but are not such as cause a Forfeiture; yet are they Finable to the Lord.

Of the first sort are these following Acts.

1. By not coming in to take his Land. Admittance.

If by special Custom upon the descent of any Copihold of Inheritance, the Heir be bound upon three solemn Proclamations at three several Courts, to come in and be admitted into his Copihold, and he cometh not; this is a Forfeiture if he do not come, this is *ipso facto* a Forfeiture. *Calthrop. f. 69. Co. of Copihold, f. 164.* And yet if a Copiholder enter before Admittance, this is no Forfeiture without a special Custom for it.

2. By denying of Suits of Court.

So if a Copiholder being sufficiently warned to appear at the Court Baron of the Manor, and he wilfully make default, having no excuse for his absence: And this absence is greater, if he do wilfully refuse to come; or being come to be sworn of the homage, or being sworn to present; or if he depart without Presentment; as if thirteen be sworn, and twelve present, and one refuse: But if a Copiholder be hindered by sickness, waters, debts, or the like; his default is no Forfeiture, but otherwise it is *ipso facto*, a Forfeiture. *Dyer 217. 31. Calth. f. 67. Dyer 233. 9. H. 6. 44.* So if he swear in Court, he is none of the Lords Copiholders, or being required to be sworn of the Homage, refuse it for that cause: This it seems is a Forfeiture, and that without Presentment.

So if the Steward shew a Roll, whereby the Tenant is proved a Copiholder, and the Tenant say he is a Freeholder, and shew a Deed to that purpose, and tear in pieces the Court Roll; this is such a Forfeiture. And yet if there be a doubt in it, and the Copiholder do his service with a Protestation, that it may be recorded, as it shall fall out; this is no Forfeiture, nor Finable. So if he speak unreverent words of the Lord in the Court, as if he say, he doth exact and extort unreasonable Fines, and undue Services that is onely Finable: So if he say, he will devise a means to be no longer his Tenant; this is neither a Forfeiture, nor Finable.

3. By non-payment of the Fine.

Where the Fine upon Admittance is certain, if after Admittance it be upon demand denied, or not paid, or where the Fine is uncertain, and the Lord hath set a reasonable

reasonable Fine, and the Tenant doth not pay it in a reasonable time after demand; *Denand.* in these cases, it seems there is a Forfeiture: But it is no Forfeiture in him to deny the payment, if it be set unreasonable. And of this point the Judges, not the Jewry shall be Judge; and yet of this also, some hold there must be a Presentment, before there can be a Forfeiture. *Co. 4. 27. 28. Calth. f. 67. Trin. 4 Jac. B. R.* But no Forfeiture can be by this, without demand, made at, or after the time of the Fine set, so also of a Rent. *Hobbar, Rep. pl. 179.*

If a Copiholder sue a Replevin against the Lord, distraining for his Rent, or Service; this is such a Forfeiture. *Co. of Copihold. f. 163.* So if the Lord bring Trespass against the Tenant, and he plead it his Freehold. *4. By bringing a Replevin.*

And yet if the Copiholder doubting of the truth hereof, whether it be due or not, intreateth of the Lord, that the Jewry may enquire thereof; this is no Forfeiture. *5. By Pleading.*

If a Copiholder for life suffers a recovery by Plaint in the Lords Court, as Copiholder of Inheritance; this is said to be such a Forfeiture. And yet if such a Copiholder surrender in Fee; this is no Forfeiture. *6. By suffering a Recovery.*

So if Copiholders in Fee, make Partition; this is no Forfeiture: *Calthrop, fol. 98.*

If the Lord demand his Rent of the Copiholder, and he deny to pay it, or he delay to pay it, without the Lords Agreement; or if the Lord come upon the Land, and there continue demanding of the Rent, and it is not paid; this is such a Forfeiture: For the Copiholder knowing the time of payment, is to provide it against that time. And this also by a special Custom may be a Forfeiture before the Admittance of the Tenant. *Co. of Copihold, fol. 167. Mich. 7 Jac. B. R.* But to demand it after the day, can be no Forfeiture. *Brownl. 1 part. fol. 143.* *7. By not paying Rent.*

Waste in a Copiholder is either voluntary or permissive. If a Copiholder commit voluntary Waste, as if he pluck down any ancient built House, or build a new House, and then pull it down again, or Plough up Meadow-ground, so that the ground is thereby made worse; or cut more Timber then there is need of, or being cut, doth mis-employ it, or doth not employ it in due time; or lop the Trees, and sell the loppings; or cut down any Fruit-trees for fewel, having other Wood sufficient; or behead Trees, or break the Boughs, so as the Bodies do thereby putrifie. All these things are Forfeitures, and yet the cutting and carrying away Shrouds, or Underwood is no Forfeiture, without a special Custom to make it so. *8. By doing Waste.*

So if the Tenant hath a Grant of the Trees, or a Licence to cut down Trees; in this case it is no Forfeiture. But otherwise in these and such like cases without a special Custom (which ruleth much herein) to enable the Act, it is a Forfeiture. *9 H. 4. 12. Calth. fol. 68. 36, 37 Eliz. Co. B. Co. 4. 27. of Copihold, fol. 163. Calth. 98. Co. 1. 63.* And these things will be a Forfeiture, when they be done by the Lessee at Will of a Copiholder, and the Copiholder shall have his Remedy over against the Tenant at Will, by Action of the Case. *Self. 15.*

So also it is for permissive Waste, as if the Copiholder suffer his House to decay, or fall for want of repair, or suffer his Meadows, or Lands by his ill Husbandry to be spoiled. And yet some are of another opinion in some of these cases, for they hold that many of these are no Forfeitures, till there be a Presentment of them, And herein they distinguish between voluntary and involuntary Acts, and Acts that lie in Non-feasance, which they say must be presented, and Acts that lie in Misfeasance, which needs no Presentment. *Calth. f. 68. 50.*

Of the next sort, whereof the Lord must have a Presentment, before he can take advantage of the Forfeiture, are these things following, viz: *9. By committing of Treason, Felony, &c.*

Where the Copiholder doth commit Treason, or Felony, and be therefore attaint, or be convict for Recusancy, or be Out-lawed, or Excommunicated, or goeth about in any other Court to intitle the Lord to the Copihold.

Or if he alien his Copihold Land by Fine, Deed, or make a Lease of it without Licence of the Lord, and yet this Lease as to all others, but the Lord himself is good. *10. By making a Lease, Licence, &c.* But

But in case where the Custom will warrant a Lease for a year, there it is no Forfeiture, whether it be by word, or writing; for without a Custom of Enablement, it is held, that a Copiholder by the Common Law, cannot make a Lease for a year, 35 *Eliz.* 21. *Trin.* 3 *Jac. Curia. Co.* 4. 27. *Littl. Sect.* 74. If the Copiholder having a Licence to let for ten years, and he let for twenty years; this is a Forfeiture: Yet if the Copiholder for life surrender to the Lord, to the use of another in Fee, or make a Feoffment in Fee, or Lease for life; but doth not make Livery or Seisin upon it, or not make a good Livery upon it, or doth bargain and sell the Land without enrolment of the Deed; neither of these is a Forfeiture. *Trim.* 36 *Eliz.* 2. *Co.* 4. 23. of *Copihold.* f. 169. *Brownl.* 1 part. 39.

So if the Copiholder have Copihold Lands, and other Lands in *Dale*, and he bargain and sell all his Lands in *Dale*, and the Deed is enrolled; by this the Free-land onely passeth, *ergo*, this is no Forfeiture: But if he have no Free-land, there it is a Forfeiture. And all these offences are the greater when they are willingly done.

Of the third sort of Offences, are these following, *viz.*

Where the Copiholder being of the Grand-Jury, doth indict the Lord, or give evidence against him; or being a Bailiff, if he arrest him, or sue him at Law (except it be in the case of a Replevin before,) neither of these acts is a Forfeiture, nor is it Finable. So neither if the Copiholder disseise the Lord of any other Land. *Calib.* f. 68, 91. So if the Copiholder abuse the Lord in words, or abuse the Lords Common with his Cattle, or rail upon another Copiholder in the Court, or use any such like words, or Deeds of Contempt, that do not tend to the Lords disinherittance: These things are at the most but Finable. *Calthrop.* f. 45.

In answer to this Question, these things are to be known.

8. Who may
Forfeit, and
how.
Infant.

1. A Copiholder of *Non sane memorie*, an Ideot, or a Lunatick, cannot forfeit his Estate.

2. An Infant under fourteen years of age, cannot forfeit: for he is till then to be in Ward to the next of Kin, or Bailiff, according to the Custom of the place: Nor can he forfeit by any negligent, or ignorant offences as non-claimed, not coming to be admitted, not repairing, nor *malfeasans*. Thus, if he bring a Replevin against the Lord; alien by Deed, or the like acts: But by a voluntary Waste, or obstinate denial of Rent, an Infant may commit a Forfeiture, and so he may by doing a Felony. *Co.* of *Copihold.* f. 172.

Feme-Covert.

3. A Feme-Covert cannot by any act she can do alone forfeit her Estate; but her Husband, or she with the consent of her Husband, may; yet if a stranger with the Wives consent, without the consent of her Husband, commit a Waste: This is not a Forfeiture. *Co.* 4. 27. of *Copihold.* f. 172, 173.

Guardian.

4. The Guardian of a Copiholder may forfeit his Wardship; but he cannot forfeit his Copihold. *Co.* of *Copihold.* f. 172, 173.

Cor que use.

5. *Cor que use* of a Copihold cannot forfeit it.

6. A Disseisor of a Copihold cannot forfeit it.

7. He that doth forfeit, can forfeit but his own part; and therefore if there be two Joyntenants, and one of them commit a Forfeiture: Lease for life, the Remainder for life, or in Fee, and the first Tenant for life commit a Forfeiture, or purchase the Manor, and extinguish the Copihold, the Remainder is not hurt. If the Husband and Wife be Joynt-Copiholders of the purchase of the Husband, during Coverture; and he is attainted of Felony, and dieth, his Wife shall have all the Land: But if the purchase were before the marriage, then a Moyety is gone. *Calth.* f. 92, 97. So where the Estate is made to three *successors*, and one of them doth commit a Forfeiture; this cannot hurt the Estate of the other two. So where a Copiholder in Fee, by Licence doth make a Lease for years by Deed, or without Licence by Copy, and either of these Lessees commit Waste: By this the Reversion is not forfeit. *Co.* of *Copihold.* f. 172.

8. If a Copihold be surrendered to the use of *q. s.* he cannot forfeit this before Admittance.

9. If one hath several Copies, the Forfeiture of one of them is not the Forfeiture of the other. *Co.* of *Copihold.* f. 174.

Regularly,

Regularly, None can take advantage of the Forfeiture, but he that is Lord of the Manor at the time of the Forfeiture; and therefore if the Copiholder make a Feoffment, and then the Lord doth alien the Manor; in this case, neither the Granter, nor the Grantee, can take advantage of the Forfeiture. And yet if there be Tenant for life of the Manor the Remainder in Fee, and a Copiholder commit a Forfeiture; and the Tenant for life of the Manor die before his Entry; in this case he in Remainder may enter. And he that was never Lord of the Manor, shall take advantage of the Forfeiture, as where the Lord make a Feoffment of the Copihold in Fee; in this case the Feoffee shall enter upon the Forfeiture. *Co. 4. 24. of Copihold, 176.*

In case where a Copihold is forfeit, and the Lord hath notice of it, if he shall do any thing afterward, whereby he shall acknowledge the Copiholder to be his Tenant, as distrain upon the Land for Rent, admit him to be Tenant, or the like: By this the Lord is concluded to take advantage of the Forfeiture. And yet if the act done by the Copiholder be such an act as doth destroy the Copihold, as if he make a Feoffment of the Copihold, or the like; in this case no subsequent act of the Lord will help. *Co. of Copihold, 176.*

They are expressed in these following Statutes, *Rich. 3. 4.* A Copiholder that hath twenty six shillings and six pence *per annum*, may be a Juror as well as he that hath twenty shillings *per annum* of Freehold Land. *1 Ed. 6. 14.* About Abby Land. *2 Ed. 6. 8.* About Offices found, *1 M. 12.* Now expired touching the assistance of Justices of Peace to suppress a Riot. *5 Eliz. 14.* About Forgery to defraud a Copiholder. *13 Eliz. 7.* About the Copihold of a Bankrupt. *14 Eliz. 61.* About his Copihold that doth depart the Kingdom without leave. *35 Eliz. 2.* About a Recusant. When the Statute doth alter the Service-Tenure, Interest of the Land, or other thing in prejudice of the Lord, Custom, or Manor, or of the Tenant there, the general words of Tenant, or the like, extend not to Copiholders: But when the act is for the good of the Commonwealth, and no prejudice may accrew, by reason of any alteration of the Interest, Service, or Custom of the Manor, there usually Copiholders, and Copiholds are included. *Co. 3. 8. March 36. Brownl. 1 part. 34.* For this cause it is judged, they are not intended in these following Statutes. *viz. Westm. 2. 1. of Intails.* And yet by Custom such Lands may be intailed.

Westm. 1. 26. Of an *Elegit*. *16 R. 2. 5.* Of Forfeiture of Lands by receiving Bulls, &c. *2 H. 5. 7.* Of the Forfeiture of Hereticks. *27 H. 8. 10.* Of Uses. *31 H. 8. 1.* *32 H. 8. 31.* About Partition. *32 H. 8. 28.* Of Leases made by Tenant in Tail, or Husband and Wife. *17 Ed. 2. 18.* Of Ideots Lands. *Merton 1. Of Damages. Co. 4. 30. Westm. 2. 3. 31 H. 8. 13.* And that of *32 H. 8. 9.* Of Champerty. *Co. 4. 26. 4 H. 7. 24.* Of Fines. *Co. 9. 105.* See *Bro. 2 part. 89, 86, 77, 78.*

For the better understanding hereof, these things are to be known.

1. For any thing which doth concern his Copihold, he cannot sue, or be sued in any real Action, or Actions favoring of the reality elsewhere, but in the Lords Court. But he may bring an Action personal in any other Court, and the Lessee of a Copiholder may bring an *Ejectione firme* in any other Court. *Co. of Copihold, 147.*

2. If the Lord oust him he may have an *Ejectione firme* or Trespass against the Lord in any Court; but he cannot have an Assize against the Lord. *Co. of Copihold, 146.*

3. A Copiholder of base Tenure in Antient Demesne, cannot have a Writ of *Droit Close*, or *Monstraverunt*, but Tenants, of Frank-tenure in Antient Demesnes may. *Co. of Copihold, 146.*

4. If the Copiholder by Licence of the Lord make a Lease of the Land, and the Lessee cut down Timber, there being a custom that the Copiholder may cut down Timber; the Copiholder in this case must punish this in the Lords Court.

5. If a Wife dowable by custom, recover her Dower by plaint in the Lords Court, and in the Action she recover damages also, she may not sue for these damages at the Common Law. *Co. of Copihold, 146.*

6. If a Copiholder make a Lease by Copy for years, or by Deed, with Licence rendring Rent, an Action of Debt; for this Rent may be brought in any other Court. *Co. of Copihold, 146.*

9. Who shall take advantage of a Forfeiture, or not.

10. What Acts will confirm an Estate forfeit.

Sett. 16. 11. In what Statutes the Copihold and Copiholder is included, or not.

Customs.

12. How the Copiholder may sue, or be sued.

Ejectione firme.

7. If a stranger cut down the Trees growing on the Copihold, an Action of Trespass lieth against him; for this at Common Law. So if the Trees by Custom belong to the Tenant, and the Lord doth cut them down. *Co. of Copihold, 147.*

8. If the Copiholder Surrender to the use of the Creditor in trust to pay his Debts, and then to have the Land again, and he keep it; in this case this being proved by Examination of Witnesses upon an English Bill, the Lord may reſeize and reſtore the Land. *Calthrop, f. 74.*

9. If the Lord hath a great Waſte, and he grant a Rent out of it; the Grantee may diſtrain the Tenants, unleſs they can preſcribe to have Common there. *Calthrop, f. 97.*

10. If the Steward, Bailiff, or Tenants, into whose hands the Surrender is made, reſuſe to preſent, or admit the Tenant; in this caſe he is to ſue by Bill or Petition, to the Lord in his Court. And if the Lord there will not do him right, the Tenant may ſue him and them in *Chancery*, and there he ſhall have relief. *Co. of Copihold, 180.*

11. For the order of Proceſs in Suits in the Lords Court, inquire the Cuſtom of the place, and ſee *Calthrop, f. 75. 98.*

For this theſe things are to be known.

13. Of a Licence to Alien.

1. That the Lord may Licence his Tenant to let by Deed for years, if there be a Cuſtom for it. And the Entry of this in the Court Rolls is thus, *Ad hanc curiam J. S. petit licentiam domini demittendi, &c. Cui dominus licentiam dat, &c.* And if it be by the Steward, *Cui dominus per ſeneſcallum licentiauit.* *Co. of Copihold, 123, 125.*

Cuſtom.

2. This Licence (it ſeemeth) is not grantable by the Steward, without a ſpecial Cuſtom to enable him to do it, or a ſpecial Warrant from the Lord to give him power ſo to do, *Co. of Copihold, f. 124.*

3. If a Tenant for life of a Mannor, grant a Licence to a Copiholder to Alien, and the Lord die; in this caſe the Licence is good. *Co. of Copihold, f. 85.*

CHAR. LIII.

Of Corn, and a Corrody.

Transportation.



Or Corn theſe things are to be known.

1. None may tranſport any Corn, whatſoever, nor any Malt made thereof, nor any Beer, Butter, Cheeſe, Herring, or Wood, but for victualling of Ships, or the like, without the Kings Licence, except it be in ſome ſpecial caſes when Corn is very cheap, and from ſome Ports, and with ſome kinde of Ships onely, and by allowance, and direction of ſome great Officers.

Cuſtoms.

2. The King by his Proclamation may reſtrain the Transportation of it at his pleaſure.

3. The Kings Cuſtoms muſt be duly paid therein.

4. He that doth Tranſport, muſt Lade at one place. *1, 2 Phil. & Mar. 5, 13 Eliz. 13. 35 Eliz. 7.*

5. There is no Act now to forbid the importing of Corn, for that *Stat. of 3 Ed. 4. 3.* is repealed by *31 Jac. 28.*

Ingroſſing.
Foreſtalling,
&c.

6. None may buy Corn to ſell again without Licence. *5 Eliz. 12.*

7. He that ſhall buy Corn for the change of his Seed, muſt bring in as much other Corn to the ſame Marker. *5 Ed. 6. 14. 13 Eliz. 25.*

8. Corn when it is of a ſmall price may be ingroſſed and kept in Grainers, *15 Ed. 6. 14. 13 Eliz. 25.*

Purveyors.

9. Purveyors muſt take Corn by meaſure ſtriked, and not without the owners conſent. See *Purveyors.*

10. None

10. None may buy Corn to sell it in Meal, unless he be licensed under the hands and seals of five Justices in open Sessions, under pain of treble value, and two moneths Imprisonment without Bail, *Act. 23 Octob. 1650.* See more in *Wingates Abridgment*, *Stat. 5 Eliz. 12: 13 Eliz. 13. 3 Car. 4.*

of a Corody.

A *Corody* was an Allowance of money, or meat or drink, due to the King from an Abbey or House of Religion of his own founding, towards the reasonable sustenance of one of his Servants, being put to his Pension; where he thought good to bestow it. But a *Pension* was taken for money given to one of the Kings Chaplains for his better maintenance in his service, until he can be better provided for by a Benefice. The *Corody* was given to one of the Kings servants that did live in the Abbey; the Pension was given to him that did attend on the King. *Terms Law*, *F.N.B. 230. & Stat. 33, 34 H.8. ch. 19.*

Corody, what.

Pension, what.

CHAP. LIV.

Of Costs and Damages.



Costs are the Expences laid out in the prosecuting of any Suit in Law, which is so much as the Court will allow him that is the Plaintiff or Defendant in the Action, and is to have it at the end of the Suit.

1. Costs, what it is.

For Answer to this Question, all these things must be known.

Self. 1. Where Costs shall be recovered in Suit, or not.

1. Where a Plaintiff doth recover the thing sued for in any Personal Action, there he shall recover Costs of Suit also, *Flow. 310. 9 H.6. 32.*

2. Where a Plaintiff is Nonfuit after Appearance, or after Verdict given against him in an Action of Debt, Trespass, Detinue, Covenant, or upon the Case, the Defendant shall recover Costs against him, *23 H.8. 15. Dyer 32.*

3. Wheresoever a man shall recover Damages by the Common-Law, or by the Statutes of 6 Ed. 1. ch. 1. or *Merton. 1.* there he shall recover Costs also, *Co. 10. 110.*

4. Where an Act of Parliament doth give increase of Costs, there some Costs were recoverable before, *Stat. 2 H.4. 1. 27 H.6. 10. 14 H.6. 13. 8 Ed.4. 13. F.N.B. 148.*

5. In a *Mortdaucester, Aile and Besaile*, and Intrusion of his own doing, the Demandant shall recover Costs, *Glouc. ch. 1.*

6. In an Attaint, Costs shall be recovered, *11 H. 6. 4.*

7. Where the Defendant sueth a Writ of Error, the Plaintiff shall recover Costs, *11 H. 7. 10.*

8. Where a Verdict is found for the Defendant, the Plaintiff must pay Costs, albeit the Declaration be insufficient. So it hath been often adjudged, as two Judges said, *Pasch. 19 Jac.*

9. If an Executor avow for Arrearages of Rent upon *St. 32 H. 8.* and recover, it seems he shall recover Costs, *Trin. 22 Jac. B.R.*

10. In a Suit in Chancery, if the Bill prove false, or the Plaintiff delay his Suit, the Defendant will have Costs there, *Bro. Conscience, 24.*

11. But he that sueth, or is sued in *forma Pauperis*, a Plaintiff or Defendant that is admitted so to sue, shall neither recover nor pay Costs, neither party shall pay Costs, *22 H.8. 15. Bro. 452. Pasch. 7 Jac. B.R. Eslins Case:*

12. If the Suit be in the Kings name, and it be Nonsuit, or Judgment is given against the King, after Verdict no Costs shall be recovered, *Stat. 23 H. 8. ch. 15. 24 H. 8. 8. 4 Jac. 3. 8 Eliz. 2. 43 Eliz. 6.*

13. Where in any Suit double or treble Damages is given by any Statute, and no Damages was recoverable before, as in the case of Waste and *Q. impedit*, and some other Actions, there no Costs shall be recovered, *Co. 10. 116. Kelw. 26. 27 H. 6. 10. 2 H. 4. 7. Curia 7 Jac. Co. B.*

14. In an Action of Debt for Ingrossing, where a great Sum of money is recovered, no Costs shall be recovered, *Co. 10. 110. Bro. 258.*

15. In case where the Action brought doth not exceed Forty shillings, Debt or Damages, there no Costs shall be recovered in it, *43 Eliz. 6. 1 Jac. 25.*

Executor or
Administrator.

16. If an Executor or Administrator be Nonsuit, or Verdict pass against him in a Suit for any thing touching the Testament, he doth not pay Costs. But if he bring an Action for a thing done to himself, as for taking away Goods from himself, and the like, and he be Nonsuit, or Verdict pass against him, in this case he shall pay Costs. *Experience.* The Issue was, That the Plaintiff was not Executor, and the Jury found for the Defendant, and yet the Court would not give Costs to the Defendant, *Brownl. Rep. 1 par. 79.*

17. No Costs shall be recovered against an Executor or Administrator, upon the Statute of 8 Eliz. 2. nor upon the Statute of 4 Jac. 2. By the Court, *M. 6 Jac. B. R.* See more of these things in *Brownl. Rep. par. 66. 79. 107. Westm. 2. 5. Marth. ch. 17. 6. 4.* And see more in Damages, *March. f. 57. pl. 88. f. 61. pl. 94.*

For this, take these things following.

Self. 2.
What Costs
shall be recovered, and
how they shall
be taxed.

1. That in an Action of the Case for slanderous words, if the Jury do give under Forty shillings Damages, then the Plaintiff shall recover no more Costs than the Jury hath given him in Damage, *Stat. 21 Jac. ch. 16.*

2. If the Action be a Personal Action, and do not concern Land, or a Battery, and the Debt or Damages to be recovered do not come to Forty shillings, or above the Costs must be no more than the Debt or Damages is, *43 Eliz. 6. 1 Jac. 25.*

3. Where Officers are sued for any thing about their Offices, and Verdict is given against the Plaintiff, or he is Nonsuit; there in some cases the Officer shall recover double, in some cases treble Costs. And for this see the several Statutes of 43 Eliz. ch. 2. 7 Jac. 5. Ordinance. *March 16. 4.* See more for Costs, 11 H. 6. 4. 3 H. 7. 10. 19 H. 7. 25. 23 H. 8. 15. 24 H. 8. 8. 8 Eliz. 2. 43 Eliz. 6. 4 Jac. 11. 21 Jac. 12. 3 Jac. 15. *Wingates Abridgment.* And in all cases the Costs are to be taxed and set down by the Court wherein the Action is, and at the end of the Suit, and not before, *Co. 10. 116. 110. Dyer 291.*

Where the
Costs may be
increased or
abridged, or
not..

In some cases the Court may and doth abridge, and in some cases increase the Costs given by the Jury. And this the Court doth as it seeth cause: For if the Court doth apparently see the Jury hath given excessive Costs, upon Motion made, it will abate it: And if it perceive the other to put him to excessive Costs, as if after Issue tryed the other get an Injunction to stay the Suit, and he get it dissolved; in this case upon Motion to the Court, it will increase the Costs, *21 Ed. 4. 78.*

Self. 3.
3. Damages,
what.

Damages taken largely, is a recompence for a wrong: But taken strictly, it signifieth a part of that which the Jurors are to enquire of, passing for the Plaintiff or Demandant in any real or personal Action. For, after Verdict given of the principal Cause, they are then asked their consciences touching Costs and Damages, which is concerning the loss that the Plaintiff or Demandant hath suffered by means of that wrong done to him. So that Damna is either *pro injuria illata*, for the wrong done, or *expensa litis*, for the charges laid out in the Suit. And this Damages for the wrong done, is always to be recovered from the Tenant or Defendant; but Costs may be recovered against the Defendant by the Plaintiff, or against the Plaintiff by the Defendant, *Co. upon Lie 257. 22 H. 6. 27.*

Damna.

4. In what Action Damages shall be recovered, or not; and what Damages shall be recovered, and how taxed.

For answer to this, we are to know these things.

1. That regularly Damages are to be recovered in all Personal and in all Mixt Actions, and in such Real Actions wherein any Statute hath given Damage; otherwise not: For otherwise by the Common-Law no Damages are recoverable in any Real

Real

real Action. And for this, see *Co.* 10. 116. 106. 9. 74. *Plow.* 82. *Stat.* 6 *Ed.* 1. 1. *Westm.* 2. 35. 13 *Ed.* 1. 5. 1 *Ed.* 3. 6. 22 *H.* 8. 3. 11 *H.* 6. 4. *Co.* 4. 30. 71. *Co. super Lit.* 32. 33. *Dyer* 284. 14 *H.* 8. 25. 33 *H.* 8. 39. 18 *Eliz.* 5. 27 *Eliz.* 10. 21 *H.* 8. 19. 7 *H.* 8. 4. 3 *H.* 7. 18. *Bra. Coss.* 29.

2. In some cases single Damages only are to be given, as in Dower; and regularly in all Actions. For which see *Stat.* 52 *H.* 3. *ch.* 3. 20 *H.* 3. 1. 8 *Eliz.* 22. 13 *Ed.* 1. 36. 6 *Ed.* 1. 8. 6. 5 *H.* 4. 6. 1 *H.* 6. 11. 52 *H.* 3. 6. 3 *Ed.* 1. 34. 17 *R.* 2. 6. In some Cases and Suits double Damages are to be recovered: And for this see *Stat.* 2 *H.* 4. *ch.* 11. 34 *Ed.* 1. 22 *Ed.* 3. 51. 5 *Eliz.* 14. 2 *Ed.* 6. 12. 23 *H.* 8. 9. 28 *Ed.* 1. 9. 12 *Ed.* 2. 5. 13 *Ed.* 1. 26. 37 *Ed.* 3. 2. 1 *R.* 2. 9. And in some cases treble Damages are to be recovered: And for this, see *Stat.* 36 *Ed.* 3. *ch.* 16. 8 *H.* 6. 9. 8 *Eliz.* 2. 3 *Ed.* 6. 3. 2 *H.* 4. 25.

3. A man shall never recover more Damages then he doth declare for in his Declaration, *Co.* 10. 113. 13 *H.* 7. 16.

4. In Personal Actions, the Damages shall be only for the wrong done before the Writ brought: But in Real Actions the Plaintiff doth never count for Damages, for there he is to recover at the last for all the time, *Co.* 10-116.

5. How a Jury may tax Costs, and where it may divide the Costs, or not, See *Co.* 11. 5. 10. 130. 18 *H.* 8. 1.

In some cases the Court may also increase Damages; and so the Court may in some cases also abridge the Damages given by the Jury. But it must be in a case obvious to the Court; as for the Maim of a man (which is to be seen) when the Jury give small damage. And so when every man that looks upon the wrong, and damage given for the wrong, they see it to be excessive; in this case the Judges do use to keep the Plaintiff from his Judgment, until he do release the Excess of the Damages.

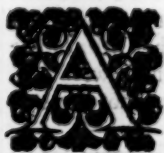
3. Where the Damages may be increased or abridged, or not.

Writ to enquire of Damages, what.

The Writ to enquire of Damages, is a Writ that issueth forth after a Judgment had in Trespass upon a Confession or Default, to enquire by a Jury what Damages the Plaintiff hath sustained by the Trespass: And then upon that Inquisition, the final Judgment is given for so much as the Jury shall find, and for Costs of Suit. See more for this Costs and Damages, *St.* 3 *ac.* 15. 21 *ac.* 16. 4 *ac.* 3. 43 *Eliz.* 6. 23 *H.* 8. 15. 3 *H.* 7. 10.

CHAP. LV.

Of Cottages.



Cottage is a little House newly built, that hath not four Acres of Land to it: And he is a Cottager, that doth dwell in such a House.

1. Cottage.

A House built since 31 *Eliz.* for habitation, or any Building or Housing made for other purpose, that since that time hath been or shall be converted or ordained to be used as a Cottage for habitation or dwelling, where there is not assigned and laid to the same Cottage or Building four Acres of ground at the least, to be accounted according to the Statute or Ordinance *de terris mensurandis*, lying neer to the said Cottage, being his or her own Freehold and Inheritance that doth enter or convert the Cottage or Building, and to be continually occupied and manured therewith so long as the same Cottage shall be inhabited; is to be accounted a Cottage within the Statute. Wherein these things are to be known.

2. What shall be said to be a Cottage, and how the parties that erect or continue it shall be punished.

1. If a man convert that Building which before this Statute was one Dwelling-house, into two Dwelling-houses; these are two Cottages punishable by this Statute.

Self. 1.

2. If one build a new House upon an old Foundation, in the same quantity that the old was; this is no Cottage within this Statute.

3. If one build two distinct Cottages together, the one upon the old foundation, the other upon the new: That which is built upon the old foundation, is no Cottage; but that which is built upon the new foundation, is a Cottage.

4. If one build a House upon an old and new foundation together, so that the entire House doth stand upon both together; this is a Cottage within this Statute.

5. If a man have a House, and one hundred Acres belonging to it, and he sell the House from the Land, or the Land from the House, or sell all the Land, and keep the House; this is now become a Cottage within this Statute: And if a man erect a House, and lay four Acres to it, and after take it away again; now this is become a Cottage within this Statute.

6. Any House ordained or erected for habitation or dwelling in any City, Town, Corporate, antient Borough or Market-town, or for the necessary and convenient habitation of any Workmen in any Mineral works, Coal-mines, Quarries, or Dells of Stone or Slate, in or about the making of Bricks, Tile, Lime, or Coals; so as the same Building be not above one mile distant from the place of the same Mineral or other Works, and be used only for the habitation of the said Workmen, shall not be accounted a Cottage within this Statute.

7. Any House made within a mile of the Sea, or upon the side of such part of any Navigable River where the Admiral ought to have jurisdiction, so long as no other person shall dwell therein but a Sailer, or man of manual occupation, to or for making or furnishing, or victualling of any Ship or Vessel used to serve on the Sea; nor made in any Forrest, Chase, Warren or Park, so long as no other person shall dwell therein but an Under-keeper or Warrener, for the keeping of the Deer or other Game of the Warren; nor any other House made, so long as no other person do dwell therein but a common Herdsman or Shepherd, for keeping the Cattel or Sheep of the Town, or a poor, lame, sick, aged or impotent person; is not to be accounted a Cottage punishable by this Statute. But no Cottage (by this Statute) made for a common Herdsman, for a common Shepherd (called a Sheep-coat) or a poor, lame, sick, or impotent person, that was not made before the Statute, is excepted by the Statute; for it was meant only of such as were then in being. *Co. 2 par. Inst. 737.*

8. Any Cottage that shall be by Order of the Justice of Assize at the Assizes, or Justices of the Peace at the Quarter-Sessions by their Order entred in open Assizes, or at Quarter-Sessions for any just cause upon complaint to them, be decreed to continue for habitation, for so long time only as by such Decree they are tolerated and limited, is not to be accounted a Cottage against this Statute.

9. And therefore if the Churchwardens and Overseers of a Parish, or the greater part of them, by the leave of the Lord or Lords of the Manor, whereof any Waste or Common within their Parish is or shall be parcel, and upon agreement before with him or them made in writing, under the hands and seals of the said Lord and Lords, shall set up any House in a fit place within the said Waste, at the charges of the Parish, for the habitation of the impotent Poor of the Parish, by Order of the Justices of Peace at their Quarter-Sessions, is not a Cottage against this Law.

10. Four Acres by Copy for lives, or for any number of years, will not serve to lay to it.

11. This Statute doth not extend to Cottages erected, or Houses converted to Cottages before the 29. day of March, 1589. *Co. 2 par. Inst. 737.*

12. The forfeiture of him that shall erect any such Cottage, or convert any House into such a Cottage, is Ten pounds: And the forfeiture of him that shall afterward willingly uphold and maintain any such House erected or converted, is Forty shillings for every moneth the same is continued; and these Forfeitures are to go to the King, *Stat. 31 Eliz. chap. 7.* Resolved by the Judges 8 *Car. B. R. Stat. 31 Eliz. per Justice Bridgman. Stat. 43 Eliz. chap. 2. Stat. 31 Eliz. Co. 2 part of his Inst. 736.*

2. Inmates or Under-tenants who they are, and how they shall be punished, redressed or tolerated.

Inmates be those that are admitted to dwell for their money, jointly within another man; though in several Rooms of his Mansion-house, passing in and out at

one door, and being not able to maintain themselves, *Kitch. 45. Stat. 31 Eliz. 2. chap. 7.*

There must not be an Inmate, or more Families or Houſholds then one, dwelling or inhabiting in any one Cottage erected, placed or ſuffered, *Kitch. 45.* Wherein theſe things are to be known.

ſeſſ. 2.

1. If one demise part of his Houſe in which he doth dwell, to a Gentleman that doth not keep his Table there, but goeth to Victualling-houſes for his Victuals, and yet he hath certain Rooms in the houſe; this is not an Inmate, *Kitch. 45.*

2. If one keep his Daughter that is married, and her Husband, or his Son, by Covenant or otherwiſe, and he doth find them, and they have ſome Rooms in his Houſe; this is not an Inmate, *Kitch. 45.*

2. If one keep his Daughter that is married, and her Husband, or his Son and his Wife, by Covenant or otherwiſe, and he doth find them, and they have ſome Rooms in his Houſe; theſe are not to be accounted Inmates, neither ſhall they have Common. But if theſe live in one Cottage, and they part the Houſe between them, and diet themſelves ſeverally, it ſeems they are Inmates, *Kitch. 45.*

3. If one have a Houſe, and he let certain Rooms of it to another to dwell in with him, he is to be accounted an Inmate, and yet he ſhall not have Common in the Lords Waſtes and in the Fields, except he be of ability; for if he be a man of ability, he ſhall not be ſaid to be an Inmate in any caſe. But if one take one into his Houſe to Table, or ſojourn with him, and let him certain Rooms, he is not to be accounted an Inmate, neither ſhall he have Common, *Kitch. 45.*

4. If the Inheritor of a Houſe demise a certain parcel of his Houſe in which he doth dwell, and ſever it from the other part, ſo that there are ſeveral doors into the High-ſtreet; it is now as two Houſes, and is not to be accounted an Inmate, but he ſhall not have Common. But if there be but one door out into the ſtreet for both the Families, then he that is taken in is to be accounted an Inmate, *Sr. 43 Eliz. chap. 2.* But an Inmate within the meaning of this Statute muſt be one that is in a Cottage. 2. It extendeth to Cottages as well made before, as after the Statute.

3. And as well to Cottages that have four Acres of ground, or more laid to them, as thoſe that have not four Acres of ground laid to them, *Co. 2 par. Inſt. 738.*

5. Inmates may be placed by the Order of the Juſtices in their Quarter-Sessions, with licence of the Lord of the Manor, in any Cottage built upon the Waſte of the ſame Manor for the impotent Poor, by the Churchwardens and Overſeers; and they are not to be puniſhed that do ſo place them.

6. It ſeems the Statute of 31 *Eliz.* as to Inmates, doth extend to Cities, Burroughs and Market-Towns; for it is put generally, and the Exception in the Statute doth go to the erection of Cottages, and not to Inmates; and ſo is the common practice.

7. The Forfeiture of every Owner or Occupier of any ſuch Cottage, placing or willingly ſuffering any ſuch Inmate or other Family then one, is Ten ſhillings for every moneth any ſuch Inmate ſhall ſo dwell in any ſuch Cottage. And this Forfeiture is to go to the Lord of the Leet where the Cottage is. The moneth ſhall be accounted by 28 days: *Co. Book of Entries. 165 b.*

All the offences aforeſaid may be heard and determined by the Juſtices of the Aſſizes, and Juſtices of Peace in their open Sessions, and by Lords within the Precincts of their Leets, and none others may do it; the Sheriff cannot do it. And they may award Execution for the levying of the ſaid Forfeitures, as cauſe ſhall require. The Lord hath election to ſue in any Court for the Forfeiture, or to diſtrain and ſell the Diſtreſs, and give back the overplus. And if he bring an Action at Common-Law, when he hath Judgment, he ſhall have Execution by *Fieri facias, Elegit* or *Capias*, as the words of the Statute are, *Co. 2 par. Inſt. 738.* And as touching the Forfeitures for Inmates, the Lord in his Leet may take the Preſentment of the Jury thereof, and afterward levy the ſame Forfeitures by Diſtreſs and Sale of Goods to his own uſe, *Sr. 31 Eliz. c. 7. Co. 2 par. Inſt. 738. 3 H. 7. 4.*

CHAP. LVI.

Of a Covenant.

1 Covenant,
what.

Covenantor.
Covenantee.

2 The Kinds.



Covenant is the Agreement or Consent of two or more, by Deed in Writing sealed and delivered, whereby either or one of the parties doth promise to other, that something is done already, or shall be done afterwards. And he that makes the Covenant, is called the Covenantor; and he to whom it is made, the Covenantee. *Terms of the Law. Plow. 308.*

And this is either exprefs, or in Deed, *i.* when the Covenant is expreffed in the Deed: As when *A.* by Deed doth covenant with *B.* to serve him for a year, and *B.* doth covenant with *A.* to pay him Ten pounds for this service. Or it is implied or in Law, *i.* when the Deed doth not exprefs it, but the Law doth make and supply it. As when one doth make a Lease for years by the words [*demise* or *grant*] without any exprefs Covenant for quiet enjoying; in this case the Law doth intend and make such a Covenant on the part of the Lessor, which is, That the Lessee shall quietly hold and enjoy the thing demised against all persons, at least having title under the Lessor, and at least during the Lessors life and (as some think) during the whole Term. And hereupon an Action of Covenant may be brought against him in the Reversion: So that if the Heir that is in by Descent put out the Termor of his Father; the Termor may have this Action against him *Terms of the Law, tit. Covenant. Co. 4. 80. 5: 17. F.N.B. 145, 146. Dyer 338. 257.*

A Covenant is also either real, *i.* that whereby a man doth bind himself to pass a real thing, as Lands or Tenements: As a Covenant to levy a Fine of Land, in which case the Land is to be recovered; or when it doth run in the Realty so with the Land, that he that hath the one, hath or is subject to the other; and so a Warranty is called a real Covenant. Or it is personal, *i.* when it doth run in the Personality, and not with the Land, but some person in particular shall have benefit by it, or be charged with it: As when a man doth covenant to do any personal thing, as build or repair a house, serve him, or the like. And these also are some of them said to be inherent, *i.* such as are conversant about the Land, as that the thing demised shall be quietly enjoyed, shall be kept in reparations, shall not be aliened, or if it be to be sold, that the Lessor shall have the first refusal; to pay Rent, not to cut down Timber-trees, or do Waste, to fence the Copices when they be new cut, to make further Assurance, or the like. And some of them are said to be collateral, *i.* that are conversant about some collateral thing that doth nothing at all, or not so immediately concern the thing granted: As to pay a sum of money in gross, to build a house in another mans ground, to make a Feoffment or Lease of other Land, to give other Security to perform the Covenants, or to pay the Rent, or that the Lessor shall distrain for the Rent in some other Land then that which is demised, or the like, these are collateral Covenants. There is also a Covenant to stand seised of Land to Uses, which is now become a kind of Conveyance of Land. For which read *Uses* at large. *Brownl. 1 par. 22, 23.*

3. The use and
operation of
it.

The most frequent use of a Covenant, is to bind a man to do something in future; and therefore it is for the most part executory: And if the Covenantor do not perform it, the Covenantee may have thereupon for his Relief an Action or Writ of Covenant against the Covenantor, so often as there is any Breach of the Covenant, *Co. 1. 154. Lit. Br. 309. 27 H.8.16. Plow. 308. F.N.B. 145.*

A Writ or
Action of Co-
venant what.

And this Writ of Covenant is therefore defined to be a Writ lying where a man is bound by a Covenant in a Deed, and hath broken it. And in this case commonly the party damnified shall recover Damages only for the Breach: And if he have a Judgment in an Action brought for one Breach, and after the Covenantor doth break the

the Covenant again; in this case he may bring a new Action, and so for every Breach. But a Covenant doth sometimes also make a transmutation of a Property and Possession of things, as in case of a Covenant to stand seised of Land to Uses, for which see *Use*. And in case where one doth covenant, that another shall have a piece of Land for five years; this is a good Lease for five years, for which see *Lease*. And in case where one doth covenant with another, That if he pay him Ten pounds such a day, he shall have all his Castell in *Dale*, or his Lease for years he hath of the Manor of *Dale*; in this case it seems if he pay the money at the time, he shall have the Property of the Goods, and of the Lease for years. It is said therefore, that in some cases upon the Writ of Covenant, the party shall recover the Land it self out of which he hath been ejected.

A Covenant may be in the Affirmative, or in the Negative. And it may be executed, 1. that a thing is done already; or executory, i. that a thing shall be done hereafter: And these are all good. But if it be of a thing present, as if I covenant that my Horse is yours; this is void. *Plow. 330. 27 H. 8. 16.*

And these Covenants being made by a Deed poll, are as good and effectual as when they are made by a Deed indented, so as the party have the Deed to shew; for otherwise a common person cannot have an Action of Covenant; for it doth not lie upon a Verbal agreement, neither can it be grounded without a Writing, except it be by a special Custom as in *London, F. N. B. 145. g. Co. 3. 63. Evers Case, 8 Jac.*

And there needs not in this case formal and orderly words, as *Covenant, Promise*, and the like, to make a Covenant on which to ground an Action of Covenant. For a Covenant may be had by any other words, and upon any part of an Agreement in writing, in what words soever it be set down for any thing to be, or not to be done; the party to or with whom the Promise or Agreement is made, may have this Action upon the breach of the Agreement. *Lit. Bro. fol. 430. Co. 2. Lord Cromwells Case. Dym 57. 150. 21 H. 7. 37. 40 E. 3. 5.*

And therefore if these words be inserted in a Deed amongst other Covenants, [That the Lessee shall repair, Provided always that the Lessor shall allow Timber: Or that the Lessee shall scour ditches, Provided always that the Lessor do carry away the earth;] these are good Covenants on both sides. And if a Lease be made of Houses by Patent to J. S. for Twenty one years, and therein is inserted this clause, [And that the said J. S. and his Assigns shall repair the Houses when they shall be decayed;] this is a good Covenant. *Adjudg. Pasch. 14 Jac. B. R. Sir Thomas Brev. vers. Guipherland's Case.*

And so also it is where these or the like words be inserted amongst other Covenants, [And that the Lessee shall pay Ten shillings a year Rent, or that the Lessee shall not alien;] these shall be said to be Covenants, unless it be in such cases where there is some other means to enforce the doing of the thing; as if in case of the Rent there be a clause of Distress, Re-entry, or *nomine pena*. *Bro. Cov. 21. 26. & Co. & Dyer ubi supra.*

And in all cases regularly, where words that do begin the sentence be conditional, and have the effect of a Condition, and do give another remedy, there they shall not be construed to make a Covenant, as in the cases of Condition before. And yet if words of Condition and words of Covenant be coupled together in the same sentence, as [Provided always, and it is Covenanted, or the like;] in such cases the words may be construed to make a Covenant and a Condition both. Covenant with two severally is good, *March 103. pl 176.*

If a man make a Lease for life by Indenture, and therein are inserted these words; [It is provided, that if the Lessee die within sixty years, that then his Executors and Assigns shall have the Land until the sixty years be ended, to be accounted from the date of the Indenture;] this, albeit it be not a good Lease, yet it is a good Covenant. *Lease.*

If a man make a Lease for years, and warrant it to the Lessee, his Heirs and Assigns during the Term, or he that hath right to the Land confirm the Estate of the Lessee for years with Warranty; in these cases howbeit this be not a Warranty, nor in the nature of a Warranty, yet it shall be construed a good Covenant in Law for the quiet

Use.
Lease.
Contrad.

4. What shall be said a good Covenant in Deed, upon which an Action of Covenant may be had, and what not.

1. In respect of the manner of making it.

quiet enjoying of the thing, *Bro. Covenant* 38; *Descent* 50. 21 H. 7. 32.

If the Lord grant to his Tenant, that he will not distrain him in such a part of his Land for his Rent; this shall be taken to be a good Covenant, by this word [grant.] *Perk. fess.* 69.

2. In respect
of the matter
or substance
of it.

A Covenant to do any thing that for the substance and matter of it is lawful, or not to do any thing that for the matter of it is unlawful, is good. As if the Grantor covenant, That he is seised or possessed of a good Estate of and in the thing he doth grant, and hath power to grant it: That the Grantee shall quietly enjoy it: That it is and shall be free from Incumbrances: That he will make further Assurance, if need be. That if the Grantee be evicted, he shall pay no Rent: That the Grantee shall pay Rent: That he shall discharge all dues, and save and keep harmless the Grantor. That he shall not alien the thing granted; or if he do, that the Grantor shall have the first refusal thereof. That he shall not do Waste. That he shall have Houseboot, Hayboot. That the Grantor or Grantee shall repair the old Housing, or build new. That he shall pay and discharge all Rents and payments issuing out of the Land. That he shall not fell Trees; or if he do, that he shall pay to the Grantor so much in money for every Tree. That if he fell any Underwood, he shall fence it. That he shall make an Estate of Land. That he shall be quit of any Suit, Service, or Payment. That he shall give sufficient Security to *7. S.* for an Hundred pounds he doth owe him; and all these and the like Covenants are good. See *West. Symb.* in his first Part *1000*, & *infra Plow.* 308. 302. 27 H. 8. 16: *Dyer* 13. 324. 253. 251. *Fitz. Cov.* 1.

And generally where a Condition for the matter of it is good, a Covenant comprehending the same matter, is good also. See *Condition, numb.* 7. But if the matter required to be, or not to be done by the Covenant, be for the substance thereof unlawful, then is the Covenant void, and doth not bind. See *Conditions against the Law, numb.* 7. *Dyer* 6. And therefore if one covenant to kill, or rob a man, or the like; this Covenant is void. So if one covenant that he will maintain another in his Suits, or that he will not appear in Inquests, or that he will break the Peace, or that he will forestall Corn, or the like; these Covenants are void. So if one be Tenant in Fee-simple of Land, and he covenant that he will not alien it; this Covenant is void. So if a man be a Tradesman, and he covenant that he will not use or exercise his Trade; this Restraint, if it be absolute and continual, is void; but if it be *sub modo* only, as that he shall not use his Trade at one time, or in one City or Town only, this Covenant may be good. 18 *Jac. B.R. Joilliff versus Broad. Pasch.* 19 *Jac. B.R. Tanner versus Brag.*

So if a man be by Covenant restrained to sow the Land which hath been used to be sowed; and this be either absolutely, or *sub modo*, i. That if he sow it, he shall pay thus much an Acre for it; these Covenants have been held to be void. *Sed quare* how the Law is now; for it seems the Statute of 39 *Eliz. ch.* 2. is discontinued. If *A.* owe money to *B.* and *B.* owe money to *C.* and *B.* doth make a Letter of Attorney to *C.* to sue *A.* at his own charge, and *B.* doth covenant with *C.* that he will not release the Debt to *A.* In this case, albeit this be Maintenance in *C.* to sue at his own charge, yet this is a good Covenant, and not against Law. *Hil.* 20 *Jac. Co. B. Maire versus Stapleton.*

So also if a Dean and Chapter, or the like, covenant to renew a Lease, contrary to the meaning of the Statute of 18 *Eliz. ch.* 11. it seems this is a good Covenant, *Trin.* 14 *Jac. Co. B. Tailors Case.*

Impossible.

And if the thing to be done by a Covenant, be in the nature of it impossible, the Covenant is void, 27 H. 8. 27. 4 H. 7. 4. And therefore it is, that if a man covenant to go to *Rome* in three days, or the like, the Covenant is void. So if a man covenant to make a Feoffment to his wife, this Covenant is void. But if a man covenant to make a good Estate of Land to her in Fee-simple, or otherwise, or to find her Maintenance, or to give her so much by the year; these are good Covenants. And generally, where being in a Condition, will make the Condition void, because it is against Law; there it being in a Covenant, will make the Covenant void. See *Condition, numb.* 7. *Brownl.* 2 par. 281.

If

If a Lessor Covenant with his Lessee, that he shall and may have Hous-boot, Hay-boot, Plough-boot, &c. by the assignment of the Bailiff of the Lessor; this is a good Covenant: And yet it seems it doth not restrain the power that the Lessee hath by the Law, to take these things without Assignment. But if the Lessee do Covenant that he will not cut any Timber, or Fuel, without the leave, or without the Assignment of the Lessor; this is a good Covenant, and doth restrain him; for in this, and such like cases, the rule is, *Modus & conventio vincunt legem*. Dyer 19. 115.

If an Obligee Covenant with the Obligor, that he will not sue him upon the Obligation until *Easter* following; this is a good Covenant, but no Release or Suspension of the Debt. *Mich. 36, 37 Eliz. Co. B. R. Adjudge Deaux versus Jefferies.* Release.
21 H. 7. 23.

If there be Lord and Tenant of three Acres of Land, White-acre, and two others, and the Lord grant to the Tenant by Deed, that he will not distrain in White-acre for his Rent, or Services; this is a good Covenant, but doth not determine the Seigniorie. *Perk. Sect 69.*

If one man grant a Mill within his Manor, and Covenant for him and his Heirs, that there shall be no other Mill set up within the Manor; it seems this is a good Covenant. *Fitz. Covenant 5.*

If one make a Lease, wherein are divers Covenants to be performed on the part of the Lessee, and after the Lessee doth Covenant, that if any of the Covenants be broken, that the Lessor shall enter upon the Land demised, and hold it until the Lessee make him amends for the damage done by the breach of the Covenant; it seems this is a good Covenant, and that the Lessor may take advantage thereof accordingly. See more in *Brownl. 1 part. 21. Fitz. Covenant 3.*

If a man seised of Land in Fee, Covenant to stand seised of it to Uses, and no Estate doth rise by the Covenant; yet this may be good by way of Covenant, and give remedy to the Covenantee in an Action of Covenant. But with this difference. If the Covenant be future, as where one doth Covenant with another, that in consideration of a marriage, his Lands shall descend, remain, or revert to his Son and Heir Apparent, and to the Heirs of his Body; on the Body of his Wife; in this case the Covenantee may have a Writ of Covenant upon the Covenant. For if a Covenant be present, as that a man and his Heirs shall from henceforth stand and be seised to such and such uses, and the uses will not arise by the Law in the case; in this case no Action of Covenant will lie upon this Covenant, for this Action will never lie upon any Covenant, but upon such a Covenant, as is either to do a thing hereafter, or that a thing is or hath heretofore been done, and not when it is for a thing present, as when *A.* doth Covenant with *B.* that his black Horse shall be for ever after the Horse of *B.*; this is no good Covenant to give the Horse to *B.* or to give him an Action of Covenant for him, but *A.* may keep him still notwithstanding. *Plow. 307, 308. 21 H. 7. 18. 27 H. 8. 16. Finchlesley 49.*

If one Mortgage upon Condition to re-enter upon payment of an hundred pound at a day, and the Mortgagee doth Covenant that he will not take the profits of the Land, until default of payment; this is a good Covenant, and the Mortgagee therefore may not meddle with the profits, until the day of payment come. *Agree, 8 Car.*

If one make a Lease for years of Land; by the words [*Demise or Grant,*] and there is not contained in the Lease any express Covenant for the quiet enjoying of the Land; in this case the Law doth supply a Covenant for the quiet enjoying of it against the Lessor, and all that come in under him by title, during the term, and upon this the Lessee, his Executors, Administrators, or Assigns, may have an Action of Covenant if he be disturbed. But where there is an express Covenant in the Deed for the quiet enjoying of the Land, there the Law will not make this implied Covenant. *Expressum facit cessare tacitum.*

5. What shall be said a good Covenant in Law, upon which an Action of Covenant may be had, and what not, Warranty.

And therefore herein this is not like to the case, where a man doth make a Lease for life by the words of *Dedi & concessi*; or make a Lease for life by other words, Reserving Rent; (in which cases the Law doth create a Warranty against all men, during the life of the Lessor :) For if in these cases there

be an Express Warranty in the Deed, yet this doth not take away nor qualify the implied Warranty, but the Lessor may make use of which of them he will, if he be ousted or evicted by one that hath an elder title. *Browl. 2 part. 212, 213, 214. Co. 4. 80. 5. 17. Trin. 3 Jac. B. R. Stiles case. Pasche, 7 Jac. B. R. Winchcombs case.*

6. How a Covenant in Deed or Law shall be taken and expounded, and how it shall be performed.

A Covenant in particular (being one part of a Deed) is subject to the general Rules of Exposition of all parts of Deeds in general, as to be always taken most strongly against the Covenantor, and most in advantage of the Covenantee. 2. To be taken according to the intent of the parties. 3. *Ut res magis valeat, &c.* 4. When no time is limited for the doing of the thing, it shall be done in reasonable time, and the like. *Plew. Sess. 287.* See the Exposition of Deeds before in *oto.*

Joynt and several.

In cases where the Covenantees have, or are to have several Interests or Estates, where when the Covenant is made to, and with the Covenantees, *Et cum qualibet eorum, aut altero eorum*; in this case these words make the Covenant several: As if one by Indenture Demise Black-acre to A. and White-acre to B. and Green-acre to C. and Covenant with them and either of them, or Covenant with them, and every of them, that he is lawful owner of all these Acres; in this case the Covenant is several: But if he Demise to them the three Acres together, and Covenant in this manner; the Covenant is joynt and not several. And if A. and B. do Covenant joyntly, and severally; in this case the Covenant may be joynt, or several, and the Covenantors may be sued, either the one way or the other, at the Election of the Covenantee. *Co. 5. 19. Dyer 338. Bro. Covenant 49.*

For quiet enjoying.

If one make a Lease of Land to another, and Covenant that he shall quietly enjoy it without the let of any person whatsoever, or without the let of any person whatsoever claiming by, or under the Lessor; in both these cases the Covenant shall be taken to extend to such persons as have title, or claim some Estate under the Lessor; for if in the first case any person that hath no title, and in the second case any person that shall claim under another, and hath title, or that shall claim under the Lessor, claim, or enter, or otherwise disturb the Lessee; this is held to be no breach of the Covenant. *Sed quere* of the first case; for herein some conceive a difference between a Covenant in Deed and a Covenant in Law: And that howsoever the Covenant in Law is extended onely to evictions by title, yet that the Covenant in Deed shall be extended further. And therefore that if A. make a Lease for years to B. and doth Covenant that B. shall quietly enjoy it, during the term, without the interruption of any person or persons; that if a stranger in this case, that hath no right, doth interrupt B. that he may have an Action of Covenant; as when such a promise is by word, an Action of the case will lie upon it. See *Browl. 1 part. 20, 21, 22. F. N. B. 145. Dyer 318. 36 H. 8. 3. Mich. 7 Jac. B. R. Accord in Gambles case. Co. 4. 80. Dyer 318. By Furver at Lent Assize, Gloucester. 23 Car.*

Action of the Case.

And if the Lessor Covenant with his Lessee, that he hath not done any act to prejudice the Lease, but that the Lessee shall enjoy it against all persons; in this case these words [*Against all persons*] shall refer to the first, and be limited and restrained to any acts done by him, and no breach shall be allowed, but in such an act. *Curia per visum versus Psad. Mich. 40, 41 Eliz. B. R.*

Executors.

The Covenant in Law upon the words Demise or Grant also for the quiet enjoying of the thing demised, is general against all persons that have title, during the term, and extendeth to the Heir after the death of the Lessor, as against himself onely, and shall charge the Executors or Administrators for any disturbance in the life of the Covenantor, but not for any disturbance afterwards; he that doth sue therefore upon this Covenant, must shew that he was molested or evicted by one that had an elder title. *Co. 5. 17. 22 Hen. 6. chap. 52. Co. 4. 80. Dyer 337.*

If one doth Covenant to enter into Bond for the quiet enjoying of Land, and doth not say what Bond: in this case it shall be taken to be a Bond of so much as the Land to be enjoyed is worth. *Ca. 5. 78.*

A Warranty in a Lease for years, shall be taken for a Covenant for quiet enjoying, *Fitz. Covenant: 21. See before. 7 Eliz. 4. 6. Bro. Grant: 64.*

If one Covenant with another, to acquit him of all charges issuing out of the Land, and after by Parliament the tenth part of the value, not of the Issues of all Lands are given to the King; in this case it seems the Covenant shall not extend to this. But if the Parliament had given the tenth part *exinnum terra*; the Covenant would have extended to this as well as to Rents, Commons, and such like things, wherewith the Land is charged. *Brownl. 1 part. 19, 20, 21.*

To free from Incumbrances and Charges.

If *A.* Covenant with *B.* to make such Assurance, or such further Assurance of Land as the Counsel learned in the Law of *B.* shall advise; in this case albeit *B.* be learned in the Law himself, yet he may not devise this Assurance, but some other learned in the Law must advise, otherwise *A.* is not bound to make it. *Co. 5. 19.*

To make Assurances of Land.

And if *A.* Covenant with *B.* to make such Assurance of Land by a day, as *B.* or his Heirs shall devise; in this case *B.* or his Heirs must first devise the Assurance before *A.* is bound to do any thing. And therefore if one sell Land for money, and the Vendee doth Covenant to make back to the Vendor and his Heirs, such Assurance of the Land, as the Counsel of the Vendor shall devise within one year, provided, That if the Vendee make default in the Assurance, then if he do not pay twenty pound to the Vendor, that then the Vendee shall stand seized to the use of him and his Heirs, and the Vendor tender no Assurance, the twenty pound is not paid; in this case the Land is in the Vendee freed from the Covenant. And therefore in these and such like cases, where a man is to make such Assurance, as *A.* or his Heirs, or their Counsel shall devise: *A.* or his Heirs must take care, that in time they have an Assurance reasonably drawn, and ready to be sealed, and to tender it to him that is to seal it, for until then there can be no breach of Covenant. But if *A.* be bound to make a Feoffment, Lease, or other Assurance of Land to *B.* by a day; in this case *B.* need not to demand it, or tender the Assurance, for *A.* at his peril must do it, otherwise he doth break his Covenant. *Co. 5. 19, 20. Dyer 361. And by Justice Bridgman.*

And yet if in this case *B.* do get the Assurance drawn, and tender it to *A.* it seems *A.* is bound to seal it, or otherwise he doth break his Covenant. *Trin. 20 Jac. B.R. Steed versus Spike.*

And if the case be so that *A.* is bound to make such Assurance to *B.* by a day, at the costs of *B.*; in this case *A.* must do the first act, *viz.* notify to *B.* what manner of Assurance he will make, that he may know what money to tender; and when the money is tendered, *A.* must see that he do make the Assurance accordingly at his peril, and if he fail in either of these, the Covenant is broken. *Brownl. 2 part. 283. Co. 5. 20, 22.*

If *A.* be bound to make such Assurance to *B.* as by the Counsel learned of *B.* upon request made, shall be devised; in this case it is sufficient if the advice be given to *B.* and that he do make it known to *A.* and it is not needful it be given to *A.* immediately. *Co. 5. 20.* And if *A.* Covenant with *B.* to make such Assurance to *B.* as *J. S.* shall devise, and *J. S.* doth devise a reasonable Deed of Bargain and Sale, and he tender it to *A.* to Seal; in this case *A.* is bound to Seal it presently, and he shall not have time to advise with his Counsel upon the Deed; but if he be illiterate and cannot read the Deed, he may refuse and delay to Seal it, until he can get some body to read it, which he must do as soon as he can. *Dyer 338. Co. 2. 3.* And if one be bound by Covenant to make an Assurance upon request; the Covenantee must request and tender an Assurance also, and he must tender such a one also as is reasonable, otherwise the Covenant will not be broken by the refusal or neglect to do it; as if one be bound to make a Feoffment to *A.* upon request; in this case *A.* must get a naked Deed of Feoffment drawn without Warranty or Covenants, and tender it. And if the Covenant be to make such a Lease as the former; in this case the second Lease must not differ from the former, & if it do, the party is not bound to Seal it. *Experientia.*

If one Covenant to levy a Fine at the next Assizes for thirteen years *exinnum*; this shall be taken from the time of the Fine levied, and not from the time of the Covenant. *Curia. Hil. 7 Jac. Co. B. R.*

If one bargain and sell Land to me by Deed indented, and before the Intolment of the Deed, I do Covenant with *J. S.* to convey all the Land, whereof I am seized, and to do this before such a day, and before the day the Deed is inrolled; in this case my Covenant shall not extend to this Land conveyed to me by this bargain and sale. Adjudge in Sir *J. Bress* case.

If *A.* Covenant with *B.* that in consideration of a marriage between the Son of *A.* and sister of *B.* that he at the coits of his Son, and by his sufficient Deed, will before *Easter* day, assure Land to his Son; and *B.* doth Covenant, that if *A.* do perform this, then he will make him a general Release; in this case albeit *A.* be ready, and the Son do not tender the Assurance, and the Conveyance is not made, *B.* is not bound to make any Release. *Dyer* 371.

To repair the Houses.

If one Covenant to keep and leave a house in the same, or as good plight as it was at the time of the making of the Lease; in this case the ordinary and natural decay of it, is no breach of the Covenant: But the Covenantor is hereby bound to do his best to keep it in the same plight, and therefore to keep it covered, &c. *Brownl. 1 part. 23. Fitz. Covenant 4.*

For the having of Houfeboot, &c.

If the words of a Covenant be [That the Lessee shall have thorns by the Assignment of the Lessor and necessary fuel also:] it seems by this, that there must be an Assignment of the fuel, as well as of the thorns. *Dyer* 19.

If the Lessor Covenant with his Lessee, that he shall have sufficient Hedgboot, by Assignment of the Bailiff of the Lessor; in this case, and by this the Lessee is not restrained from that liberty that the Law doth give him, and therefore that he may take without Assignment: But if the words be Negative, that he shall not take without Assignment, or that he shall take by Assignment, and not otherwise, *contra. Dyer* 19, 20.

To convey Lands of the value of, &c.

If *A.* doth Covenant with *B.* that where as a marriage is intended to be solemnized between *A.* and *C.* the Daughter of *B.* at or before the fourteenth day of *August* next, and where the said *B.* hath paid to the said *A.* a thousand pound for portion, &c. the said *A.* in consideration thereof doth Covenant with *B.* that he within one year of the day of the marriage, will assure Lands of the value of four hundred pound *per annum*; in this case, albeit the marriage be not before that day, yet the Covenant must be performed. *Trin. 21 Jac. B. R. George versus Lane.*

That the Lessee shall make Estates.

If one make a Lease for years of a Manor, and Covenant that the Lessee shall make estates for life or years, and that they shall be good; in this case it seems this Covenant shall not be taken to enable the Lessee to make estates for a longer time then his estate will bear. By Justice *Bridgman.*

That if the Lessee sell, the Lessor shall have the first refusal.

If the Lessee Covenant with the Lessor, That if the Lessee be minded to sell his estate, the Lessor shall have the first refusal; in this case when the Lessee is minded to sell, he need do no more but acquaint the Lessor with his purpose, and know his minde, and if he do not answer him presently, he may sell it to whom he will: And if the Covenant be further, that the Lessor shall give as much as another will, the Lessee must tell him what another doth offer him, and ask him whether he will give so much; and if he refuse or do not accept it presently, the Lessee may sell to whom he will. *Dyer* 13.

To do one thing for another.

If one Covenant to serve me a year, and I covenant to pay him ten pound for it; in this case albeit he do not serve me, yet I must pay him the ten pound. But if I Covenant with him to pay him ten pound, if he serve me a year, *contra*; for in this case I am not bound to pay him the money, unless he serve me a year. So if one Covenant to make new Pales, so as he may have the old; in this case it seems he is not bound to make the new Pales, unless he may have the old Pales. So if one Covenant to pay money for service, counsel, or the like, or Covenant to marry ones Daughter, or make an estate, and the Covenant is penned conditionally, and so as one thing is the cause of another, and it is not set down by mutual and reciprocal Covenants; in all these cases, if the cause or condition be not observed, the Covenant shall not be performed. *Co. super Littl. 204. Dyer* 371: *Mich. 7 Jac. Co. B. R.*

If one make a Lease for ten years, and Covenant that if the Lessee pay him ten pound within the ten years, that he shall have the Fee-simple, and the Lessee surrender his estate within the time; in this case, if the Lessee pay the money, the Lessor is bound to make the Fee-simple to him. But if the words of the Covenant be, that if he pay him ten pound within the term, he shall have Fee, and the Lessee surrender his term, and then pay the ten pound; in this case the Lessor is not bound to make the Fee-simple, for it was not paid within the term. *Co. 1. 144.*

That the Lessee shall have the Fee.

If one Covenant to do a thing to *J. S.* or his Assigns, or to *J. S.* and his Assigns by a day, and before the day *J. S.* die; in this case it must be done to his Assigns, if he before the day, name any Assignee; and if he do not, it must be done to his Executor or Administrator, which is an Assignee in Law. See more in *Condition. Num. 8.*

Assigns.

Obligation 7. 27 H. 8. 2.

If one be seized of Land in Fee, or possessed of a term of years, and he doth alien it, and supposing he hath a good estate, he doth Covenant that he is lawfully seized or possessed, or that he hath a good estate, or that he is able to make such an alienation, &c. And in truth he hath not, but some other hath an estate in it before; in this case the Covenant is broken, as soon as it is made. *Dyer 303. Co. 9. 60.*

7. When a Covenant in Deed or Law shall be said to be broken, and when not, and how.

And if I bargain and sell Land by Deed indented to *B.* and before the Deed is introlled, I grant the same Land to *C.* and Covenant that I am seized of a good estate of it in Fee, and after the Deed is introlled; in this case the Covenant is broken. Adjudge Sir *Peral Brocas* case. *32 Eliz.*

That the Covenantor is seized of a good Estate, &c.

If *A.* let Land to *B.* and Covenant that he shall quietly enjoy it without the let of any person whatsoever, and *A.* himself, or any other person that hath any title to the Land, by, or under him, as if he make a Lease of it, or grant a Rent out of it to another, or any other person that hath any title to the Land, albeit it be not by, or under *A.* as if *A.* were a Disseisor, and the Disseisee do enter or disturb *B.*; in all these cases the Covenant is broken. And so also is the Law deemed to be by some in case of Covenant, in Deed for quiet enjoying, where a stranger or one that hath no title to the Land, doth enter or disturb *B.* But otherwise it is in case of Covenant in Law for quiet enjoying; for in this case, if a stranger that hath no title to the Land, doth enter or disturb the Lessee; this is no breach of the Covenant in Law. And in all cases where any person hath title, the Covenant is not broken until some Entry, or other actual disturbance be made by him upon his title. *Mich. 8 Jac. Lamb's case. Dyer 328. F. N. B. 145. 26 H. 8. 3. Hil. 39 Eliz. B. R. Corus case. Fitz. Covenant. 26. Bro. Covenant. 40.*

For quiet enjoying.

If a man make a Lease of Land, and after make a Feoffment of the same Land, and the Feoffee doth disturb the Lessee; in this case it hath been said, this is a breach of the Covenant for quiet enjoying. See *quere Brownl. 1 part. 20, 21, 22, 23, 24. 78. 80, 81. 20 Jac. Bro. Covenant 7.*

If a man purchase Land to him and his Wife, and his Heirs in Fee, and then make a Lease for years of it to *J. S.* and Covenant for him, his Executors and Assigns, that the Lessee, his Executors and Assigns, shall quietly hold and enjoy the premises, without the let of the Lessor, his Heirs or Assigns, or any other person, by or through his or their means, title or procurement, and after the Lessor doth die, and his Wife doth enter and disturb; in this case, and by this means the Covenant is broken. *Hil. 20 Jac. Adjudge B. R. Butler versus Lady Swinerton.*

And so it is also, if *A.* purchase Land of *B.* to have and to hold to *A.* for life, the Remainder to *C.* the son of *A.* in Tail, and after *A.* doth make a Lease of this Land to *D.* for years, and doth Covenant for the quiet enjoying as in the last case, and then he dieth, and then *C.* doth out the Lessee; in this case this was held to be no breach of the Covenant. *Swans case. M. 7, 8 Eliz.*

So likewise if *A.* be seized of White-acre in Fee, and take to Wife *B.* and then make a Lease of it to *C.* with such a Covenant as before, for the quiet enjoying, and then *A.* doth die, and after *B.* doth recover Dower; by this the Covenant is broken, and yet if the Mother of *A.* recover Dower, and out the Lessee, *contra.* So also if a Tenant in Tail doth make a Lease with such a Covenant, and his Issue doth disturb the

the

the Lessee; this is no breach of the Covenant. And yet if the Lessor be the cause of the Gift in Tail, or procure the disturbance, this may be a breach of the Covenant. And so also it is where a man is seised of Land in Fee, and he doth make a Lease with such a Covenant, and afterwards he doth die; and then his Heir is in Ward by reason of a Tenure, and hereby the Lessee is disturbed; it seems this is no breach of this Covenant. *Dyer* 42. 26 *H* 8. 3. *Fitz. Covenant*. 6. 26.

If one Covenant that the Wife he is about to marry shall quietly enjoy all her Goods, and that the Covenantor shall take it into his possession, and the Husband doth onely take the Goods, and keep them in his possession; this is no breach of the Covenant. *Curia. B. R. Pasch. 6 Car. Crowls case.*

If a Covenant be for the quiet enjoying against all persons, but the King and his Successors, and the Patentee of the King do disturbe; this is a breach of this Covenant. Adjudge. *Hil. 38 Eliz. Woodresse versus Greenwood.*

If two make a Lease, and Covenant that the Lessee shall enjoy the Land without the let of them, or any other, and one of them alone doth disturb the Lessee; this is a breach of the Covenant. Adjudge. *Mich. 2 Car. B. R. Sanders case.*

If a Lessee grant and assign all the Land contained in his Lease to A. and doth Covenant with him, that he hath not done any act or thing by which the Grant or Assignment might be impaired, but that the Assignee his Executors, &c. may enjoy it against all persons, and before this time the Wife of the Lessor had recovered and had execution of a third part of this Land for her Dower; in this case this is no breach of the Covenant, for the words [*but that, &c.*] do refer to the former, and are not absolute. *Dyer* 249.

If A. grant the Bailiwick of W. to B. for life, and B. assign it to C. for three years, and after to D. and C. doth Covenant with D. that he will not do or suffer to be done any act, during the said three years, by which the Grant made by A. may be forfeit, but that after the three years ended, he may enjoy it in as ample manner as C. did, or might have done without any act by C. and after the three years ended, C. doth execute a Procees there; and thereby incroach upon the Office; this is no breach of the Covenant. Adjudge. *Rich. versus Row. Pasche, 13 Jac. Cur. B. R.*

To free from
Charges and
Incumbrances.

If A. grant Land to B. and his Heirs, tending ten pound Rent, and B. doth sell the Land to C. and his Heirs, and doth Covenant with C. that from such a day he shall enjoy it, discharged of all Incumbrances, and before that day a Common Recovery is had against C. in which A. is vouched, and this is to the use of C. and his Heirs, supposing hereby the Rent had been gone, which is not so; in this case the Covenant is broken, for this Rent is an Incumbrance. *Brownl. 1 part. 20, 21. Curia, Hil. 20 Jac. Co. B. R. Greenway and Tuckfolds case.*

If a Lease be made of Land for years, and the Lessee devise it to his Wife *durante viduitate*, and after to his Son, and he in Reversion doth sell the Fee to the Woman, during the Widowhood, and doth Covenant that the Land is discharged of all former Sales, Rights, Titles, Charges; in this case the Covenant is broken at the first by reason of the possibility of the Son. *Co. 10 52.*

If A. grant White-acre to B. and Covenant that B. shall enjoy it against all Incumbrances, and C. doth disturb him in the taking of Common there, and this is a Common which is against Common Right, and which he hath by Prescription; in this case it seems this is a breach of the Covenant. But if it be of a Common that is of Common Right, *Contra. 9 Eliz. Co. B. R.*

To make E-
states and Assu-
rances.

If A. Covenant with B. before Easter to make him a good sure Estate of Land, discharged of all former Bargains, Leases, and Incumbrances whatsoever. (Leases or Grants for life or years, reserving the ancient Rent during the term onely excepted) and A. after this, and before the estate made, doth make a Grant of all or part of the Land, reserving the old Rent; it seems this is no breach of the Covenant. *Brownl. 1 part. 84. Dyer* 139.

If one make a Lease to J. S. for years, and Covenant with him that upon the Surrender of that Lease, he will make him a new Lease, and the Lessor before J. S. can make any Surrender, doth sell away the Reversion, or make a Lease to another

of the Land, and so disable himself; this is *ipso facto* a breach of the Covenant, without any Surrender made by the Lessee, which in this case is not needful. For, *Lex neminem cogit ad vana & inutilia peragenda*. So if one be seised of Land in Fee, and Covenant to make a Feoffment of it to *T. S.*; by a day upon a Request, and the Covenantor before the day doth make a Feoffment of it to another, and then doth die before any Request made to him; in this case the Covenant is broken. *Co.*

5. 21.

If *A.* Covenant with *B.* to make such Assurance as *B.* or as the Counsel learned of *B.* shall devise, and *B.* tender such an Assurance to *A.* to seal, and *A.* doth refuse or delay to seal it; this is a breach of the Covenant. *Dyer* 338. *Co.* 2. 3.

If *A.* doth Covenant with *B. C. D.* and *E.* to make them a Feoffment such a day, and they come to the Land at the time to take it, and *A.* doth not make the Feoffment; by this the Covenant is broken. And so also if *B.* and *C.* onely, or one of them doth come to the Land; for it may be made to any of them in the name of the rest. But if none of them come to the Land, albeit the Feoffor never come there, it seems the Covenant is not broken. *Bro. Covenant* 3.

If *A.* Covenant with *B.* before *Easter* next, to assure his House to him, and *K.* his Wife, during the life of *T. S.* and *A.* surrender his House to the use of *B.* and such as *K.* shall name at the Request of *B.*; in this case the Covenant is broken, for this is no performance of it. *Curia, B. R.*

If one Covenant to repair, sustain, and amend a House, and the House is burnt by the negligence of the Covenantor, and not repaired again; this is a breach of this Covenant. And if the Lessee Covenant for him and his Executors, to repair at his own costs (the principal Timber not hurt or in decay for lack of reparations, or otherwise in default of the Lessee or his Executors onely except) and he die, and afterwards the House is burnt in default of the Executors; in this case the Covenant is broken, and the Executors may be charged. *Dyer* 334.

If one Covenant to leave a Wood in the same plight he findes it, and he cut down Trees; in this case the Covenant is broken presently, for it is now become impossible to be performed by his own act: But if in this case some of the Trees be blowed down with the wind, or the like, by this the Covenant is not broken, for it is now become impossible to be done by the act of God, and in this case the Covenantor is not bound to supply it. And so likewise of a Covenant to repair Houses, or if one Covenant to sustain Houses or Sea-banks, or Covenant to leave them in as good case as one doth finde them, and the Houses be burnt, or thrown down by tempest, or the like, or the Banks be overthrown by a sudden flood, or the like accident; in this case the Covenant is not broken by this accident onely; but if the Covenantor do not repair, and make up these things again in time convenient, the Covenant will be broken. And if Houses be let to me for years, and I Covenant to leave them in as good plight as I finde them, and I throw down the Houses; this is no breach of the Covenant for I may re-edifie them, and therefore no Action will lie upon this Covenant until the end of the term. *Fitz. Covenant* 29. *Co.* 5. 15. *F. N. B.* 145. *Co.* 1. 98. *Perk. Sect.* 738. *Dyer* 33. *Plow.* 29. 40 *Ed.* 3. 5.

If one Covenant to repair a House before a day, and it happen the Plague is in the House before and until the day, and thereby it is not done; in this case the Covenant is not broken, for this will excuse, but then it must be done in convenient time afterwards, for otherwise the Covenant will be broken. *Hil.* 8 Jac. *Curia.*

If a Lessee Covenant to do all the reparations of a House Demised at his own costs and charges, and he cut Trees upon some of the Ground Demised to amend the House; it seems this is a breach of his Covenant. See *March. f.* 17. *Dyer* 198.

A man makes a Lease, and that the Lessee shall have *Conueniens lignum non succidat & vendat arbores*, and the Lessee cuts down Trees; this is a breach of Covenant. *March* 9. pl. 22.

If one Covenant to pay money at five several days, and he fail of payment the first day; by this the Covenant is broken. *Co. super Litt.* 292. *Brownl. Rep.* f. 19. 20, 22. 2 part. 176, 177, 173.

If

To leave a
stock, &c.

If one take Land sowed, or a stock of Cattle in Lease for years, and the Lessee Covenant to leave it in as good plight, as he doth take it; in this case he must leave it sowed again, and if any of the Cattle die, he must make up the number, otherwise he doth break his Covenant. 40 Ed. 3. 5.

Not to take
Toll.

If a Corporation do Covenant not to take Toll, and their Common Officer appointed for that purpose doth take it; this is a breach of the Covenant. 43 Ed. 3. 17.

To build a
House.

If *A.* Covenant with *B.* to build a House by a day, and *B.* doth forbid him, and thereupon he doth forbear to do it, and doth it not; in this case the Covenant is broken, for this will not excuse him: But if he do by any actual impediment hinder him, or be the cause why the thing is not done, then the not doing of it is no breach of the Covenant. And therefore if a Lessee Covenant to cleanse one of the Ditches in the Land demised, and the Lessor enter upon the Land it self, and keep out the Lessee, and he doth not cleanse the Ditch by the time; by this the Covenant is broken: But if in this case the Lessor do by force keep the Lessee out of the Ditch or place it self, *Contra.* 18 Edw. 4. 8. *Kelw.* 34. *Trin.* 36. *Etiz. B. R. Carrel versus Reade.*

To have liberty
to go in and
out of a Shop.

If *A.* and *B.* be Joyntenants of a Shop, and *A.* Covenant with *B.* that he and his Assigns shall have free ingress and egress in and out of the Shop, and *A.* doth appoint *C.* his Servant to enter as Servant to him, and to occupy in Common with *A.* and this Servant doth expel the Servant of *B.*; in this case this is a breach of the Covenant. *Hil.* 16 Jac. B. R. *Siliard versus Lee.*

To come into
a House.

If *A.* Covenant with *B.* that *B.* shall come four times a year into the house of *A.* without being ousted by *A.* and *A.* when he doth see *B.* coming, doth shut the doors and windows, and doth not suffer *B.* to come in; by this the Covenant is not broken. 3 H. 4. 8.

To marry an-
other.
Make a Feoff-
ment, &c.
Tender and
Refusal.

If *A.* Covenant with *B.* to marry the Daughter of *B.* make a Feoffment, or do any other act to *C.* (who is a stranger to the Covenant) and *A.* doth tender it and offer to do as much as doth lie in his power, but the stranger doth refuse it, and thereby it is not done; yet this doth not excuse, but the Covenant is broken: But if the Covenant be to do any such act to the Covenantee himself, and the Covenantor tender it, and the Covenantee refuse it; by this the Covenant is performed. To pay Rent. See *Brownl. Rep.* f. 19, 20, 22, 24. 2 parts 176, 177, 273. 33 H. 6. 16. *Bro. Covenant* 3. *Fitz. Bar* 62.

See more in the last Question, and in *Obligation, Numb.* 7, 8, 9. and in *Conditions, Numb.* 9, 10. *Mich.* 7 Jac. Co. B. R.

8. Who shall
or may have
advantage of a
Covenant in
Deed or Law,
and bring a
Writ of Cove-
nant upon the
breach of it,
or not.

Any one that is party to the Deed, to whom the Covenant is made, may take advantage of the Covenant, but not a stranger; for if *A.* Covenant with *B.* to do an act to *C.* who is no party to the Deed, and he doth it not, *B.* and not *C.* must sue him upon this breach.

If a Lease be made of Land to a Husband and Wife for years, and the Lessor doth enter upon the Land, and put them both out, or the one of them after the death of the other; in this case both of them while they both live, and the survivor after the death of one of them, may have this Action of Covenant upon the Covenant in Law:

So if a Wardship be granted to a Woman by Deed, and she take a Husband and die; the Husband shall have advantage of this Covenant in Law made by the word [Grant] if he be disturbed.

So if one by the words [Demise or Grant] Lease Land to a Woman sole for years, who taketh a Husband and dieth; in this case if the Husband be disturbed he shall take advantage of this Covenant in Law. *Co.* 5. 17. *Dyer* 257. 47 Ed. 3. 22.

Heir.

If a Feoffment be made in Fee, and the Feoffor doth Covenant to warrant the Land, or otherwise to the Feoffee and his Heirs; in this case the Heir of the Feoffee shall take advantage of this. As if *A.* Covenant with *B.* and his Heirs to infeoff *B.* and his Heirs of Land, and *B.* die before it be done; in this case his Heirs shall take advantage thereof.

And

And if *A. B.* and *C.* have Lands in Coparcenary, and they purchase other Lands in Fee, and they Covenant each to other his Heirs and Assigns to make such Conveyance to the Heir of him that shall die first, of a third part as he shall devise; in this case the Heir, not the Executor, shall take advantage of the Covenant. *Dyer* 338.

Executors and Administrators shall take advantage of Inherent Covenants, albeit they be not named. And therefore if *A.* Covenant to do a thing to *B.* and do not name his Executors or Administrators, and it be not done; it seems the Executors or Administrators of *B.* may have an Action of Covenant for the not doing of it. As if one Covenant with *J. S.* to pay him money at *Michaelmas*, and do not say to his Executors, &c. and he die before the time; in this case his Executor or Administrator shall take advantage of this Covenant, and may recover the money. *Co.* 5. 17. *F.N.B.* 145. *Dyer* 112. 271.

Grantees of Reversions shall have the like advantage against Fermors (by Action onely) for any Covenant or Agreement contained in their Lease, as the Lessors, their Heirs or Successors might. And so also shall Lessees against Grantees of Reversions (Recoveries in value except) by the Statute of 32 H. 8. 34. And herein (as in the cases of a Condition before) a difference is taken between Covenants that are inherent, and Covenants that are collateral. For the Covenants whereof Grantees by this Statute shall take advantage, are inherent Covenants, (i.) Such Covenants as do concern the thing granted, and tend to the supportation of it: As where a Lessee for life or years doth Covenant with his Lessor and his Heirs, to keep the Houses demised in good reparations, or the like, and after the Lessor doth grant away the Reversion of all, (*Mich.* 8 Jac. *Primes* case,) or part of the Houses to *J. S.*; in this case *J. S.* shall take advantage for any breach of the Covenant in his time, but not for any breach before the time the Reversion was granted. But if the Lessee doth Covenant with his Lessor and his Heirs, to pay him a sum of money, or make him a Feoffment, or the like, and then the Lessor doth grant the Reversion to *J. S.*; in this case *J. S.* shall not take advantage of this Covenant: And yet the Executors or Administrators of the Lessor shall take advantage of this Covenant. See *Goldsb.* 175: pl. 109. See *Condition*, *Numb.* 12. *Co.* 5. 18. 9 Jac. *B. R.* *Wilborne* and *Befwich's* case. Accord.

Regularly, every Assignee of the Land or thing Demised, shall take advantage of inherent Covenants, as if a Covenant be, to have Estovers to burn in the House Demised, or to have Timber to repair, or if the Covenant be that the Lessor or Lessee shall repair, or the like. And therefore of these Assignees in Deed and in Law Assignees of Assignees *in infinitum*, shall take advantage, and Assignees of Executors or Administrators, Tenants by Statute, or Elegit, or after a sale upon a *Fieri Facias*, a Husband in the Right of his Wife; any one of these, and any other that shall come lawfully to a term, unto which such a Covenant is incident, albeit he be not named, yet may he take advantage of it. *Co.* 5. 17.

If a Lease for years be made to *J. S.* by the words [*Demise or Grant*] and the Lessee assign this over to *J. D.*; in this case *J. D.* may take advantage of the Covenant in Law, and bring an Action against the Lessor, if he be disturbed. *Co.* 4. 80: *Dyer* 257. *Fitz* *Covenant* 30.

If a Lease for years be made of Land, and the Lessor doth Covenant with the Lessee and his Assigns to do, or not to do something; in this case an Assignee by word, or an Assignee by Deed, may take advantage of this Covenant. *Co.* 3. 63: *F.N.B.* 145.

If two Coparceners make Partition of Land, and the one of them doth Covenant with the other to acquite her, and her Heirs of a Suit that issued out of the Land, and the Covenantee doth alien her part to a stranger; in this case the Alienor shall have the same advantage for acquital of the Land as the Covenantee had.

So if *A.* be seised of the Manor of *B.* whereof a Chappel is parcel, and a Prior with the consent of his Covent, had covenanted with *A.* and his Heirs, Lords of the Manor to celebrate Divine Service in the Chappel, and after *A.* had sold the Manor;

in this case the Vendee or Assignee of the Manor should have had the same advantage of the Covenant the Vendor had. But if the Lord had sold the Chappel, the Assignee of the Chappel should not take advantage of the Covenant. And if a Covenant be to say Divine Service in the Chappel of a stranger; in this case the Assignee of the Manor, in which the Chappel is, shall not take advantage of the Covenant. *Brasyl. 2 part. 56. 207. Co. super Littl 385. Co. 5. 23. 18.*

9. Who shall be bound and charged by a Covenant; and against whom a Writ of Covenant doth lie, and where, or nor, Executors, Administrators.

Regularly, all those that do seal and deliver the Deed, and are named and bound by the exprefs words of the Covenant, whether the Covenant be collateral or inherent, are bound by the Covenant contained in the Deed: And therefore if Heirs, Executors, Administrators or Assigns, be named in the Covenant, for the most part they are bound by the Covenant. And in all cases of Inherent Covenants also, where a man doth Covenant for himself onely, and doth not name his Executors and Administrators, or either of them; they are bound, and may be charged by the Covenant notwithstanding: And in some cases the Law is so also for collateral Covenants; and in most cases of Inherent Covenants that tend to the support of the thing granted, (in respect of which it is presumed, the Lessor took the less for the Land) such as have the Land, albeit they be neither Executors nor Administrators, or either of them but Assignees, &c. shall be charged by the Covenant, though they be not named; for these Covenants are said to run with the Land. *Co. 5. 16, 17, 18.*

If a Feoffment or Lease be made to two, or to a man and his wife, and there are divers Covenants in the Deed to be performed on the part of the Feoffees or Lessees, and one of them doth not seal, or the wife doth, or doth not seal during the Coverture, and he or she that doth not seal, doth notwithstanding accept of the Estate, and occupy the Lands conveyed or demised; in these cases, as touching all Inherent Covenants, as for payment of Rent, and the accessories thereof, as clauses of Distress, of Re-entry, of *Numine panna*, Reparations, and the like; they are bound by these Covenants as much as if they do seal the Deed. So if a Lease be made to A. for years or life, the Remainder to J. S. in Fee, and there is a Rent reserved, or there be divers Covenants on the part of the Grantees, and J. S. doth never seal the Deed, or Counterpart; yet if in this case he accept the estate after the death of A. he must pay the Rent, and perform all the Covenants that are Inherent. So also if there be Covenants in the Kings Patent to be performed on the part of the Patentee. As if there be this clause in the Patent [And that J. S. (the Patentee) shall repair the House which it is decayed;] in this case the Patentee is bound by this Covenant, and all such like Covenants. But *quere* of collateral Covenants, in the first cases, for therein it seems the Feoffee or Lessee is not bound: And yet it is said, That if an Indenture be made between A. of the one part, and B. and C. of the other part, and therein there is a Lease made by A. to B. and C. on certain Conditions, and B. and C. are bound to A. by the Indenture in twenty pound, to perform the Conditions, and B. onely doth seal the Deed, and not C; yet in this case, if C. accept of the Estate he is bound by the Covenants, and one of them cannot be sued without the other, whilst they are both living. *Quis sentis commodum sentire debet & onus. Et transit terra cum onere. Co. super Littl. 231. Dyer 13. Bro. Covenant 6. Det. 80. Experientia. Pasche, 14 Jac. B. R. Bret and Cumberlands case. Co. super Littl. Sect. 231.*

Heirs.

If a man Covenant for him and his Heirs, to do any thing whatsoever; hereby his Heirs are bound: But otherwise, except the Heirs be bound by the Deed by exprefs name, an Heir shall scarcely be bound or charged in any case by a Deed. And therefore it is, that if the Lessee for years be ousted by any other but the Heir himself, no Action of Covenant will lie against the Heir, unless there be an exprefs Covenant wherein and whereby the Lessor and his Heirs are bound. But if he be ousted by the Heir himself, it seems an Action of the Covenant will lie against him: And yet if he be ousted by an elder title from the Lessor, *Contra*; for in this case the Heir shall not be charged. *Co. 5. 17. Bro. Covenant 38: 32 H. 6. 32. Dyer 257. Fitz. Covenant 31.*

Executors, Administrators.

If a man do Covenant for himself onely, to pay money, build a House, for quiet enjoying, or the like, and he doth not say in the Covenant. [His Executors

Defendants]

Descent Administrators, &c.] Yet hereby his Executors and Administrators are bound, and shall be charged. And yet if a Lessee for years Covenant for himself, to repair the Houses demised, omitting other words; it seems in this case he is bound to repair onely during his life, and the Executors or Administrators are not bound. So if a Lessor Covenant for himself onely, to discharge the Lessee of all quit Rents out of the Land; it seems this Covenant is onely personal, and shall binde the Covenantor onely during his life. But if in these cases these words [*during the Term*] be added in the Covenant, as if a Lessee Covenant for himself to repair the Houses, during the term, or the Lessor Covenant for himself to discharge the Lessee of all quit Rents, during the term; in these cases it seems the Executors and Administrators also, will be charged after his death. 10 H7. 10. Dyer 19. 14. Bro. Covenant 50. Dyer 114.

If a Lessee be oustled by one that hath title; it seems an Action of Covenant will lie for this ouster against the Executor or Administrator upon the Covenant in Law, if he were put out in the life time of the Lessor, and not otherwise: For if there be Tenant for life, the Remainder in Fee to another, and the Tenant for life by the words [*Demise or Grant*] doth make a Lease for years and die, and after he in the Remainder doth enter and put out the Lessee for years; in this case he cannot upon this Covenant in Law, charge the Executors or Administrators of the Lessor: But upon an expresse Covenant for quiet enjoying he may. Dyer 157.

In some cases an Assignee shall be charged though he be not named, and in some cases shall not be charged, though he be named; and in some cases he shall be charged when he is named, as when the Covenant doth extend to a thing in *esse*, parcel of the Demise, there the thing to be done is Appurtenant and *quodammodo* annexed to the thing, and shall binde the Assignee, though he be not expressly named, as a Covenant to repair, &c. But if the Covenant be annexed to a thing not in *esse* before, but *de novo* to be erected on the thing, as to set up a new House, or the like; in this case it will not binde the Assignees, unless they be named in the Covenant. And if the Covenant be to do a thing meerly collateral; in that case it will not binde the Assignees, albeit they be named expressly. Also when a contract is personal onely, and a man doth binde himself and his Assigns, his Assigns shall not be bound hereby: As if one Demise Sheep, or other stock of Cattle, or any other personal Goods for any time, and the Lessee doth Covenant for him and his Assigns, at the end of the Term, to deliver them in as good plight, as they were at the time of the Demise, or such a price for them, and the Lessee assign them; in this case this Covenant will not binde the Assignee: But the Executors and Administrators of the first Lessee are bound hereby. So if one Demise a House and Land, with a stock or sum of money for years, rendring Rent, and the Lessee doth Covenant for him and his Assigns to deliver the money at the end of the term; in this case an Assignee shall not be bound by this Covenant, as the Executors and Administrators of the Lessee shall. See more in *Brownl. 1 part. 19, 20, &c. Co. 5. 16.*

Assignees or Grantees.

Executors.

If a Lessee Covenant to repair the Houses demised, or to discharge the Lessor *de omnibus oneribus circa terram*, or the like; in these cases, and such like, albeit Assignees be not named in the Covenant, yet Assignees and Assignees of Assignees in *infinitum*, and all others that shall come to the Land by the Act of Law, or by the Act of the Parties, shall be bound and charged by this Covenant. Co. 5. 17. Dyer 27. Bro. Descent 50.

If a Lessee Covenant for him and his Assigns to build a new House upon the Land demised within seven years, and the Lessee assign it over; in this case the Assignee is chargeable. But if a man Covenant for him and his Assigns to make a Feoffment, Obligation, or the like, in this case the Assignee shall not be charged, albeit he be named. And if the Lessee Covenant for himself, or for himself, his Executors and Administrators onely to build a new House upon the Land demised, and the Lessee assign over the Land; in this case the Assignee is not bound by this Covenant. See more in *Conditions of Obligations. Co. 5. 17.*

If a Lease be made rendring Rent, and if it be arrear that the Lessee his Executors and Assigns shall forfeit three shillings four pence *nomine penna*, and the Lessee assign

assign the term; in this case it seems the Assignee, shall be charged with the *nomine pana. Goldsb. 127. pl. 125. Thins case. versus Cholmsley. Trin. 36 Eliz. Co. B. R.*

Note.

Election.

And in all the cases before where a Covenant is broken, an Action of Covenant may be brought. But herein note that howsoever, in divers of the cases before Assignees are chargeable upon a Covenant; yet the Lessee himself is not hereby discharged, but the Lessor or Grantee of the Reversion, hath Election to charge which of them he will. And therefore if a Lessee Covenant for him and his Assignees to repair, and the Lessee assign; in this case the Lessor may have his Action of Covenant against either of them. And if a Lessee Covenant for him, his Executors, Administrators, and Assigns, to repair the Houses demised; and he in Reversion doth grant away his Reversion, and the Lessee assign his estate; in this case, albeit the Grantee of the Reversion, have accepted the Rent of the Assignee of the term, yet he may still have an Action of Covenant against the Executor of the Lessee upon this Covenant. So if a Patentee Covenant for him and his Assigns to repair, and he assign, the King may have his Action against either of them. *Brownl. 1 part. 120, 121. Bro. Covenant 32. Hil. 16 Jac. B. R. Curia, Bre. qu. su. Cumberland.*

If A. and B. do Covenant for themselves jointly without more words; the Covenant is joyn, and one of them cannot be discharged without the other. But if they Covenant for themselves severally, the Covenant is several, and they may be sued a part. And if they Covenant jointly and severally; then the Covenant is joyn and several, and they may be sued either way at the Election of the Covenanttee. *Co. 5. 23.*

10. When a Covenant shall be said to be gone and discharged, and when not, and how.

Where the Deed it self wherein the Covenants are contained, or the Estate on which the Covenants are accessory to the Principal, do depend, is gone and determined, there regularly the Covenants are gone also. And therefore if a Lease for life or years, be surrendered, whereby the Estate is gone, or a Deed become void by rature, or the like, and there be Covenants contained in the Deed; by these means the Covenants are gone also. But this Surrender doth not discharge the breach of Covenant which was before the Surrender. For if a Parson Lease his Glebe for years, and after resign, whereby the Lease for years doth become void; in this case the Covenants of the Lease, as to the time before the Relinquishment shall be said to be in force still. *Dyer 26. Co. 5. 23. 40 Eliz. 3. 27. Bro. Surrender 47. Covenant 42. Hil. 4 Jac. B. R. Moile versus Austen.*

Where a Covenant is become impossible to be done by the act of God, as where one doth Covenant to serve another seven years, and he die before the seven years be expired; by this the Covenant is discharged. *Co. 1. 98. Pl. 286.*

Where there is an expresse Covenant in a Deed, for quiet enjoying, the implied Covenant is gone. *Expressum facit cessare tacitum. Co. 4. 80.*

Release.

By a Release of all Covenants from the Covenanttee the Covenant is discharged, so as the Release be by Deed, for a Covenant by Deed cannot be discharged by word. And therefore if A. by Deed Covenant with B. to build a House by a day, and B. doth wish him to let it alone; this is no discharge of the Covenant. *18 Ed. 4. 8.*

If the Lessor accept the Rent of the Lessee or his Assignee, after a Covenant broken; this doth not discharge the breach of the Covenant, but the Lessor may sue for it notwithstanding. *Pasches 6. Cur. B. R. Adjudge Bachelors case.*

If the Deed wherein the Covenant is, be by consent of both parties cancelled; this discharge the Covenants in time to come, but if any were broken before, he may sue for that. *Brownl. 2 part. 167.*

See more in *Brownl. 2 part. 134, 135, 158, 159, 170.*

CHAP. LVII.

Of a Countermand, or Revocation.



Countermand or Revocation, is the recalling and determining of some power or authority given, or thing before done. Or it is the commanding of some thing contrary to that which one had commanded before. And this is either in Law or in Equity. The kinds of

And so it is either general, as when a man doth revoke all former Wills; or special, as where a man doth revoke his Will made such a day. Or it may be general and special, as where a man doth revoke all former Wills, especially his Will made such a day. And in case where an Authority or Licence is revoked, it is as if it had not been given; and if he that had it, shall do any thing upon it, he may be punished for it, as if no such Authority at all had been given him. *Brook. 330.*

27 H. 8. 26. 4. 7. 14.
For this take these things.

1. That the King by his Prerogative might have revoked his Presentment to an Advowson before Induction, which a common person could not have done. And he may Countermand his Authority, Protection, and Commission at his pleasure. *Dyer 348. 291. Register 204. 305.*

2. A common person may Countermand his Licence, Power, Authority, or Command, before it be executed. And so (for the most part) he may do his Grant, if it be merely of a matter of ease, pleasure, or trust. And therefore if I Licence another to enter into my House or Ground, or to take and use my Horse for a time, or to take and deliver such a thing to J. S. or I being a Justice of Peace, make a Warrant to J. S. to arrest a man, or I command or licence one to take Deer for me, or to cut Wood for me, or the like, or I make a Letter of Attorney to make, or take Livery of Seisin for me, or to sue, or do any thing in my name; or I deliver another Goods or Money, to deliver over to another, or give to the poor, or to bestow for a few years gift, or the like, or I make another my Factor, Proctor, or Attorney, or I assign Auditors to take an account, or I Grant to another to hunt in my Park, or to keep my Court; or if I command another to do any of these things. In all these cases, before the thing be done, I may forbid the doing of it, and may recall the Power. So a man's Will is revocable at his pleasure, notwithstanding he say in it, it shall be his last Will, and not revocable, and notwithstanding it be annexed to a Feoffment, and Livery, and Seisin made upon it. So an Administration granted, may be revoked by him that makes it; so also it seems of an Attornment; and so it is said of a Surrender of Copihold-land to uses; that this in some cases is revocable. So a Submission to an Award is revocable also. *Brook. Rep. 2 par. 296. Dyer 21. Co. 4. 62. Dyer 49. 5 H. 7. 18. 6 Ed. 4. 39 H. 6. 7.*

3. All these things being in their own nature revocable, are still so, albeis they be made and done with irrevocable words; and though a man binde himself by Bond or Assumpfit not to revoke it, and yet he may be sued upon the Assumpfit or Bond for revoking it. But a man cannot by any act he can do, make a Power or Authority, not revocable, which by Law, and in his own nature, is revocable. *Co. 8. 82. 5 Ed. 4. 3.*

4. But a man cannot revoke an Interest, as if he hath made a Lease for years of his ground, or a Grant of his Horse for four days, or Grant to another the keeping of his Park for two years. Or grant one the keeping of his Court and ten pound yearly out of the Issues thereof, for a time certain, these things cannot be recalled. *Dyer 348. 291. 49. 39 H. 6. 7. 18 Ed. 4. 8.*

5. It

5. It is said also, That if a thing be delivered, to be given to another in satisfaction of something before done; that this is not revocable. *Dyer* 49. 22.

6. If one deliver a Deed to another, as an Escrow on certain Conditions performed, to take effect as his Deed; this is not countermandable. *Perk. Sett.* 141.

Surrender.

7. If a Copiholder, like to die, do Surrender to Tenants out of Court, according to custom, to the use of his Wife or Children; and this is without any consideration of money, &c. and he recover, it is said before the Presentment and Admittance; this is countermandable. But if it be to the use of a stranger, it is otherwise. *Kitch.* 82.

8. If two exchange Land by Deed, or without Deed, and neither of them enter, they may revoke or dissolve the exchange by mutual consent; but it must be dissolved by Deed. 3 *H.7.* 13. *F.N.B.* 36.

9. If I present a Clerk to an Advowson, I cannot revoke it. 14 *Ed.4.* 2.

10. If I grant a Reversion, I cannot before Attornment revoke it. 60 it is in Nominations and Elections. If I enfeoff such a one as *J. D.* shall name within a year, and he name *J. D.* yet before the Feoffment, and within the year, he may name another, and Countermand the first Nomination: But if I enfeoff *J. S.* to the use of such a one as *J. D.* shall name within a year, and he name *J. D.* and he do name within the time; this is not revocable. 14 *Ed.4.* 2.

For answer to this, take these cases.

3. What *Ad.* shall be said to be a good Revocation of a thing revocable, or not. Of a will.

Sett. 2. Woman-sole marry.

1. By the making of a latter Will of Land in writing, a former Will is revoked; and this, albeit it make no mention of the former Will. And if the former Will be only about Goods and Chattels, the latter Will, albeit it be but Verbal, will revoke a former Will made in writing. *Co.* 8. 90. *Dyer* 310. *Co.* 4. 60. If a Woman-sole make a Will, and then take a Husband; this is a Countermand of her Will: But if in this case she happen to out-live her Husband, and this Will continue, and no other Will is made, the Will perhaps will be revived, and good again. *Co.* 4. 62. If one make a Will of Land, and after he make a Feoffment of the Land, or a Bargain and Sale of it, but this Conveyance is defective for lack of Livery of Seisin or Inrolment; yet this is a Countermand of the Will. And yet if I do onely Covenant, to make an estate of it, and do make no estate of it; it seems this is no Revocation of the Will. And if I make a Devise of my Land, and after make a Lease for years of it; it seems this is no Revocation, but the Will may stand good, for the Reversion after the Lease for years ended, *Dyer* 74. 47. If one have a Lease for years, and give it by Will, and then Surrender it, and take a new Lease; this is a Countermand of the Devise, and if he die, the Devisee shall not have this Lease. *Goldsb. Rep.* 93. If a man that is of sound memory, make his Will, and after this he becomes not himself; this is no Revocation of the Will in Law, nor can he whiles he is in this case, make any express Revocation of it. *Co.* 4. 61.

Non compos mentis.

Of an Attornment.

2. If a Feme-sole make a Lease for life, rendring a Rent, and after she sell the Reversion, and then before the Attornment of the Tenant she marry; it is said, That by this the Attornment of the Tenant is Countermanded, and that now it cannot be made. But if she take to Husband the Grantee of the Reversion, that this is no Countermand. 2 *R.2.* 8.

Of a Submission to an Arbitrement.

3. If a Woman-sole submit to an Arbitrement, and after she marry, and after the marriage the Award is made; this Award is void: For by the marriage, the Submission is countermanded in Law. And let the Award be never so much to her profit, it is void. *Whise* against *Gifford*, *B. R.* Adjudged.

Feme covert.

4. A Woman-covert whiles her Husband lives, can make no good Countermand of any thing she did, whiles she was unmarried. *Co.* 4. 61.

5. The Countermand that is of force to revoke a Power regularly, must be made after the same manner was made; that is, if the Power be created by writing, it must be dissolved in the same manner; in that case therefore, the Revocation must be by writing also.

Notice.

6. And regularly where there is an express Revocation, there notice must be given of it, to him to whom the power is given, before he execute the power, otherwise it is not good: For if once the Power be executed, the Revocation comes too late; but in case of a Countermand in Law, there no notice is needful. And therefore if one

make

make a Feoffment with a Letter of Attorney to make Livery, and before the Livery be made the Feoffor make a Lease or Feoffment to another; this is a good Countermand without Notice. *Fortior est dispositio Legis quam hominis*, (i.) The Disposition of Law, is stronger then the disposition of man. *Vivions case*. Brownl. 2 Rep. 290.

But for the Revocation of a Will, see in my Book of *Common Assurances*, chap. 23. Numb. 5, 6, 11, 12. And for *Revocation of Uses*, chap. 24. Numb. 9. And see more in *Goldsb. Rep.* 109. And in *Titles, Licence, Arbitrement*, in my Book of the *Second Part of the Marrow of the Law*, page 139. And *Authority*, page 59.

CHAP. LVIII.

Of Courts.



His word Court did sometimes signifie the Kings House, where he did reside and abide with his Household: It doth also signifie a Tribunal or place where Justice is administred Judicially. And of these Courts there are many Kindes. They were heretofore distinguished into Courts Ecclesiastical, Christian, or Spiritual, such as did handle Spritual Matters; and these were stiled the Convocation, the Subscription, the High Commission, the Prerogative, the Arches, the Audience, the Consistory, the Courts of Faculties, of

Sec. 4.
COURT. What.
The Kindes of
it.
Spiritual
Courts.

Peculiars, of the Archdeacon or his Commissary, of Delegates, and incidently of Appeals, of Commissioners of Review, and of the Conservators of the Privileges of *St. Johns of Jerusalem*; all which are now gone, and out of use, whereof you may read in *Coak*, in the Fourth Part of his *Institutes*, from Page 321, to the end of the Book.

And Courts Civil, which were ordained and used about Civil Matters; and these were very many; and of these there are some out of use, and others that are still in Being, and of use. Those Courts and Jurisdiccions that are out of use and gone, are such as these: The Council Table, the Courts of the High Steward of *England*, of the Star-Chamber wherein the Great Lords of the Council and the Judges were Judges, of Redress, of Delays, of Judgments in the Kings Great Courts, wherein were Judges, such great Men as the King did appoint; a Court to enquire of, and certifie unlawful and true Accounts in the Exchequer, wherein were Judges, such as the King did appoint; the Courts of General Surveyors of divers of the Kings Lands, &c. Of Chivalry before the Constable and Marshal, of the Counting-House of the Kings Household, wherein the great Officers about the King, were Judges; of the Lord Steward, Treasurer, and Comptroller of the Kings Household, concerning Felony, &c. Of Port-moots, kept in Haven Towns or Ports; about Beacons, Light-houses, Sea-marks, &c. about Ambassadors, Leagues, and Treaties, of Justices of Trailbasson, of Court of Wards and Liveries, wherein the Master, Attorney, and Receiver General were Judges; of the Royal Franchise of *Ely*, of the County Palatine of *Pembroke*, of the Escheator and Commissioners for finding of Offices, and some others; these are in a manner quite gone.

But there are other Courts and Powers like to Courts, still in Being, more or less, as the Parliament, the Council of the Lord Protector, the Kings Bench, now called the Upper Bench, the Chancery, the Common Pleas, the Exchequer, wherein is the Exchequer Chamber, the First Fruits, Tenths, and Augmentation Courts, the Court of Admiralty, the Courts of the Justices of Assize, of the Justices of *Nisi Prius*, of the Justices of *Oyer and Terminer* of all ordinary sorts, General and Special, and of Justices of Gaol-delivery; the Courts of the Justices of the Peace, and of Justices in Eyre; the Courts of the Marshalsey, of Requests, of the Dutchy Chamber of the Cinque Ports; the Courts of the Counties Palatine, the Courts of the Citie of *London*, the chief whereof is called the *Hustings*, the Courts of *Westminster*

Hustings. What.
and

and *Normich*, of the two Universities, of *Wales* of the North, of the *Stanneries* in *Cornwall* and *Devonshire*; the Courts of the Forests, of the Isles of *Man*, &c. the Courts of the Tourn, of the Leet or view of Frank-pledge; the County Court, the Hundred Court, the Court Baron and Copihold Court, the Court of Ancient Demefn, the Court of the Coroner, the Court of Pipowders, the Court of the Clerk of the Market; the Powers of the Commissioners of Sewers. of Bankrupts, and some others; all these are more or less of use amongst us. And some of these are also of Record; and so they are all or most of them, except the County Court, Hundred Court, Court Baron, and Copihold Court, which are not of Record, and therefore called Base or Inferior Courts. Of all which, you may read in *Co. 4 part of his Inst. 1 part. 58. 260. 117. Cromp. Jur. of Courts* throughout. And you must know that in stead of the Kings Privy Council, there is a Council of the Lord Protectors. And for their Election, Office, and Power, see the *Act of Government*, 16 December. 1653.

Señ. 2.
2 Parliament,
What.
The Judges.
Knights of the
Shire.

The Parliament is the Supreme Court and Power of the Commonwealth, ordained by the Common Law, made up of a great Assembly, chosen by the people, called Knights, Citizens and Burgeses, who are the Judges there.

By the new Act of Government made, these things are ordained. 1. That a Parliament be called every three years. 2. That during five moneths, without their own consent, it be not adjourned, prorogued, or dissolved. 3. The numbers to be chosen for *England*, *Scotland*, and *Ireland*, are there set down. 4. The sending of Writs, of Summons, and manner of proceeding thereupon, and in the Election of Members is there set down. 5. That sixty of this Assembly do make a Parliament, and the Supreme Legislative Power is to rest in the Lord Protector and them. 6. If they agree upon any Bills, and present them to the Lord Protector, and he do not within twenty days agree to them, they may pass them for a Law, without his consent, if they please. *The Government*, 16 December. 1653.

Their Jurisdiction
and
Power.

This Assembly by the ancient Common Law of the Nation, hath an absolute Power over and above all other Courts, they are to debate and conclude Matters for the Commonwealth: This Court hath power to make, revoke, alter, or change any of Laws or Statutes of the Nation, to judge of Matters in Law, to try any one for his life, to reverse the proceedings in any other Court, and to correct and reform all other mischiefs, especially such as have no other ordinary remedy; and for which there is no Regular Redress in other Courts. And from hence there doth lie no Appeal; nor can any other Court examine anything that is done in this Court. But for this Court, the Power thereof, the Qualifications and Privileges of the Members of the Assembly, the Proceedings therein, and the Officers belonging thereunto, and other matters concerning it, See *Crompt. Jur. of Courts* 19. *D. & St. 55. Fofescur*, cap. 8. 4 *Ed. 3.* 14. 36 *Ed. 3.* 10. 5 *R. 2.* 4. 4 *H. 4.* 23. 5 *H. 4.* 2. 7 *H. 4.* 15. 1 *H. 5.* 1. 8 *H. 6.* 1. 10 *H. 6.* 2. 11 *H. 6.* 11. 23 *H. 6.* 11. 7 *H. 8.* 16. 25 *H. 8.* 21. 31 *H. 8.* 10. 34. 35 *H. 8.* 13. 1 *Ed. 6.* 12. And in divers other places, but excellently in *Co. 4 part of his Institutes*, cap. 1.

3. Star-Chamber,
What.

The Star-Chamber was a Court to punish Riots, Frauds, Perjuries, Forgeries, and such like offences, that had not ordinary remedy in other Courts, it was held in a Chamber at *Westminster*, over which were many gilded Stars; it is now put down. You may read of it, in *Crompt. Jur. Co. 4. part of his Inst.* It was dissolved by 16 *Car. 17.* And so was the Orders of the Council Board.

Council Board.
Chancery,
What.

The Chancery is a Court of Equity or Conscience instituted by the Common Law. But for this, see a large Treatise in my First Part of the *Marrow of Law*, cap. 59.

Court of Requests,
What.

The Court of Requests also, being much of the same nature with the Chancery, is a Court of Equity, instituted for the help of such Petitioners, as in cases of Conscience, did make their address by supplication to the King, wherein the Lord Privy Seal and Masters of Requests were Judges. They had to do onely in causes that were merely Equitable, or one of the Parties did belong to the King, or one of the Parties was poor and oppressed by a rich Man, or where any special Matter was sent unto them by the King, or where the thing did concern Colleges, Universities, or Hospitals. But for this see *Sir Tho. Smith, de Republica. Co. 4. 9. Ainsberr, f. 104.*

The

The Upper-Bench (formerly called the Kings Bench) is the most ancient Court of the Nation, instituted by the Common-Law originally for the Pleas of the Crown, as Treasons, Felonies, Misprision, and the like: But now it dealeth not only in Criminal, but in Civil matters also, as Contracts, and the like. The Judges of this Court are the Lord Chief Justice, and three, four, or five other Judges as the Lord Protector shall appoint. But anciently the King himself did usually sit in it, and therefore it followed his person; but it is now kept at *Westminster-Hall*. In this anciently Officers were sworn, and the Oath of Allegiance was taken. And at this day all Criminal matters are here decided, and many Common pleas also: also all Breaches of the Peace, publick Annoyances and Offences against the Lord Protector and his people are to be redressed. See for the Power and Proceedings of this Court, *Crompt. Jur.* 68. *Plow.* 320. *Co.* 11. 98. *Co.* 4 par. *Inst.* ch. 7.

This Court (now out of use) was instituted by the Common-Law for the deciding of matters of War, and in times of War; and herein the Lord High-Steward, Constable, or Marshal was Judge. And for this see *Crompt. Jur.* 82. *Co.* 4 par. *Inst.* chap. 4.

There was a Court of Chivalry for matters of War, and Titles of Honor and Place, held before the Constable of England, and Earl Marshal; now gone. *Co.* 4 par. 117.

The Marshalsey was the Court wherein the Marshal of the Kings house was Judge: He was to hear and determine, and punish all offences done within the Verge, and to determine all matters of difference between such as were of the Kings household, and betwixt them and others within the Verge. For this see *Co.* 4. 47. *Crompt. Jur.* *Co.* 4 par. *Inst.* ch. 18.

There is a Court of the Steward and Marshal of the Kings house; and it seems to be included within the Marshalsey, or in the same. *Stat.* 13 Ed. 3. ch. 3.

The Court of Common-Bench or Common-Pleas, is that Court instituted by the Common-Law for the Pleas and Controversies of common Persons, or common Pleas; and herein they are commonly heard and determined. And the Judges of this Court are the Lord Chief Justice, and three, four, or five other Judges as the Lord Protector please to appoint. In this Court are handled Suits for Land, Debts, Benefices and Contracts. And in this Court do pass Assurances of Land by Fines and Recoveries, which did formerly sometimes pass in the Upper-Bench, and before Justices in Eyre. For the power and proceeding of this Court, see *Crompt. Jur.* 91. *Co.* 4 *Inst.* c. 10.

The Court of the Exchequer is a Court instituted by the Common-Law, wherein all causes touching the Revenues of the Crown have been handled and decided. The Judges of this Court are the Lord Chief Baron, and three, four, or five other Barons, as the Lord Protector shall appoint: And their work and power is, to hear and decide all causes belonging to the Lord Protector's coffers, and to receive and pay all money due to and from him, which is called the Receipt of the Exchequer. They have there also a Court of Chancery before the Chancellor and Barons of the Exchequer, called the Exchequer-Chamber. For the Power and Proceeding of these Courts, see *Crompt. Jur.* 52. 104. *Co.* 4 par. *Inst.* ch. 11. 13. And herein now is all the power of ordering of First-fruits and Tenths exercised. For which see *Co.* 4 par. *Inst.* 14. *Stat.* 16 H. 8. c. 3. 2 & 3 P. & M. c. 4. 1 Eliz. 4. The Augmentation-Court seems also to be here. See *Stat.* 27 H. 8. c. 27. 33 H. 8. 39. 37 H. 8. 4. 1 M. 10. See Officers.

The Court of Wards and Liveries (now abolished) was a Court appointed by the Law for the ordering of the Kings Wards and their Lands. For which you may read Sir *Tho. Smith de Rep.* 116. *Crompt. Jur.* 112. *Co.* *Inst.* 4 par.

The Court of Admiralty is a Court instituted by the Common-Law for the hearing and determining of matters done upon the Sea. The Admiral is Judge here: And he is said to be an Officer whose authority is in matters done upon and beyond the Seas; all which he is to determine by the Rules of the Civil-Law. He was also to prepare and maintain the Kings Navy, and might have arrested Ships for his service. He is to suppress and chase Robbers. And his Jurisdiction reacheth into the great Rivers of the Country below the Bridges, but not within the body of any

Upper-Bench,
what,

Judges.

The Power.

Court of the
High-Steward,
or what.

Court of Chivalry, what.
Marshalsey,
what.
Judge.
Power.

The Court of
Steward and
Marshal.
Sect. 3.
Common-Bench
or Common-
Pleas.
Judges,
Power.

Exchequer,
what.
Judges.
Power.

Exchequer-
Chamber, what.

Court of First-
fruits & Tenths
and of Aug-
mentation.

Court of Wards
and Liveries,
what.

Admiralty and
Admiral, what.
Judge.
Power.

Courts, have only to cite men to appear, and to execute his Judgments: which he may do upon the Land: But otherwise if he take upon him to meddle with any thing done in part, or in all upon the Land; it is *coram non Judge*, and a Prohibition may be had out of some other Court to forbid him, *Co. 2. 93. 13 R. 2. 13. 15 R. 2. 3. 12 H. 4. 11. 8 Ed. 3. 10.*

Floſſam, what.
Jeſſam, what.
Lagan, what.

Wreck, what.

This Officer only hath conſuſance of *Floſſam*; which is, where a Ship is periſhed, and the Goods that were therein float upon the Sea. *Jeſſam*, which is where the Goods are caſt into the Sea to ſave the Ship. And *Lagan*, which is where a Cork is tyed to the Goods, that it may be found again. But he hath not to do with *Wreck*, which is where a Ship is broken, the Paſſengers drowned, and not one of them eſcapeth to Land alive; and eſpecially if the Owner of the Goods be drowned. *Co. 3. 106, 107.*

What ſhall be ſaid to be *Wreck*, and what *Floſſam*, *Jeſſam*, and *Lagan*, or oors, and who ſhall have them.

For this, know theſe things.

1. Where-ever Goods ſhall be accounted *Wreck*, there are theſe things in the caſe. 1. There muſt be a Shipwrack; the Ship muſt be drowned. 2. The Goods muſt be caſt out upon the Land by the Sea, and not floating ſtill upon the Water; for then they are *Floſſam*. Nor caſt upon the Land by the Mariners for fear of a Tempeſt, or when the Ship is about to periſh. 3. All the living creatures muſt be dead; for if any Man, Dog or Cat eſcape alive to the Land, it is not *Wreck*. But in this caſe where Goods come ſo to Land, they muſt be laid up and preſerved, or ſold, if they be ſuch Goods as will not keep, by the Sheriff or other Officer; and the Goods, or if they be ſold, the Money made thereof, delivered to the Town to keep. And if the Owner of them come within a year and a day of the Seizure thereof, and prove them to be his own, he muſt have them again: And ſo may his Executor or Adminiſtrator after his death. But ſomething muſt be allowed to them that have ſaved and kept them.

2. Whiles Goods remain in or upon the water, they are accounted *Floſſam*, *Jeſſam*, or *Lagan*; but when they be caſt upon the Land, they be *Wreck*.

3. If the Ship periſh, and Owner be not known, and the Goods prove *Floſſam*, *Jeſſam*, or *Lagan*; the Lord Protector, or any that hath any Kings grant, or may preſcribe for it, may have it, and take it by ſeiſure. And ſo likewiſe it is of Goods wrecked; any Lord may claim and have them by Patent, Cuſtom, or Preſcription; and if no ſuch Title can be made by any other, they will go to the Lord Protector. *Co. 3. 106, 107. D. & St. 51. Plow. 466. Weſtm. 1. 14. Bro. Wreck 2. 3. Co. 16. 91. Stat. 17 Ed. 2. ch. 11. Co. 2. 93. 1 H. 7. 23. 9 H. 7. 20. 39 H. 6. 35. Co. 4. par. Inſt. ch. 22. Prer. Reg. 11.*

Sec. 4.
The Courts of the Juſtices of Aſſiſe, Juſtices of Niſi prius, of Gaol-delivery, of Oyer and Terminer, what. The Judges. The Power.

All theſe four Courts are held by Commiſſion from the Lord Protector, and not by authority only of the Common-Law, or of any Act of Parliament. And in theſe Courts the Commiſſioners only are the Judges.

The Juſtices of Aſſiſe are to take Aſſiſes in the Country; and theſe have the power of the ancient Juſtices in Eyre. The Juſtices of Niſi prius are to try Cauſes in the Country, or adjourn them to the next Term. The Juſtices of Gaol-delivery are to hear and determine all ſuch Cauſes as appertain to thoſe that for any offence are caſt into Gaol. The Juſtices of Oyer and Terminer are to hear and determine ſome notorious miſſemeanors in the Country.

And all theſe Courts, and the Court of the Juſtices of Peace, are commonly held at once, and by one and the ſame Commiſſion, by our Judges in their Circuits at our Meetings called the Great Aſſiſes. And theſe Commiſſions were deviſed, and are uſed for the eaſe of the People, that by this means they may have Juſtice near home. And therefore it is at this day, that there are Six Circuits in this Nation; and the Judges go over all theſe Circuits twice a year, and uſe to ſtay three or four days in a place, and in that time do hear and diſpatch all the buſineſs of the place where they be, and give notice of the day before they come. And they come commonly with five Commiſſions, Oyer and Terminer, Gaol-delivery, Aſſiſe, Niſi prius, and Juſtices of the Peace. And by theſe Commiſſions they keep all theſe Courts together, where Trials are by Niſi prius, to the great eaſe of Juries and Parties, that otherwiſe muſt go to London with their Evidences and Witneſſes. And the Courts at *weſtmiſter* alſo

also are much eased hereby. But in matters of great weight, and where the Title is intricate, the Judges are wont to retain those Causes to be tryed at *Westminster*. And in these Courts the Sheriff, and all the Justices of the Peace of the County are bound to attend, or the Judges may fine them for their default; and so they may for any other misdemeanor in them. For the Power of these Courts and Judges, and their manner of Proceeding, See *Crompt. Jur.* 104. 135. *F.N.B.* 151. *Stat.* 4 Ed. 3. 5. 8 R. 2. 3. 33 *H.* 8. 24 2 R. 3. 2. 20 R. 2. 3. *Westm.* 2. 30. *Co.* upon *Lit.* 293. *Co.* 4 par. *Inst.* 27, 28, 29, 30, 31.

The Court of the Justices in Eyre, was by Commission; the Judges whereof were the Commissioners called *Justiciarii itinerantes*. These are now out of use, and included within the other Commissions. See for this *Co.* 9: in the Epistle. *Crompt. Jur.* 142.

Court of Justices in Eyre, what.

For the Courts of *Green-Cloth*, *Chivalry*, and some other Courts now gone and forgotten, you may read in *Co.* 4 par. *Inst.*

Of *Green-cloth*, *Chivalry*, &c.

The Court of the *Duchy of Lancaster*, was a kind of Chancery-Court for the hearing and deciding of the matters that concern the *Duchy of Lancaster*: And in this Court the Chancellor of the *Duchy* was Judg. For this, see *Plow.* 214. *Crompt. Jur.* 134 163. *Dyer* 168. *Co.* 4 par. *Inst.* 36. It was dissolved by *Stat.* 16 Car. 17.

Of the *Duchy of Lancaster*.

The Courts of the Principalities of *Wales*, were those Courts that are held in and for the Counties of *Wales*. For which see *Co.* 4 par. *Inst.* 47. *St.* 27 H. 8. 26. 34 H. 8. 26. 5 *Edw.* 2. 29. They were dissolved by the same Act.

Of the Principalities.

The Courts of the Counties-Palatine of *Lancaster*, *Chester*, *Durham*, *Pembroke*, and *Ely*, were the Courts of these several Counties, and the Jurisdctions they have there. For which see *Crompt. Jur.* 137. 27 H. 8. 25. *Co.* 4 par. *Inst.* 36, 37, 38, 39, 40. These were dissolved by the same Act; and so were all other Courts of like jurisdiction. See *Wingates* Abridgment.

Of the Counties Palatine.

The Court of the *Five Ports* or *Haven Towns*, are the Courts appointed for those Towns only. See for this *Crompt. Jur.* 146. *Co.* 4 par. *Inst.* 42.

Of the Cinque-Ports.

The Courts of the *Justices of the Forrest*, are Courts appointed by the Institution of the Common-Law for matters of the Forrest only. For which see *Crompt. Jur.* 146. *Forrest.* *Co.* 4 par. *Inst.* ch. 73.

Of the Justices of the Forrest.

The Court of *Commissioners of Sewers* are by the Common-Law to see the Ditches drained, and Mounds well kept in the Marsh or Fen-Countries, and the passages in the great Rivers scoured for the carrying of the water in the Sea, and for preserving the Country. *St.* 6 H. 6. 15. *Co.* 4 par. *Inst.* 62.

Of the Commissioners of Sewers.

The Court of the *Quarter-Sessions*, is the Court of the Justices of the Peace held in every County quarterly before the Justices of the Peace of the County, about matters of the Peace. And for this, and the power and office of the Justices of the Peace, and their proceeding in this Court, and in their other Sessions, see my two Books of the *Justice of Peace Office*, at large.

Of the Quarter Sessions, Special & Sessions, Private.

The Court of *Pipowders* was antiently a Court by Common-Law, incident to Fairs and Markets only, for the punishment of Disorders there, and the Trial of matters done in and about the Fair: And in this Court the Steward is Judg. But at this day they use to try matters done out of the Fair, in these Courts. See for this, *Co.* 4 par. *Inst.* 60. *Dyer* 133. *Co.* 3. 51. 10. 73. *Kelw.* 99. *St.* 17 Ed. 4. 2.

Court of Pipowders, what. Judges. Power.

The Court of the *Clerk of the Market*, is by the Common-Law kept by and before an antient Officer called the *Clerk of the Market*, whose office is to look to Weights and Measures: And to keep the Standards, (i.) the Examples thereof; whether dry, as Ells, Yards, Bushels, Pecks, &c. or moist, as Pints, Quarts, &c. and to see that all the Weights and Measures of the Country be according to this pattern, and to punish them that buy or sell by any other Weights or Measures. And for this they are to go Circuit every year all the Country over in all places, and to view and enquire by Jury, and return into the *Exchequer* what they find of Defaults. See for this, *Co.* 4 par. *Inst.* 61. *Crompt. Jur.* 126. *Westm.* 1 ch. 10. *Co.* 4. 46. 5. 7. *Stamf.* L. 1. 52. 17 Ed. 4. 2.

Of the Clerk of the Market. Judges. Power.

St. 5.
Court of the
Coroner, what
Judg.
Power.

The Court of the Coroner, is a Court instituted by the Common-Law, and kept before an Officer so called; whose office therein is, to enquire of every man that is slain, and cometh to an untimely end, by what means he came to his end; and to enquire of every circumstance, and to enquire who they were that committed the fact; and to enquire what lands, goods and chattels the party had at the time of the fact committed, and to seise them to the use of the Lord Protector. And these Officers are also to enquire of *Treasure-Trove*. *Mag. Charta, ch. 9. Westm. 1. ch. 10. Co. 46. 57. Stamf. lib. 1. 52. Cromp. Jur. 126. Co. 4 par. Inst. ch. 59.*

Court of the
Escheator,
what.

The Court of the Escheator was instituted by Common-Law to be held by an Officer of that name, whose duty and office therein was, to enquire and find by Office after the death of the Kings Tenants, what had happened to him, and to return this Office into the Exchequer. But the Tenure in *Capite* being gone, this Office, Court, and Officer is gone with it. You may read of it, *Stat. 1 H. 8. ch. 8. 3 H. 8. 2. F. N. B. 100. Co. 4 par. Inst. 43.*

Of the Sheriffs
Turn, Leet, Law
day, and View
of Frank-pledge,
what.

The Sheriffs Turn, Leet, Law-day, and view of Frank-pledge, are Courts of one nature, use and end. And for the better understanding of them, we are to know, that at first all Administration of Justice was in the King; and no Law was used, nor Justice administered, but what was before him. Afterwards when by the increase of people and causes, the burden grew too great for him; as the Kingdom was divided into Counties, so was the Administration of Justice divided into Courts, into the *Kings-Bench*, and other Courts; and amongst other, Powers were given and Courts granted to every Sheriff within his County, who antiently were the greatest men of the County. And this Officer for his help had two Courts: The one called the *Turn*, being a Court of Record instituted by the Common-Law for every County, wherein the Steward is Judge; and this is to reform publick grievances, and matters of the Crown. And to this Court all Lay-men above twelve years old, under the degree of Baron, were to appear and do service, to be sworn to the King, to serve Offices, and to hear and be instructed in the Laws, be bound to be of good abearing, and be viewed to see how they kept their Bonds. Here Breakers of the Peace were punished, and publick Anoyances redressed: Here also Inne-keepers, Victuallers, Butchers, Fishmongers, and other Tradesmen may be punished for selling by unlawful Weights or Measure, or by excessive prices. And this Court at first was taken out of the *Kings-Bench*.

Turn.

Judge
Power.

The other Court which the Sheriff had, was called the *County-Court*; and this was erected for to give remedy in Civil actions between man and man, in any matter of wrong under Forty shillings. And by these two Courts the whole County was governed at the first. After this, by reason of a greater increase of people, and so of causes, and for ease of the people, derived other Leets or Law-days out of the Sheriffs Turn, and Hundred-Courts out of his County-Court, and granted to the Lords of Manors and Liberties much of that Power the Sheriff had, as we find it at this day. And so one man hath, and may have a Leet in another mans Land or Manor.

Leet or Law-
day, or View of
Frank-pledge.

So that by this we see, that a Leet is, where one hath by Grant from the King all that did belong to the Sheriffs Turn within a certain Precinct, as Hundred, Manor, or the like; wherein the Steward alone is Judge, and wherein he hath the same power within that Precinct, as the Sheriff had in his Turn over all the County. So that now the Sheriff is not to meddle within that Precinct, except in case where the other Stewards of Precincts do neglect their duties there, or when the Leet is forfeit (as it may be) into the Kings hands: And if the Sheriff do so, he is a Trespassor. And if he warn to his Turn any of them that are under another Leet, they may be discharged by a special Writ for that purpose. These Courts had consuance of lesser offences and causes: The greater offences and causes were heard and determined in the *Kings-Bench*, *Common-Pleas*, by the Judges there, and by the Judges in their Circuits in their Courts there. See for this, *Mag. Charta, ch. 35. Bro. Leet. Dyer 30. Finches law, f. 241. Co. 6. 67. 9. in his Epist. Inst. 4 par. ch. 54. Stat. 31 Ed. 3. 14. 1. 1 Ed. 3. 17. 4. 1 Ed. 4. 2. 28 Ed. 3. 9. 42 Ed. 3. 4. 11 H. 7. 15. 13 Ed. 1. 26. Marl. 10. Westm. 2. 32. 31 Ed. 3. 1. 19 H. 7. 24.*

All these three Courts, the *County-Court*, the *Hundred-Court*, and the *Court-Baron*, are much of one nature, and much alike in all their Proceeding. The *County-Court* is for the whole County; the other for the Hundred; and the last for the Tenants of the Manor to which it is incident: For to every Manor there is a *Court-Baron* incident; and to every Sheriffs Office his *County-Court* is incident; and that so inseparably, that the King could not by his Grant have divided them, or the profits thereof from the Sheriffs, albeit the Grant were made before the Sheriff were made.

The *County-Court* then is a Court not of Record, incident to the Sheriffs Office, for the hearing and determining of small matters under Forty shillings, between party and party within the County. And in this Court the Sheriff is only a Register, and no Judge; but the Freeholders of the County are Judges, and called Free-suitors.

The *Hundred-Court* is detived out of this, and is of the same nature and extent of power within the Hundred, as the other is within the County: And in this Court also the Steward is but a Notary, the Freeholders of the Hundred are Judges.

The *Court-Baron* is the Court that every Lord of a Manor hath as incident to his Manor. And this is in some Manors double, i. The one is called the Copiholders Court, which is for Trial of the Titles of their Lands, and for the taking and passing of Estates, Surrenders, Admittances and Grants; and herein the Lord or his Steward is Judge. And the other Court, which is called the Freeholders Court, is only for the Trial of Actions, such as are triable in the County or Hundred Court; wherein the Freeholders of the Manor are Judges. And for this see *Manor and Copihold*.

To shew the Time and Place for keeping these Courts, Power and Jurisdiction thereof, and manner of Proceeding therein, by particulars, would of it self fill a Book. But for this, being for the greatest part of it done by me already, See it in my Book called the *Court-keepers Guide*. And see *Co. 4 par. Inst. ch. 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.*

A Presentment is an Information given in by a Jury in a Court, to any Officer which hath authority to punish any offences done contrary to Law. The word is also taken for a Presentation to a Church, *Terms of the Law*. See my *Just. of Peace*, 2 par. in the *Judgments*. *Co. 9. 113.*

Affecors are such as be appointed in a Court-Leet, &c. to mulct such as have committed any fault which is arbitrarily punishable, and for which no express penalty is prescribed by Statute. See for this at large in my *Court-Keepers Guide*, p. 22, 23. *Co. 8. 40.*

The *Spiritual Courts*, that are now taken away, were for Spiritual matters; for Tythes' Legacies, and against men for Heresies, Defamations, and the like. And in these Courts Ecclesiastical men, as Bishops, their Chancellors were Judges.

There were many of these kinds of Courts: As the *Convocation of the Clergy*, who were to punish Heresies, Schisms, and the like offences. The *High-Commission-Court*, which was the Court held by the Bishops and other Commissioners upon the Statute of 1 *Eliz. ch. 1.* for the ordering and reforming of some special offences appertaining to Spiritual jurisdiction, by the punishment of Fine and Imprisonment. Which is dissolved by *Stat. 16 Car. 17.*

The *Prerogative-Court* of the Archbishop of Canterbury; which was for the proving of Wills, and granting of Administrations, in the case where the party dead within his Province had *bona notabilia* within some other Diocese then that wherein he died; which regularly was to be the value of Five pounds, but in the Diocese of London Ten pounds by Composition. And this Power doth continue still, and is now vested in and exercised by certain Commissioners in London, who do sit in the *Doffers Commons*.

The Court of the *Arches* or *Audience*, which had some peculiar jurisdiction in the Spiritual causes; the which was usually kept in *Bow-Church* before the Dean of the *Arches*, Judge there.

The Court of *Audience*, which was used to be kept by the Archbishop in his Palace, with Confirmations of Bishops, Consecrations, Elections, Admissions, and

Seff. 6.
County-Court,
Hundred-Court,
Court-Baron,
what.
Judges.
Power.

County-Court,
what.

Free suitors,
Hundred-Court,
what.

Court-Baron,
what.

Presentment in
a Court, what.

Affecors, what.

Seff. 7.
Convocation,
what.
High Commis-
sion Court,
what.

Prerog. Court of
the Archb. of
Cant. what.

Court of the
Audience or
Arches, what.

Court of Au-
dience, what.
and

and Institutions into Benefices, Dispensing with Banes of Matrimony, and the like.

Court of *Faculties*, what.

The Court of *Faculties*; which did belong to the Archbishop or his Substitute, and was to give Dispensations to marry, to eat Flesh on days prohibited, to have two or more Benefices, and the like.

Of *Peculiars*.

The Court of *Peculiars*; which was a peculiar Jurisdiction which the Archbishop of *Canterbury* had in divers Parishes within the City of *London*, and other Dioceses, &c.

Consistory-Courts of Archbishops and Bishops.

The *Consistory-Court* of every Archbishop and Bishop in his Diocese, was that which was usually held before the Chancellor in the Cathedral-Church, or before his Commissary in the remote places of the Diocese.

Of the *Arch-Deacon*, or his *Commissary*.

The Court of the *Archdeacon* or his Commissary, which was a Court of the Archdeacons, held where and when he pleased; wherein he had, and did exercise Jurisdiction in some Spiritual causes within his Archdeaconry.

Of *Delegates* and *Appeals*.

The Court of *Delegates* and *Appeals*; which was a Court wherein persons delegate by the Kings Commission, did sit to hear Appeals in the *Chancery* in certain causes.

Of *Commissioners* of *Review*.

The Court of *Commissioners of Review*; which was a power granted by the King to certain Commissioners to review a Sentence and Cause heard and determined by others.

But for these Courts and Powers, they being abolished and gone, we shall say no more of them; but refer him that desires to read of them, to *Co. 4 par. Inst. ch. 74. 5. 51. 11. 54. D. & St. 164. Dyer 240. Stat. 24 H. 8. ch. 12. 1 R. 2. 13. 14. 2 & 3 Ed. 6. 13. E.N.B. 52. Brownl. Rep. 1 par 34.*

Citation, Libel, what.

Their course of Proceeding in these Courts, was by *Citation*, which was the Process by which the party was called into their Courts to answer: And then by *Libel*, which was the original Declaration in the Suit, and delivering a Copy thereof; the which if the Defendant could not have gotten of the Ecclesiastical Judge, he might by a Writ called *Copia libelli deliberanda*, have forced him to it. They could not have imposed any Pecuniary mulcts, nor given Damages in any cause; nor could they have enforced subjection to their Sentences, but by Ecclesiastical censures, as by Penance, Interdiction, and Excommunication. By Penance, (*i.*) by ordering the Offender to do some open penance in some publick place. Interdiction, (*i.*) the forbidding the Administration of Divine things. Excommunication, (*i.*) the casting of a man out of the Church. But see these things in the places before cited: And see more in *Officers, Judges, Judgment*, and other Titles.

Copia libelli deliberanda.

Penance.
Interdiction.
Excommunication.

CHAP. LIX.

Of the Offences and matters heretofore called of
the Crown.

touching the matters heretofore called the matters of the Crown, and reduced in the Law to that Title and Head, they are the things that do concern Treason, Felony, and divers other offences, some by Common-Law, and some by Statute-Law: Of which some are greater, and some less. The first and greatest offence is High-Treason. And this heretofore might have been done many ways:

Corons.

But now by certain new Laws it is ordained and declared, That these following Acts and Words, and none other shall be adjudged Treason, (that is to say;)

Sec. 1.
High-Treason,
what it is, and
how it may be
committed.

1. To compass or imagine the death of the Lord Protector for the time being.
2. Maliciously or advisedly either by Writing, Printing, open Declaring, Teaching, Preaching, or otherwise publishing any of these things, That the Lord Protector and People in Parliament assembled are not the Supreme Authority of this Commonwealth: Or that the exercise of the chief Magistracie, and administration of the Government over the Countreies and Dominions of England, Scotland and Ireland, and the People thereof, is not in the Lord Protector assisted with his Council; or that the said Authority or Government is tyrannical, usurped or unlawful: Or to declare, That there is any Parliament in being, or that hath continuance, or any Law in force for continuing the same.
3. To plot, contrive, or endeavor to stir up or raise Force against the Protector or the present Government, or for the subversion or alteration of the same, and shall declare such endeavor by any open Deed.
4. If any one (not an Officer or Member of the Army) shall plot, contrive or endeavor to stir up any Mutiny in any part of the Army, or to withdraw any Soldier or Officer from their obedience to their Superiors in the Army, or from the present Government.
5. If any shall procure, invite, aid or assist any Forainers or Strangers to invade England, Scotland, or Ireland, or any the Dominions thereto belonging, or shall adhere to any Forces raised by the Enemies of this Commonwealth.
6. If any shall plot, contrive or endeavor the betraying, surrendering, or yielding up any City, Town, Fort, Magazine, Ship, Vessel, or Forces by Sea or Land belonging to this Commonwealth.
7. If any shall counterfeit the Great Seal of England, or of Scotland or Ireland for the time being, used and appointed by authority of Parliament, or the Lord Protector with the consent of the Council; or the Sign Manual, Privy Signet, or Privy Seal of the Lord Protector for the time being.
8. If any person shall proclaim, declare, publish, or any way promote any of the Issue of the late King, or any claiming by or under him or them, to be King or chief Magistrate of England, Scotland, or Ireland, or either of them, or of any of the Dominions to either of them belonging. Or shall keep or hold any Intelligence whatsoever by Letters Messages, or otherwise, to or with Charles Stuart, or James Stuart, their Mother the late Queen, or any of them.
9. If any counterfeit the Money of this Commonwealth, or bring any false Money, either counterfeit, or rather like to the Money of this Commonwealth, into this Land, (knowing it to be false) to the intent to merchandise, or otherwise: Or shall falsly forge or counterfeit any such kind of Coin either of Gold or Silver, which is not the proper Coin of this Commonwealth, and yet is or shall be current within the same: Or shall bring from beyond Sea into any of the Dominions of this Commonwealth any such false or counterfeit Coin, being current within this Commonwealth.

Common.

Commonwealth, (knowing it to be so) to the intent here to utter it by Merchandise or otherwise: Or shall impair, diminish, falsifie, clip, wash, round, file, scale, or lighten for gain any of the Monies of this Commonwealth, or any of the Dominions of it, or the Coin or Monies of any other Dominions allowed or suffered to be current here.

10. If any maintain the Popes authority here, or procure any Instrument of Absolution to the People here from their obedience, or of Reconciliation; or shall use any such Instrument to such purpose; or shall endeavor to absolve or reconcile the People by any such means from their obedience here to any other Prince, to be had or used here: Or if any shall be willingly so by any means withdrawn and reconciled, or promise obedience to any Foreign Power: Or if any Priest, Jesuite, or other Religious person both here, and having taken Orders under the Pope, shall come into, be, and remain in any of the Dominions belonging to this Commonwealth.

11. That if the Lord Chancellor or Commissioners of the Great Seal do not send abroad the Writs of Summons for Parliaments, according to the Act of Government: Or if the Sheriffs and others shall not give notice thereof, and do their duty for the Election of Knights and Burgeses. All these Offences are Treason. Ord. 19 Jan. 1643. The Act of Government, Decemb. 16. 1653.

The punishment of it.

The punishment for this offence is; That the person duly convicted and attainted thereof, is to forfeit to the Supreme Magistrate all his Lands he hath in Fee-simple, Fee-tail, for life or years; all his Goods and Chattels, and his Life. If he be a man, he is to be drawn on a Hurdle to the place of Execution; and there to hang till he be half dead; then to be cut down, his Entrails and Privy-members to be cut and taken out of and from his Body, and burnt in his sight; and his Head to be cut off, and his Body to be divided in four parts, and placed where the Lord Protector pleaseth. But if it be a woman that is the Traitor, she is to be drawn to the place of Execution, and burnt only. But for all these things, and the Trial of, and Proceeding against Traitors; you may read *Stamford of the Pleas of the Crown*. 6 Ed. 6. 13. Dyer 99. Bro. Corone throughout. Dyer 265. 300. Co. 3. 11. 1. 99. 7. 13. 8. 24. 5. 12.

The kinds and degrees of Felonies.

The next degree of offences, are Felonies. And these are some of them simple, and some of them relative. And some of them concern the Commonwealth, and some against it; and some more immediately against private persons. Some of these also do touch the body, some the goods, and some the body and goods together, and some the goods only. That which doth concern the body only, is either by taking away the life thereof, which is called Homicide; or by abusing it without death, as by cutting out the Tongue, Buggery, or the like.

Homicide is either of ones self, or of another. That of another is either voluntary, or involuntary. That which is voluntary, is either punishable by the Law, when it is commanded for Justice sake; or allowed or excused for other causes, which be no Felonies. Or it is punishable: And that is sometimes upon malice, which is Murder; or sudden adventure, as by a sudden falling out, and in hot blood; or without any premeditate malice, or in a mans own defence, or by a meer chance as Chancemedly. The offence of killing man is therefore greater or less, according to circumstances in these and other particulars: For if a woman kill her Husband; Child, a Parent; or Servant, a Master; these are Petit-Treason. And of all these offences a man may be guilty simply, or by relation, when a man doth participate of the offence of another man by advice, counsel, or the like. Hence we have the distinction of a Principal offender, and an Accessary thereunto.

Señ. 2. Petit-Treason, what it is.

The next offence in order, is Petit-Treason. Petit-Treason is, where any Woman killeth her Husband; Man or Maid-servant, his or her Master or Mistress; Son or Daughter, his or her Father and Mother; this is Petit-Treason. So if a Servant resolve to kill his or her Master or Mistress, and after, before it be done, he or she be out of his or her service; yet this is Petit-Treason. So if a Woman procure her Servant to kill her Husband, it is Petit-Treason against the Woman and her Servant: Otherwise it is in a stranger, if he do so.

So

So if the Servant hold the Candle, whiles another doth kill her Master, she being in the Confederacy: And if one do suffer a prisoner for High Treason to escape, it seems it is Petit-Treason in him; these offences are Petit-Treason. For the which, a man shall lose all his Fee-simple Lands, all his other Lands, Goods, and Chattels: And if it be a Man, he must be drawn and hanged; if a Woman, she must be burned. Also some rank Sodomitry and Heresie, under this offence, and Sorcery. See *Finches Law*, f. 119. Co. 3 part of his *Institutes*, chap. 2.

The punish-
ment of it

The next sort of offences are Man-killings, or Homicides, of which there are divers kinds and degrees: These also, of which there are many kinds.

Man-killing or Homicide taken strictly, is where one man killeth another; but taken largely, it is where a man is killed by any thing else. *Stamf. lib. 1. chap. 12. Co. 3 part. Inst. chap. 7, 8.*

See 3.
Homicide, what
it is.

To make the killing of a man Felony, two things are requisite. 1. That the party killed be in *verum natura*, 2. That he die within a year and a day after the wound.

Man-killing or Homicide, is either by one or more; and it is either Spiritual or Corporal: Corporal Man-killing or Homicide, is said to be either *lingua* by tongue, or *facto* by deed. Corporal Man-killing or Homicide by the tongue, is. First, *Dissuasio*, by dissuasion, by dissuading a man from helping to save anothers life. Secondly, *Præcepto*, by precept or command; by commanding one to kill another. Thirdly, *Defensio vel assistens*, by defending or saving the murderer; by helping to pack away the murderer, or by keeping him from his tryal. Fourthly, *Consilio*, by counsel, by counselling one to kill another.

The kinds of
it.

Corporal Man-killing or Homicide by fact, may be either, First, *Iustitia*, by Justice, which is also twofold; by Compulsive Justice, As when an Officer is commanded to execute an offender; or by Permissive Justice, as when a Felon resisteth the Officer, and will not be apprehended, and he kill the Felon. Secondly, *Necessitate*, by necessity, which is also two ways; either by way of offence, As when in case of War or Execution of Justice, or by way of Defence: as when one killeth another in defence of himself. Thirdly, *Casa*, by chance, which may be done by men, or by other animate Creatures, or by inanimate things. By men two ways, either *licito*, lawfully, as when one doth a lawful act, and unawares killeth a man thereby; or *illicito*, unlawfully, as when by doing an unlawful act, one killeth another man unawares: as when one doth strike at one, and kill another man. Fourthly, *Voluntate*, by will, or voluntarily, which may be also two ways; either *consulto*, with deliberation, as when one man doth kill another of malice prepensed; or *inconsulto*, without deliberation, as when one killeth another upon a sudden affray.

For all which sorts and kinds of Man-killings, some are lawful, and some not; and of those which are unlawful, some are greater, and punished with greater punishment; and some are less, and punished with less punishment: For all which, see the several examples and cases beneath.

For Answer of this Question, take these following cases.

1. If a man set upon me to rob me upon the High-way, I may kill him and justify it.

See 4.
What Man-
killing is law-
ful, or not.

2. So if he come to rob, burn, or burglarly to break my house, I or any of my Servants may kill him and justify it.

3. So in a lawful War, a Soldier may kill as many of the enemies as he can, and justify it.

4. So a Judge by Rules of Law, may adjudge a man to death, and the Officer appointed, according to that judgment may execute him, and justify it.

5. So if a Traitor or Felon in pursuit, flee, or resist, so that he cannot be apprehended, and the party appointed to take him, kill him, he may justify it.

6. So if prisoners riotously resist the Gaoler, so that he cannot otherwise suppress them, and he kill any of them, he may justify it.

7. So where men riotously resist the Justices, and they cannot otherwise suppress them, or keep the Peace.

8. So if a man out-lawed for Felony, be brought before the Judge, he may command him to be executed.

9. So if a Forester, Parker, or Warrener, do kill any that were doing hurt in their Forest, Park, or Warren, if they will not yield after they be required, or he cannot apprehend them; in this case he may justifie it, 21 *Ed. 1.*

10. So if one do kill another upon tryal by Combat, it is justifiable.

11. And in all these cases a man need not sue any pardon of course for his life; as in cases of Man-killing, by defending himself, or by chance.

12. But one cannot justifie the killing of a man attainted in a Premunire, § *Eliz. 1.*

13. And if a man be adjudged to be hanged, and the Sheriff behead him, or execute him in any other manner; this is not justifiable by the Sheriff: So if any other that hath no Authority, will of his own head, execute such a person: this is Felony in both these cases, though it were the Judge himself that condemned him.

14. So if any man shall kill a man that is out-lawed or condemned for Felony, it is Felony in him.

15. So to kill any person attainted upon a Premunire.

16. So if one hath robbed anothers House, and after he hath done, and is gone, the true man kill the Thief, this seems to be Felony.

17. So if one man kill another in an unlawful War, which is not undertaken by Authority of the Lord Protector, 35 *H. 6. 58. Co. 5. 1. 22 Aff. 55. 21 H. 7. 39. 1 Jac. 8. 1 Mar. 12. 21 Ed. 1. Dyer 327. 37 H. 6. 21. 35 H. 6. 58. § Eliz. 1.*

Murder, what
it is.
The punish-
ment of it.

Murder is where one man doth kill another of malice, premeditated for gain or revenge; this is properly called Wilful murder, for which offence the murderer shall forfeit and lose all his Lands, Goods, and Chattels, and he himself must be hanged, *Plow. 261. 52 H. 3. 16. Kely. 1361 Powls. de pace 120. Co. 3 part. Inst. 7. 8.* For the Answer to this, take these cases.

See §. 4.
What Acts
shall be said
Murder, or not,
but some other
offence.

1. If I bid another kill me, and he doth it, it is murder in him, *Dyer 186.*

2. If a Woman bid the Midwife kill the child, as soon as it is born, and she doth so; it is murder in them both, *Dyer 186.*

3. If one kill an Alien, if he be under the Kings Protection, it is murder.

4. If one have malice premeditated, and strike the first blow, yet it is murder in him, if he kill me, *Powls. de pace 120.*

5. If one do wilfully poyson another, or lay poyson for one, and another hap to take it, and be poysoned; in both these cases it is murder, 1 *Ed. 6. 12. Plow. 474. Co. 11. 33.*

6. If one stab or thrust another, that had then no weapon drawn, nor then first stricken the party that did stab, and herewith the party die within six months; this is of the nature of wilful murder, 1 *Jac. 6.*

7. If one kill a Constable, Bailiff, or any other Officer as Watchman, or the like, or their assistants, or any other in their due execution of Justice: As in arresting them upon Proces out of any Court, or by Warrant from any Justice of Peace, or in the keeping of the Kings peace, or the like; this act is murder, and so punishable, *Powls. de pace. 121. Co. 9. 66. 68. 98. 4. 41.*

8. If a Thief kill a true man, being about to rob him, because he would not yield him his purse, or because he resisted him, it is murder, *Co. 9. 67.*

9. If one kill another without any cause, the Law will presume there was malice, and therefore it is murder, *Ibid.*

10. If one do wilfully hold a man whiles another doth murder him, or stand by him and encourage and abet another, or commandeth another, or came with others of purpose to kill him, and stand by whiles another doth kill him; this is murder in all, *Qui non sunt immunes a culpa non debant esse immunes a pena. Co. 9. 67. Plow. 98. Co. 11. 5.*

11. If one bear malice against A, and be about to assault him, and B. withstand him, and he kill B. this is murder, though he did bear him no malice, *Plow. 101.*

12. If one that bears no malice, accept of a challenge from the other, and fight it *sedo animo*, and he kill the challenger, this is murder. *Morgan & Egerton, 9 Jac.*

13. If two fall out at *Westminster* by accident, and fight and be parted; and after they meet and appoint to fight the next day; and then either of them is killed, this is murder, and that notwithstanding he that doth kill, shall say before the fight, that he bears him no malice. See *Man-slaughter.*

14. If the Master have malice, and tell his servants of it, and that his intention is to kill him he doth malice, and they go with him, and they do kill him; this is murder in all, both Master and Servants; *Plow. 100.*

15. If one lie in wait to kill one man, and mistake him, and kill another; or shoot at one and miss him, and kill another, this is murder, *Plow. 101. 474.*

16. If one carry any man that is sick unto the cold, with intent to kill him, and he do die, this is murder, *2 Ed. 3. 18.*

17. If *J. S.* of malice premeditated, discharge a Pistol at *J. D.* and miss him, and throw down his Pistol; and *J. D.* pursueth him to kill him, and he draw his Dagger and killeth *J. D.* this is murder: But if *J. S.* had fallen down, his Dagger drawn, and *J. D.* fall by haft upon his Dagger, *J. D.* is *felo de se*, and *J. S.* shall go quit, *44 Ed. 3. See Malb ch. 24.*

18. The private making away or hiding of the Bastard child by the Mother, unless she can prove by one witness that it was born dead, is murder in her, *23 Jac. 27.*

19. The killing of one in a Duel upon a challenge, is murder by the now Ordinance; *June 24. 1634.*

20. If one beat a Woman great with child, and the child is born alive, but one may see it to be bruised and dieth (as is conceived) by the bruises, this is murder, *Goldsb. 176.*

If one perswade another to kill himself, and be present, when he doth, is said to be murder, *sed quare.*

It is where one doth kill another man, with felonious intent, upon sudden quarrel without any premeditated malice: As if two meet together, and suddenly by accident fall out, and either at that time, or anon after, before the heat be past the one of them doth kill the other; this is Man-slaughter.

For which offence one shall forfeit and lose all that he shall lose for murder; but in this case he shall have the benefit of Clergy for his life, which if he demand before Judgment, and can read, he saveth his life and his Lands; but if he demand not the benefit of Clergy, until after Judgment, and then doth demand the benefit of the Clergy, and can read, yet he shall save his life onely. But in both cases he doth forfeit his Goods and Chattels. See Clergy, *Plow. Com. 162. Straff. 1. r. ch. 9. 43 Aff. 31. 3 H. 7. 1. 21 H. 7. 31. Plow. 99. Dyer 228. Plow. 100.*

If one goeth with malice to kill a man, and another seeing them fighting, taketh his part that went with malice, and kill the man: Now though this be murder in the other, yet it is but Man-slaughter in him that took his part: So if the Master go with malice, and the Servants go and know nothing, and then they joyn with him in the assault, and murder, yet this is but Man-slaughter in the Servants.

If one arrest another unlawfully, and the party arrested, kill him, this is not murder but Man-slaughter onely, unless the case be with stabbing within the Statute of *1 Jac. 6. Dyer 6. 26. Co. 9. 66.*

If one that had no malice, accept a challenge from him that had malice, and fight presently, and kill him that had the malice, this is but Man-slaughter: *Dyer 60. 26. 9. 16. Co. 9. 66. Morgan & Egerton, 9 Jac.*

If two fall out by accident at *Westminster*, and they be then parted, and after they meet at *Algaz*; or they appoint to meet at *Islington* the same day, and then one of them doth kill the other, this is but Man-slaughter. *Sir Thomas Lucas meris case.*

If one be much wounded by another, and he go and tell, or shew unto his Father or Brother, or some near Kinsman; whereupon he goeth presently and fighteth with him that gave the wound and kill him, this is but Man-slaughter. *Railles case, Hil. 9 Jac.*

If there be a sudden affray, and a confused multitude, and amongst them one man is killed, and no man can tell how; this is Man-slaughter in them all.

If two be in an Inner-chamber fallen out, and together by the ears, and a Brother of one of them standing at the door, that cannot get in, cries unto his Brother to make him sure, and presently after he gives the other a mortal wound, this is Man-

Man-slaughter,
what it is.

The punishment
of it.

What Act shall
be accounted
Man-slaughter,
and not Mur-
der.

slaughter in him that stood at the door. All the Judges in *Serjeants Inn*, *Trin.*

If one that is not an allowed Physitian, kill a man by his ignorance, and unskilfulness in giving him Physick, this is Man-slaughter, *Stamf. l. 1. f. 16.*

Sec. 6.
Felo de se.
The punishment of it.

A *felo de se* is he that killeth himself, for which offence he is to lose all his Goods and Chattels; *Stamf. l. 1. c. 11. Plow. 262. Co. 9. 129. Plow. 258.* But his Wife shall not lose her Dower; nor his Blood be corrupted in this case, as in some other Felonies.

In what case a man shall be said a *Felo de se*, or not.

If one man do strike another to the ground, and then draweth his knife to kill him; and the other lying along, draweth his knife to defend himself, and the other is so hasty to kill him, that he falleth upon the knife that was drawn, and so killeth himself; he is in this case *felo de se*, *44 Ed. 3. 44.*

If one shoot at *f. s.* to kill him, and thereby kill himself, it is said, he is *felo de se*, *de seculi ni*.

If a man that is mad sometimes, and hath his *lucida intervalla*, whiles he is well, give himself his wound, and after become mad, yet he is *felo de se*. So if a man do kill himself in his drunkenness, he is *felo de se*. So if a villain had killed himself. *Co. 19. Plow. 260, 261.*

If a child of a mad man, whiles he is mad, before he cometh to himself, give himself a mortal wound, whereof he afterwards dieth, he is not *felo de se*, neither shall he forfeit any thing, *21 H. 7. 31.* though he be of sound memory before he die, *22 Ed. 3. Corone 244. Co. 9. 19. Lib. 9. Plow. 230.*

Chancemedley, or by Misadventure, what. The punishment of it.

It is when one man doth kill another, without any purpose or evil intent, by some mischance. For which offence if a man be found guilty of it, he shall forfeit his Goods not lose life nor Lands, and lie in prison till he have his pardon, which he must have of Grace and Course from the Lord Protector. And it seems there is a difference between a mere chance, and a chance mixt with the wickedness or negligence of the party; for in the last cases the offence will fall out to be more than Man-slaughter *per infortunium*, *Gloc. ch. 9. 24 H. 8. 3. 32 H. 3. 20. Co. 5. 91. 91a. 26 H. 8. 3. 44 Aff. 17. Stamf. l. 1. 7. Martb. 13. 6 Ed. 1. 4.*

What shall be said to be Chancemedley, or not but a greater offence.

If certain men set upon *f. s.* to kill him, and another being present doth labor to part them, and in his labor doth kill *f. s.* this *per infortunium*. See *Exod. 21. 13, 14.*

If one beat his child or servant moderately, and in measure, the child happen, or the servant chance to die thereby; this is but Chancemedley: But if his beating were immoderate, the offence is greater. So if a Master in beating his Scholar kill him, *Kelw. 168. Poultun de pace 120.*

If one kill another at Wrestling, Fence, or shooting in Bowes and Arrows at But, or at length; this shall be said *per infortunium*, *Kelw. 108. Fitz Corone 102. 354.*

If one cast a stone at a Bird or a Beast, and a Man coming by, is hit with the stone and killed by it; or one is felling a Tree, and part, or all of it falleth upon a body and killeth him; this is Chancemedley.

If one cut down any thing, or throw down any thing in or near a High-way, and when it falleth, calleth aloud to Travellers to look to themselves; or where two men do run at Tilt, Joust, or fight at Barriers together, and one kill the other; in all these and the like cases, when the thing is lawful, and this fall out upon it, it shall be said to be *per infortunium*, *12 H. 7. 33.*

When there is a malicious minde, and unlawful act joyned with the chance, as when one intend a man, and kill another; or when one doth cast stones into a High-way, where men do usually pass, and not give warning; or shoot Arrows into a Market, or other place, where men do usually resort, or fight at Barriers, or run at Tilt or Jousts, without the Kings Command; and in these cases a man is killed, this will be an offence of an higher nature, *Stamf. lib. 1. ch. 8. Bro. 335.*

Se defendendo, what. The punishment of it.

This offence is in the same degree with the former; and it is when the Assailant doth make an assay or offer force to the Defendant, and doth strike him, and the Defendant doth slie so far as he can for saving of his life: So that he is come to a strait, beyond the which, he cannot slie, and the Assailant doth continue his assault;

so that he cannot escape, and thereupon the Defendant doth strike the Assailant and kill him; this is Homicide in his own defence. For which a man shall be punished in all things as in Chance-medley, see before. And how a man may have his pardon. See *Fitz Corone* 116. 161. *F. N. B.* 246. *Glor. ch. 9.* *Fitz Corone* 284, 286, 287. *Poulton de pace* 119. *4 H. 7. 2. 16.* *16 Ed. 3. 116.* *43 Aff. 3.* *44 Aff. 17.* *Fitz Corone* 305.

If one come and assault my House in the day time onely to beat me (and not to rob) and I kill him, this shall be said to be *se defendendo*: If one have a weapon in his hand, and run away till he can go no further, and the other run so hastily upon him, that he runneth upon the others weapon which he holdeth out for the defence of himself, and so he is killed; yet this is Man-slaughter *se defendendo*, *Glor. ch. 9.*

But in this case there must be no malice before in him that doth kill, for if so, then though there were an inevitable necessity, yet it is murder. 2. Where there is no malice precedent, there must be a necessity inevitable at the time, else it will be Man-slaughter, *Co. 7. 91.* *Fitz Corone* 387. *44. 9. 13.* *4 H. 7. 2.*

A man sometimes comes to his death by anothers chance, as wel as by a mans hands, or other means; as by the fall of himself, or some other things upon him, or otherwise: And in these cases there is something forfeited to the King, which is called a *Deodand*. Which is defined to be a thing given to God, for the pacification of his wrath, in a case of misadventure, whereby any Christian soul comes to a violent end, by unreasonable, senseless, or dead Creatures, or *Deo & danda*; and the King, or his Patentee must have it, and it must be gotten by seizure, and by his Amper, an Officer for the purpose. The things forfeited are to be sold, and the price given to the poor, and distributed for the appeasing of Gods wrath stirred up against the Earth and place for the shedding of innocent Blood thereupon; which seemeth to be grounded on *Exod. 21. 28.* *Stamf. pl.* *Corone* 1. 2. *Fitz Corone* 269. 340. *Co. 3 part Inst. 9.*

What Act shall be said to be Homicide *se defendendo*, or not but a greater offence,

Deodand, what,

For the Answer of this Question, take these things.

1. If a Horse strike a man that he die, the Horse is a *Deodand*: If a Tree fall upon a man, and kill him, the Tree is a *Deodand*: If a Cart, or the like, go over a man by chance and kill him, the Cart-wheel, Cart, Loading, and Horses, are all forfeit, *Omnia quæ movent ad mortem sunt Deodanda*; and that whether it move primarily or secondarily, as principal or accessory: So therefore if a Board press against a Wall, and that Wall fall or kill a man, the Board is forfeit also, *Kelw. 68.* *D. & St. 175.* *Dyer 78.* *Co. 5. 110.* *Fitz Corone* 298.

What shall be forfeit by such a Man-killing, and shall be accounted a *Deodand*, or not.

2. If a man be Lopping, and the Hilt or Head of his Hatchet flie, and kill a man, the Head is forfeit as a *Deodand*. And if a man fall from a Horse or Cart whiles it is going; the horse in the first case; Cart and Horses, and all are forfeit in the next case, *Fitz Corone* 389. 140. 397.

3. If one fall upon Timber, or the like, it seems that also is forfeit, yet see *Fitz Corone* 314.

4. If a Cart loaded, whiles the Horses stand still, fall upon a man and kill him, yet it seems they are all forfeit: So if one Horse move onely, and overthrow the Cart, and kill a man: So if one fall against the Wheel of a Cart, it seems all is forfeit, if the Cart be going, *Fitz Corone* 326. 407.

5. If a Bell ringing fall from a Beam, the Bell and Beam are both forfeit, *Fitz Corone* 405.

6. If one come under the Wheel of a Mill, and the Mill go, and he is killed, all is forfeit; but if it had stood still, the Wheel onely is forfeit, *Fitz Corone* 389.

7. If a Ship drown a man in fresh-water the Ship is forfeit, but *contra* if it were in the Sea, but nothing in the Ship, in the first case, shall be forfeit: If one fall from a Horse into the Water and be drowned, the Horse shall be forfeit, *Fitz Corone* 401.

8. If one fall from a Rick or Hovel, and die, the Rick or Hovel shall be forfeit, *Fitz Corone* 314.

9. If any Bull, or Bear, or any other Beast, kill a man; it is forfeit, *Fitz Corone* 298.

10. How such a *Deodand* shall be preserved, *Fitz Corone* 289.

For

What Man-
killing is dif-
punishable.

For Answer to this, these things must be known.

1. If one lay Ratsbane for Rats, or more, without any evil intent, and one take thereof; and die; this is not punishable. So if one give his Wife a poysoned Apple, and she not knowing any thing, giveth it to her childe, and she die; this is no offence in the Mother: So if one follow me to kill me, and I fall down and having a weapon, hold him up to defend my self, and he running in haste to strike me, run upon my weapon and kill himself, this is no offence to me; and yet how near these cases come to the cases of Chancemedly, consider well. So *Homicides* in doing Justice, are justifiable: So killing one as would rob or kill a man in the High-way, or his own house, are not punishable, 24 H. 8. 5. *Plow.* 474. *Co.* 913. *Corone* 303.

2. If one kill a childe in the Mothers Womb, there is no punishment for it: So if one give a man his death wound, and he die after the year and a day, there is no punishment for this, *Exod.* 21. 22. 32 *Ass.* 44. 3 *Ass. pla.* *Dyer* 186. *Fitz Corone* 303.

Action of the
case.

3. If one that is an allowed Physician, kill his Patient, through ignorance or mischance in the operation of his Physick, this is dispunishable. And yet if by his unfesance he hurt him, and he die not; *Action of the Case* will lie against him, *Stamf.* 16. *Fitz Corone* 163.

4. If an Infant under twelve years old (unless it appear that he had more then an ordinary wit at that age) or a mad-man, during his madness, kill a man, there is no punishment for this: So if a man that is both deaf and dumb, but *contra* it is of a drunken man; 3 H. 7. 2. *Plow.* 19. *Co.* 4. 41. 125.

5. If one compel another to kill a man, as by holding his hand, or the like; this is not punishable at all in him, whose hand was held, *Plow.* 8.

6. It is no Felony for Forester to kill misdoers, if they will not submit themselves, *Stat. de malefactoribus*, 21 Ed. 1.

7. If one hath a Beast which he doth know, doth usually hurt, and doth not look to him, but let him go abroad, and it kill a body; this is Felony in the owner, *Exod.* 21. 28. *Fitz Corone* 313.

What other
Acts against
the life of a
man shall be
accounted Fe-
lony, or not.

For Answer to this, these things are to be known.

1. If one kill a childe after birth, and before Baptism, it is Felony, *Dyer* 186.

2. If a Gaoler keep his prisoner more cruelly then he ought, so that he die thereby; this is Felony in the Gaoler, *Stamf.* 1. 16.

3. If one that is no Physician allowed, do give Physick, and kill the man through his ignorance; this is Felony, *Stamf.* 2. 16.

4. If one cut out any mans tongue, or put out his eyes, this is Felony, 5 H. 4. 5. if it be done maliciously.

5. If one practise Conjuraton, Inchantments, Charms, Witchcraft, Sorcery, or the like, where by any Man, Woman, or Childe, shall be killed or hurt, it is Felony, 1 Jac. 1. 1.

6. If any one that hath the Plague upon him, and is commanded by the Magistrate to keep in, do notwithstanding go abroad, it is Felony, 1 Jac. 31.

7. If any of the Kings sworn servants had conspired to kill any of the Lords of the Realm, or any of the Kings Council that were sworn as the Steward, Treasurer, or Comptroller, or the like, though they did not effect it, yet it was Felony, 3 H. 7. 14.

8. If one beat another grievously and leave him for dead, and after he recover; this is no Felony, *Non assidue conatus nisi sequatur effectus*, *Fitz Corone* 383.

9. Thus far of Felonies by *Homicide*; now follow Felonies by Theft.

See 8.
Felonies by
Theft.
Theft, what it
is.

Furtum est fraudulenter, illegitime & Felonica tractatio rei aliena personalis & mobilis animo furandi, inviso illo cuius rei illa fuerit. It is the felonious taking away of another mans movable Goods from against his will, and with a purpose to steal them. So that to make up this offence, three things are requisite; First, *Animus furandi*, it must be without pretence of Title, and this must be at the time, that the party doth come to the possession of the Goods: Secondly, The thing stolen must be *res aliena*: Thirdly, it must be a personal thing, *vide infra*, *Stamf.* 1. 20. 4 H. 7. 5.

This

This Theft is either a *persona hominis in presentia ejus*, or in *absentia ejus*; and it is from his person *ad terrorem*, as Robbery or violent Theft; or else it is *absque terrore*, as picking the Purse. And that in his absence, is either *magna*, when the thing stoln is above the value of twelve pence, or *parva* when the thing stoln is under the value of twelve pence, which is called *Pecis-Larceny*, *Stamf. l. 1. c. 3. 4 H. 7. 5. Co. 3 part Inst. cap. 47.*

For Answer to this Question, take these things,

1. There are degrees in this.
2. The first and greatest offence of this nature, is *Burglary*.
3. Burglary is where one doth break and enter into the House of another, wherein some Body is, or into the Out-house or Stable, adjoining to the House, wherein people be; in the night time, with an intent to rob or kill, or do some other Felony; in which case though he carry away nothing, nor kill any Body, yet it is Felony, *22 Ass. 39. Dyer 99: 58.* But all this must be understood in a time of peace. *Broo. Corone 176. Co. 11. 32. 13 H. 7. 12. Stamf. 30. Dyer 99: 58.* But if one break a House with intent to rob, and do not enter the House, or break the House in the day time, between Sun-rising and Sun-set, and then rob; neither of these acts are Burglary, but it will be a lesser offence, *Kelw. 75. Poulton de pace 120.*
4. If one with his family be upon occasion out of doors in the night, and the whiles one break, and rob his house, this is Burglary, *Co. 4. 4c.*
5. If a Thief finde the door open, and come in by night, and rob a House, and being frightened, break a door to escape, this is Burglary.
6. If one have two Houses, and dwell sometimes in one, and sometimes in the other, and hath servants in both; and whiles his servants be abroad, his House be broke, and he is robbed; this is Burglary. But both these cases must be understood of Mansion-houses.
7. If one of a mans own servants, let them in at the doors, or at the windows, yet it is Burglary in the Thieves, but Felony onely in the Servant. But to break a Close, with an intent to rob, and to rob, or to break a House, with an intent to beat a man, and to do it; is not this offence, but a lesser offence, *Dyer 99: Co. 11: 32: 36 Stamf. 30.*
8. The next is Robbery, which is, where one doth take from anothers person, feloniously and violently any money, or other thing, though it be but to the value of one penny, yet if it be in this manner, it is Robbery and Felony, *Fitz Corone 115.* And whether he take it, or the party deliver it upon an assault for fear, it is all one, *Dyer 124: 9 Ed. 4. 16.* And under this degree is the Cut-purse offence.
9. If one threaten to kill a man, if he do not deliver his Purse, and thereupon he give it to him, this is Robbery. *Poulton de pace 128.*
10. If one take a mans Goods, that lie before him, whether the owner will or no, or take a mans Horse or Beast before his face, the owner refusing him; this is Robbery, as well as if he took it from his person. *Poulton de pace 128.*
11. If two or more do threaten a man to kill him, unless he will bring them money, and he do and they take it away, or threaten to kill him if he do not swear to bring them money such a day, and he do accordingly; this is Robbery, *Finch. 4: 44 Ed. 3. 14. 4 H. 4. 3.* See for *Robberies*, see *Westm. 1. 27 Eliz. 13.*
12. If Thieves beset a mans house, and the owner is afraid they will enter; and thereupon cast them out money, and they go away with it, this is Robbery, *44 Ed. 3. 14.*
13. If one bargain with a Carrier to carry certain Sales of Wares to a place, and he carry them to another place, and there take out the Wares, and steal them; this is Felony. So if one undertake to carry a Tun of Wine, and the Carrier open the Tun, and take out some of the Wine feloniously. So if one deliver one any Goods to carry to a place, and he carrieth them thither, and there stealeth them, this is Felony. So if one that hath the keeping of my money, or my Butler, or Horseman, carry or convey away my Money, Plate, or Horse, this is Felony. So if my Shepherd steal away my Sheep; for in these cases still it is in the Masters though they keep it, *13 Ed. 4. 9. 13 Ed. 4. 10. 33 H. 4. 14. 13 H. 7. 12. 13 Ed. 4. 9. 27 Ass. 39.* But if a man deliver Goods to his servant, or a Carrier, in other cases, and he carry and keep them away from the owner, this will not be Felony, *13 Ed. 4. 9.*

What Ad.
shall be ac-
counted Felony
by Theft, or
not.
Burglary, what.

Self. 9.
Robbery, what.

Cutting a
Purse.

Felony by
Theft.

13. If I deliver my servant the Key of my Chamber, and he rob me; this is Felony.
13 *Ed. 4. 9.*

14. If a guest in a Tavern take away a Bowl, or any thing before him feloniously, it is felony: So if a guest take away any thing in his Chamber.

15. If I deliver mine own Goods to another to keep, and after I steal them away, it is felony in me. 7 *H. 6. 45.* 5 *H. 7. 18.* So if I confederate with another to steal my Goods from my Bailly. *Goldsb. 136.*

16. If one steal any of the Goods of any Church, or Chappel, or Corporation, it is felony. 7 *Ed. 4. 14.* 9 *Ed. 4. 33.* Though it be in time of Vacation of a Governor.

17. If one steal Goods stolen before, it is felony. 13 *Ed. 4. 3.* 4 *H. 7. 5.* If one take out of their Nest, in a Dove house, yong Pigeon, before they can fly: So such yong Goshawks, or Hierons in a Park or Ground, before they can fly: Fish out of a Pond or Trunk, where they may be taken out by hands without Nets; or Swans, Peacocks, Turkeys, Geese, Capons, Ducks; a Stag, Hinde, Buck, or Doe marked and tame: To kill Sheep, and take away their Skins, or to pluck them, and take away their Wool; or to take away wilde Fowl where they be dead, is Felony. But to steal wilde Savage Beasts or Fowls, as wilde Deer or Coneyes in a Warren, Pigeons, Hawks, or Doves flying abroad in a River, or the like; these acts are not Felony, 2 *Ed. 3. 20.* 31 *H. 7. 6.* 1 *Ed. 3. 17.* 18 *Ed. 4. 8.* 18 *H. 3. 3.* If Servants imbezle their Masters Goods at the time of his death, and afterwards being duly summoned by the Executors, will not appear, this is Felony, 31 *H. 6. 1.* If two, three or more of them steal Goods to the value of twelve pence; this is Felony in all of them, *Fitz. Crime 404.*

If any Servant above eighteen years old, that is not an Apprentice, do feloniously depart with imbezle or convert to his own use, any Goods or Chattels of his Master or Mistress, delivered to him by his Master or Mistress, or any his fellow-servants, to the value of forty shillings or above, it is Felony, 21 *H. 8. 7.* 5 *Eliz. 10.* *Dyer 5.* But if I deliver my Servant a Bond for forty shillings, and he receive it, and then go away; this is no Felony. So if I deliver him Wares to sell at a Fair, and he sell them, and then go away with the money, this is no Felony. *Dyer 5.*

If I deliver a man Goods to keep, and after take him into my service, and then he goeth away with my Goods; this is not Felony by this Statute, because he was no servant at the time, 28 *H. 8. 2.* So if I deliver Goods to the servant of *A. S.* to keep, and after die, and make *A. S.* my Executor; and before any new Commandment of *J. S.* to his servant to keep the same Goods, his servant goeth away with them; this also is out of the Statute. *Sir Francis Bacon, f. 34.*

If one steal any thing (besides the things excepted beneath) from another man, which the Jury upon the trial of the Thief, shall finde to be above the value of twelve pence, it is Felony, though it be stolen at several times, *Fitz. Crown 459.* But if the Jury finde it under twelve pence. See more of *Burglary and Robbery, Co. 3 part 2. cap. 14. 17.* Or not above twelve pence in value, then it is but *Petit-Larcenie*, and not Felony; for which the offender is to forfeit his Goods, and be punished otherwise, by whipping, binding to the Good-behaviour, Imprisonment, or the like, at the discretion of the Judge: But he is not to be punished with the loss of his life, 27 *H. 8. 12.* *Bro. 513.* *Co. 3 part 1. cap. 47.* For *Felonies by Theft*, see 39 *Eliz. 19.* 27 *Eliz. 13.* 7 *Rich. 2. 4.* 28 *Ed. 3. 11.* 5 *Ed. 3. 14.* *Whitland's super. Chanc. 17.* *Stat. Westminster.*

To steal Apples, or Hops on the Trees, Corn standing upon the Ground, or Wood growing, or the Lead or Tyle of a Church or House, is not Felony: But if these things be taken away out and covered from the House or Land; in these cases the taking of them away will be Felony, *Co. 4. 14.* 7. 18. 18 *H. 3. 1.* And if a Thief cut down a tree this day, and come to-morrow and fetch him away, this perhaps may be Felony.

To take away Writings, or a Ward, or Goods that are Treasure, Trove, Wreck, a Walf, or Barrey, is no Felony, 10 *Ed. 4. 13.* 12 *Aff. 32.*

If a Wife steal Goods by the Commandment or Compulsion of her Husband, this is not Felony in her. And if she and her Husband do steal Goods together; this is no Felony in her, as Principal or Accessary: But if she steal Goods without his privacy,

Sett. 10.
Petit-Larcenie,
what.

The punish-
ment of it.

What taking
of Goods is
not accounted
Felony.

Husband and
Wife.

vity, or receive stolln Goods against his minde, and without his knowledge; this is Felony in her, but none in him, 27 *Ass. pl. 40. Fisz Corone* 160. 383. And if the Wife take away her Husbands Goods, and give them to another; this is no Felony in the Wife that gives, nor in the other that takes them, *Fisz Corone* 455.

If an Infant under ten years of age, do steal my Goods, it is said this is not Felony. *Infant.* But it seems the course is to consider of the ripeness of wit in the Felon, and according to that, to judge him, let him be of what years he will, *Co. 4. 124. 35 H. 6. 11.* The same Law is of Man-killing by an Infant; and yet if an Infant beat or wound me, he may be indicted and fined for this, or I may sue him in Trespass, and recover damages, 35 *H. 6.* *Trespass.*

If an Idiot or Lunatick do steal any Goods, this is no Felony, *Co. 4. 124. 35 H. 6.* *Lunatick.* So likewise it is of an Idiot, as to the point of murder. And yet if he beat or wound another, he may sue him in Trespass, and have damage for this, 35 *H. 6.* *Trespass.*

If one steal Apes, Hounds, Grey-hounds, Popping-jays, Squirrels, or the like things of no value, this is no Felony, 18 *H. 8. 2. 22 Ass. 95.*

If one put his hand into anothers Pocket to take out his Purse, and the Purse doth hang still to a Key fastned to the Purse in his Pocket, this is not Felony. And yet if one steal away Goods out of one part of a House, and carry them away, and hide them in another part of the House, this is Felony: By two Justices, *M. 8 Jac.*

If my Goods be stolln away from me, and I take them again by force, where I finde them, or by the delivery of the Felon; this is no Felony, nor punishable at all. For any man may chuse whether he will prosecute a Felon for stealing his Goods, or not, till he be bound by Recognisance: But if I take money for my Goods, especially if I take more by a great deal, then the Goods be worth, or take money of the Felon, with agreement to conceal him, or the like; this is dangerous, and I may be fined for it; and yet it is clear, this is not Felony, by Justice *Bridgman, Hil. 7 Car.* But if I break the prison, wherein a Felon is, and let him out, or rescue him being apprehended, and he get away; or I have him in custody, and suffer him purposely and willingly to escape; these things are Felony, and make me liable to the same offence and punishment, as he is liable to.

If Goods be taken out of a Church or Chappel feloniously, this is a Felony, and a high degree of Felony, called Sacrilege.

Sec. 11.
Sacrilege, what.

By all which, we see that to the making up of this offence of Felony by Theft; there must go these things,

1. The taking must be of Goods or Chattels, personal and movable. For the stealing of Chattels real, as Charters of Land, an Infant in Ward, or the like, is not Felony: Nor is the taking of any thing therefore (upon this account) which is parcel of the Freehold, and unsevered, as Fruit of a Tree, Lead on a House, or the like, Felony.

2. The party from whom they are taken, must have a property and a possession in the things: And therefore is it, that the stealing of Goods, waived, wrecked, or strayed, is no Felony. And hence it is, that the stealing of things of a wilde nature, as Doves abroad, Fish in the River, or the like, is no Felony.

3. The things taken, must be things of profit. And therefore it is not Felony to take away hunting, or any Dogs, Apes, Parrots, singing Birds, and the like.

4. The case must be so, that the Goods must not come to the party that hath them by the delivery of the owner: And therefore if a servant or Carrier, take away the Goods delivered, it is not Felony; and yet if a man have the use of them onely, as Plate in a Tavern; or one deliver Goods to carry to a Carrier, to be carried to one place, and he carry them to another, or after he hath carried them to the same place, then he carry them away; this may be Felony.

5. The things stolln must be taken away and removed out of the place; and yet if one stealing my Horse be taken in the manner, with the Bridle about his head, &c. so that he cannot go away with him; it seems this is Felony.

Piracy is the robbing by Sea: And this is as penal to the offender, as the robbing by Land. See for this largely, *Co. 2 part Inst. cap. 49.*

Where it shall be tried, 28 *H. 8. 15.*

Ccc

For

What other Acts, and not acts of Man-killing, or Theft, shall be said to be Felony, or in the degree of Felony, or not.

For Answer to this Question, we are to know that a man may commit Felony, and be in danger to lose his life in divers other cases, and for divers other things; as in these cases following.

1. If any man wilfully put out the Eyes, or cut out the Tongue of another man, this is Felony, 1 H. 4. 5.
2. If one above fourteen years old, counterfeit himself an Egyptian, and so continue a moneth together in England; he is a Felon, 5 Eliz. 26.
3. If one multiply Gold or Silver, it is Felony, 5 H. 4. 4.
4. If one take up a Hawk, and do not proclaim him, and deliver him, when he is demanded, but deny him, 34 Ed. 3. 22.
5. If Masons do make Congregations or Assemblies to subvert the Laws, it is Felony, 3 H. 6. 1.
6. A Soldier or Marriner may by mis-behaving himself in a wandering life, become a Felon, 39 Eliz. 17. A man may be a Felon by forging of Evidences the second time, 5 Eliz. 14.
7. To take away any Record whereby a Judgment is Reversed, is Felony, 8 H. 6. 12.
8. It is Felony for a Rogue, banished by the Justices to return again, 39 Eliz. 4.
9. Purveyors of the King in their Purveyance for him, may commit Felony in divers cases, 28 Ed. 1. 2. 20 R. 2. 5. 25 Ed. 3. 15. 5 Ed. 3. 2. and others.
10. Felony may be done by robbing Parks, 3 Ed. 1. 20. 1 H. 7. 7.
11. To imbezzle or sell the Kings Ordnance, or Armor, was Felony, 31 Eliz. 4.
12. It is Felony to cut down any part of Powdike in Marshland, 22 H. 8. 11. 2, 3 Ph. & Ma. 19.
13. It is Felony to take a man out of Cumberland, Westmerland, Northumberland, Durham, &c. prisoner, and carry him elsewhere, 43 Eliz. 13.
14. Soldiers and Marriners may divers ways commit Felony, 39 Eliz. 13. 18 H. 6. 19. 2 Ed. 6. 2. 5 Eliz. 5.
15. One may be a Felon by relieving or receiving a Jesuit, 27 Eliz. 2.
16. If any Man or Woman commit Incest, or a Woman knowing her Husband to be living, or not having been three years absent, or by common report reputed to be dead, be known by a man; this is Felony in them both. So if one lie with a Married-woman, knowing her to be so, it is Felony in them both. If any one be a Bawd and keep a Bawdy-house after one Conviction, the second offence is Felony, All. 10 May, 1645. 9 Aug. 1648.
17. If any man, nor an Attorney, shall acknowledg any Judgment against any man, not being privy or consenting to it: Or if any levy a Fine, suffer a Recovery, or acknowledg any Statute-Recognizance, or Bail, in the name of any other person, not being privy or consenting thereto; either of these Acts are Felony, 21 Jac. 7. 26.
18. If any man imbezzle, or rase any part of a Record in any of the great Courts, whereby a Judgment is reversed; or so corrected as that the Error is redressed, this is Felony, 8 H. 6. 12. 2 R. 3. 10. Bro. Corone 173. But if the Judg do so, it is Misprision onely, Co. 11. 34. 8. 160.
19. If a Jailor use his prisoner so hardly, and thereby cause or compel his prisoner to be an Approver against his will; this is Felony, 14 Ed. 3. 9.
20. If one marry a second Wife, his first Wife being living, and having been heard of within seven years, it is Felony, 1 Jac. 11.
21. If one willingly burn any dwelling-house or Barn full of Corn, or any out-house adjoyning to such dwelling-house or Barn, it is Felony, 4 Ed. 5. Co. 4. 20. 11 H. 7. 1. Stamf. 14. 9 Ed. 4. 26. 13 Ed. 1. 33. 6 R. 2. 6.
22. If any Man ravish any Woman, Widow, or Maid, it is Felony. If one carnally know any Maid under ten years of age, it is Felony. If any one take away any Wife, Widow, or Maid, against her will, which hath Lands or Goods, or is Inheriatrix, or Heir apparant, it is Felony, 13 Eliz. 6. 3 H. 7. 2. 39 Eliz. 9. 3 Ed. 1. 14. 9 Ed. 4. 22. See Exad. 21. 16. To have two Wives at one time, is Felony, 1 Jac. 11. And yet if the party have been absent seven years, and it is not known whether he or she be living, it is not Felony.
23. If any prisoner that is in prison for Felony; or any other break any prison, and

Self. 10.
Rape, what.

Bigamy, what.

and go out, or let out any such prisoner, 1 Ed. 2. *De frangentibus prisonam*, 23 H. 8. 11. It is Felony.

24. If one transport Sheep out of the Realm the second time, it is Felony, 3 El. 3.

25. If a Recusant that hath abjured, do not depart the Realm, according to his Abjuration, it is Felony, 35 Eliz. 1. 2 Jac. 25.

26. If one do commit Buggery with man or Beast, it is Felony, 25 H. 8. 6. 5 El. 17.

Buggery, what.
Sodomy.

27. If any man shall maliciously cut or burn any frame of building, provided for a House, so that the same shall not serve for that purpose, for which it was prepared, this is Felony, 5 H. 4. 5. 37 H. 8. 6.

28. Other Felonies there are also, for which see 1 Jac. 31. 31 Eliz. 4. 5 H. 4. 24. 37 H. 8. 6. 1 Ed. 6. 12. 1 Jac. 11. 21 Jac. 26. 23 H. 8. 1. See for all these Felonies, Ca 3 part of his Inst. 13, 15, 17, 19, 20, &c.

29. Heresie, where one had been once convinced by the Bishop of Heresie, viz. For wilful and obstinate opposition of any point of Christian Faith against Scripture, and had abjured it, and afterwards fallen into the same or some other Heresie again, was punished with death. And for that served the Writ of *Heretico Comburendo*: See for this D. & St. 29. 2 H. 4. 15. F.N.B. 269. Bro. 468. Ca upon Littl. 381. 2 H. 4. 15. 2 H. 5. 15. 2 H. 5. 7. 5 R. 2. 5. See Ca 3 part Inst. 5. But this out of use, *Terms of Law*.

Sec. 13.
Heresie, what.
Heretico comburendo, what.

We have done now with the Simple Felonies, and Principal Felons: And now we come to Relative Felonies, and to Accessaries. For a man by Participation with, may make himself guilty of another mans offence, divers ways; we have shewed before, That the breaking of a Prison, and letting out of Felons is a Felony. So if one shall Rescue a Felon apprehended, this is a Felony: See for this *Rescous* in chap. So for a voluntary Escape, if one that hath a Felon in his custody, suffer him wilfully to escape or turn him going, this is Felony; and if it be in an Officer, it is the worse: But for the clearing of it, we shall handle the point of Principal and Accessary at large.

Breaking of
Prison.

Rescue.
Escape.

These two words are Relative words, Principal doth signifie the chief actor of any villany, and the Accessary is he that hath his hand and consent in it before or after, but is not present at it, called sometimes an Abettor: And he is two manner of ways, either before the fact done, when he is one of the helping and moving causes of it, which may be by Provocation, Counsel, or Consent; or after, when he laboreth to hinder the execution of Justice upon the offender for the fact; in both cases the offence of the Accessary is equal in degree and quality with the offence of the Principal; and for both, he is to be punished as the Principal is, *Consentientes agentes & instigantes pari poena plectuntur*, 46 Aff. 23. *Stamf. pl. Corone* 44, 45, 46, &c. Co 7. 2. 11.

Principal and
Accessary, what.
Abettor.
The kinds of
it.

Some also divide them again into Accessaries by the Common Law, and Accessaries by the Statute, (i.) Such as are made so by any Statute, are such as abet, counsel, or receive any which commit, or have committed any offence made Felony by any Statute, albeit the Statute do not mention Accessaries, *Stamf. pl. Corone*, 1: 45.

For Answer to this, these things are to be known.

1. In Treasons there can be no Accessaries before nor after, for all that have their hands in those offences are called and esteemed Principals.

In what offences and cases, there may be an Accessary, or not.

2. Also in Man-slaughter there can be no Accessaries before, but there may be Accessaries after; but in all other Felonies there may be Accessaries before and after.

4. In Maim, Forcible entry, Riots, Routs, and all Trespasses, there can be no Accessaries before or after; but all are esteemed Principals.

5. Also Accessaries may be in relation to offences by Statute Laws, albeit the Statute doth not mention Accessaries, Co. 4. 44. upon Littl. 57. *Stamf.* 1. 4. 5 H. 7. 10. *Stamf. pl. Corone* 45, 46, 47.

6. A man may be an Accessary to the stealing of his own Goods; as if he confederate with another to steal them from his Bailly, to the intent to charge him, *Goldsb.* 186. pl. 128.

If one man do command, counsel, advise, procure, abet, allow or stir up, comfort, encourage, aid, consent to, or hire another to do any Felony, and be not present himself when the other doth it, he is an Accessary before, *Stamf.* 1. 45. Co. 9. 112. 7. 2. 4, 5 Ph. & Ma. 4. *Kelw.* 67. *Plow.* 478.

In what case a man shall be said an Accessary before the offence, or not.

A man may be Accessary before, by provocation; and that may be, First, by incensing or allurement, of which, see examples in Scripture *Job* 2. 9. *1 Kings* 21. 25. *Prov.* 1. 10. Secondly, One may be Accessary by counsel; of which read *Sam.* 13. 5. 16. 21. *2 Chron.* 22. 3; 4. Thirdly, One may be Accessary by consent, and this may be either overt, and that may be either by word or deed, of which see *Act* 8. 1. 26. 10. *7. 56. Prov.* 1. 14. *Psal.* 50. 18. Or Covert, when one is of the confederacy, and stands by; and is silent. And by all these ways a man may be Accessary by our Law. As by these following cases,

1. If one counsel a Woman to murder the childe in her body, and after the childe is born, and then she doth murder him in the absence of him that gave her the counsel, in this case he is an Accessary, *Dyer* 186. *Plow.* 475. 2. If I perswade or command one to go and beat another man onely, and he do beat him, and kill him; by this I am made Accessary, not onely to the beating, but to the murder, *Stamf.* 1. 45. *Co.* 4. 75. 4. 44. 3. If one perswade another to perswade a third person to drink such a potion, wherein is poyson, knowing it to be so, and he doth so, and thereof the party die; the first perswader is an Accessary, *Co.* 4. 44. *Plow.* 475. 476. 4. If one command or advise another to rob another, and he in robbing of him, kill him in fight; in this case the adviser or commander is Accessary to this murder also. So if one command one to beat another, and with that beating he kill him. So if one command one to burn the House of *J. S.* and by this means any other Houses are burnt too, he is Accessary unto all; and so in all like cases where other evil ensueth upon any evil thing, counselled or advised, *Co.* 4. 44. *Plow.* 475. 5. But if divers come to do a lawful business, and one kill a man without the consent of the rest, or one do a Felony; or if a man happen by chance into company where such a murder or Felony is committed (being not of their company, nor confederacy, and having no such purpose) and he do not let such Felony, or do not raise Hue and Cry after it is done; by these things he doth not make himself Accessary, but he may be fined for these things: So if a Sheriff command his Bailiff to take a man, and the Bailiff do take the man and rob him, the Sheriff is not Accessary to this Robbery, *Plow.* 475. *Stamf.* 1. 45. 6. If one counsel or command one to kill a man, and he kill another; or to burn one mans House, and he burn anothers; or to steal a Horse, and he steal a Cowe; or to steal a black Horse, and he steal a white Horse; or to steal a Goldsmiths Plate from him, going to such a Fair, and he go to his shop in Cheapside, and rob him there, and break open his house to do it; here in these cases the party shall not be Accessary, because this is another Felony; and yet if one command a Felony, and it be done in another fashion, time, place, or manner, then it was commanded onely; he may be Accessary to it, *Plow.* 475. As if one bid another to rob *J. D.* on *Shooters-hill*, and he doth it on *Gads-hill*, or to rob him one day, and he doth it another day, or to do it himself, and he doth it by another, or to kill him by poyson, and he doth it by a Sword; in all these cases he shall be an Accessary: But if he bid him kill *J. S.* and he kill *J. D.* it is otherwise; and it is said if one command another to rob *J. S.* as he goeth to *Turbridge* Fair, and he rob him in his house, that by this he is not Accessary, *Plow.* 475.

In what case a man shall be said to be an Accessary after the offence, or not.

1. If one after a Felony is committed, and he hath knowledge of it, doth notwithstanding receive and favor, aid, assist, hide, comfort, or help the Felon in his house, or elsewhere, and conceal him from them that search after him; or help convey him away by aid of money, or other assistance, or hinder or endeavor to let his apprehension, rescue him, or the like, he is Accessary after the offence, *Stamf.* 1. 46. *14 H.* 7. 31. *Plow.* 476. But to know of a Felony onely, will not make a man accessary to it. 2. If one be out-lawed for Felony, or otherwise attainted by a Record, and a man do after receive him; in this case it seems he is an Accessary after, though he know not of the Felonie, because it is upon Record, especially if the out-lawry be in the same County, *Fitz. Corone* 377. *Dyer* 355. *Stamf.* 1. 46. 3. If one feloniously receive another that is accessary to a Felony; this receiver is an Accessary, *Stamf.* 1. 43. So that one may be an Accessary to an Accessary. 4. If one give one money to help shift him out of the Country, after he hath told him of the Felony he hath committed; by this he makes himself Accessary, *Stamf.* 1. 46. *Parrams* case, *B. R.*

M. 7 Jac.

M. 7 Jac. The Court, Fitz. Corone 447. 5. If one receive another into his house, that flieth for a Felony, and shuts the door, so as the Country not thinking him to be there, he escape whiles no man followeth him, he is Accessary, *Stamf. 1. 46.* 6. But if a Woman do after her Husband hath committed a Felony conceal him, live with, aid, and comfort him, or the like; this is no Felony in her, neither is she Accessary: But if she serve any other man so, she may be an Accessary, *Stamf. 1. 19. Fitz. Corone 183.* 7. If one know of a Felony, and do not hinder it, or pursue the Felon, but he doth not consent to it, nor is at it; this is not Felony. And if one after a Felony is committed, do help a man by his counsel, Letters, or the like, to help him out of his trouble, this will not make him an Accessary, *Stamf. 1. 46.* 8. If one do receive Goods which he doth know to be stoln, he is not (as it seems) by this Accessary to the Felony. But it is dangerous so to do, and especially to buy such Goods at a low rate: But if one pursue a Felon with Hue and Cry, and then take his Goods, and let him go; by this he may be made an Accessary to the offence, *Stamf. 1. 46.* If one receive his own Goods from the Thief, after they be stoln, if it be not with a purpose to conceal the offender, or bear with him, or to help him to escape; this is not punishable at all, *Halls case, 38 Eliz. B. R.* But if one take money of the Felon not to give evidence against him; by this he may be Accessary.

1. If many come together to do an unlawful act, as to rob or to do a riot, or the like, and one of them kill a man; in this case they are all Principal offenders, *Bro. 237. Plow 98. Kelw. 161.* 2. If one do command, incite, or perswade another to do a Felony, and be present himself at the doing of it, he shall be deemed a Principal, *Co. 9. 112.* 3. If one be present, and doth move others to kill (or though he incite not) yet if he come for that purpose, or to aid if need be; or hold a man while another doth kill him; or be of the confederacy or company, though he do nothing; in this case, if one offence be committed amongst them, he that so doth shall be a Principal, and in equal degree in the offence, and may be arraigned as a Principal, *Stamf. 1. 45. 13 H. 7. 10. Plow. 97.* 4. If one stand at the door of a room, wherein two are fighting, and he bid one of them kill the other, and he do so; if the fact by him that doth kill him, be Man-slaughter, the offence is the same in him that provoked him, and they are both Principals, *Plow 97.* 5. If one knowing there is poison in drink, perswade another to drink it, and do tell him, it will do him good, and after he is gone, the other doth take it, he is a Principal, *Co. 4. 44.*

Self. 14.
In what case a man shall be esteemed a Principal, and not an Accessary.

1. The Accessary shall not be arraigned, until the Principal be arraigned; and if there be many Principals, he shall not be arraigned till all the Principals be arraigned; and if he be found Accessary to any one of them, it is enough: But if he be charged as Accessary to one of the Principals, and the Principal be attainted by our-lawry, then the Accessary may be arraigned, *Stamf. 1. 49. Plow. 98. Dyer 25. Co. 7. 2.* 2. But a man may sue the Accessary till exigent, and then it must stay till the Principal be attainted, *Co. 9. 117. 3 Ed. 1. 14. Dyer 120.* So if he appear he shall answer, but when he hath pleaded to issue, it shall stay till the Principal be tried: But if they both appear, they must answer together immediately one after another, *21 H. 7. 31. 3 H. 7. 12. Plow. 98.* 3. And if a Principal before Attainder, or after Attainder, by Verdict or Confession, and before Judgment die, or be pardoned, or hath his Clergy, the Accessary by this is discharged, *17 H. 4. 19. Co. 4. 43.* 4. But after Attainder and Judgment given after Verdict, Confession, or by Out-lawry, if the Principal get his Pardon or Clergy, yet the Accessary shall be arraigned, *Accessarius sequitur suum Principalem, & ubi non est Principalis ibi non est Accessarius. Stamf. 1. 50.* 5. If the Attainder of the Principal be erroneous, or by Error in the Proces or Out-lawry, he being out of the Land, or the like, yet the Accessary may be attained and executed, till the first Attainder be reversed; and if the Out-lawry be reversed after the Accessary is executed, or the Principal plead, and be acquitted; the Heir of the Accessary shall have his Land again, which the Ancestor did forfeit by the Attainder, *Co. 9. 116.* 6. But if the Principal be acquitted onely by reason of the insufficiency of the Indictment, this doth not discharge the Accessary, *Co. 4. 45.* 7. If a man have been indicted as Accessary and acquitted, yet he may after be indicted, as Principal, *Bro. 401.*

How the Accessary shall be prosecuted.

8. If

8. If one be indicted for murder as Principal, and one for being Accessary before, and another after, and the Principal is convicted of Man-slaughter, or do confess it, and hath a pardon, or his Clergy before Judgment, both the Accessaries are discharged, 3 H.7.1. 7 H.4. 16. See Co. 3 part Inst. 64.

Abettors or
Particeps Crimi-
nis, what?

9. An Abettor or *Particeps criminis*. (i.) A partaker in the crime is in divers cases: He is said to be an Abettor, that without just cause doth maliciously procure one to sue a false Appeal of Felony or Murder against another: But he is said to be an Abettor in Murder or Felony, who doth command, procure, counsel, or encourage another to the doing of a Murder, or other Felonie; this is but an Accessary: But it is said to be in some other cases.

For the manner of proceeding against, and some other things concerning Murderers, and other Felons. See *Statutes*, 3 H.7. 1. 2 H.7. 1. 3 H.7. 1. 2 Ed.6. 24. 6 Ed.1. 9. 33 H.8. 23. 3 H.7. 1. 3 Ed. 1. *Officium Coronatoris*. 33 H.8. 12. 13 R.2. 1. 9 H.4. 4. 3 Ed.1. 9. 2 Ed.3. 19. 21 H.8. 11. 7 H.3. 22. 11 Ed.1. 6. 1 R.3. 3. 6 H.8. 6. 5 Ed.3. 11. 8 H.6. 10.

The state and
condition of a
Felon.

For the state and condition of a Felon, these things are to be known:

1. He is capable to receive by way of Gift or Grant, any thing from others, before or after Attainder, as before.

2. He cannot give or grant away any of his Lands after the offence done, but his Goods he may sell or give at any time before Attainder, and after he must live by them: But see for this, *Disability*, *Grant*, *Numb.* 2, 3. *Fine*, *Numb.* 6, 8. And in the next *Question*.

Stat. 15.
The Forfeiture and Punishment in case of Felony. And the condition of a person Attainted of Felony. An jour & Waft.

The punishment of every Felon, Principal and Accessary; for a Felony by the Common Law, is to hang between Heaven and Earth (as unworthy of both) to lose his Blood upwards, so that he cannot be Heir to another, being a Son of the Earth, to lose his Blood downwards; for his Blood is corrupted, so that none can be Heir to him, to forfeit all his Goods and Chattels, and all his Lands: The which the King is to have for a year and a day, to the end he may eject his Family, rase his Houses, subvert his Trees, and Plough up his Meadows, and after the year the Lord of whom the Land is held, is to have it for ever, *ut pena ad paucos metus ad omnes perveniat*: And the Wife is to lose her Dower, and so it is for Felonies by Statute Law. But that in some cases, and for some Felonies made by Statute Law, it is said by the Law, there shall be no Corruption of Blood, nor loss of Dower. The Statutes must therefore be seen; and according to this, the Judgment is given upon the trial of the Felon: But if the Felon upon his Arraignment, and upon his trial, shall not answer at all, or shall not answer directly, or shall challenge peremptorily above twenty: Or if he plead not guilty to the Indictment, and then will not put himself upon the Country; in all these cases the Judgment is, That he be pressed to death for his Contumacy; and this is called *Judgment de paine fort & dure*. And in this case, and by this means (except it be in the case of Treason) he saves his Land, but doth forfeit all his Goods and Chattels notwithstanding, Co. 4. 124. *Stamf.* 3. 33. 34. 1 Ed.6. 12. 5, 6 Ed.6. 12. 21 Jac. 6. *Westm.* 1. 12. Co. 11. 30, 40. upon *Littl.* 380, 381.

Judgment de
paine fort &
dure, what.

How his
Goods shall
be disposed.

But in this case, this is to be known, That the Goods of the Felon, till his Attainder, are his own, and he may give or sell them as he please, and neither the Sheriff, nor any other Officer, or other, can seize or dispose them, nor are they till his Attainder to be removed out of his House: But after once he is attainted by Verdict or Outlawry, the Township must look to, and secure the Goods, *Fitz. Forf.* 32. *Corone* 347. See *Seisure*. 22 Ass. 118. 31 Ed.3. 3. 1 R.3. 3. And how he may sue or be sued in this Condition, see *Disability*: see more for *Forfeiture*, the old Statutes, *Mag. Charta* 22. 17 Ed.2. 14, 16. *De Catallis Felonum*, 34 Ed.3. 12. 11 H.7. 1. 24 H.8. 5. Co. 3 part. Inst. 48.

Clergy, what.

But in some cases for Felony, the offender shall have (if he desire it) the benefit of the Book for his life, and this is called *Clergy*, which is defined to be a benefit that some offenders have in some cases of Felony, confirmed by divers Acts of Parliament. And is thus, when a man is arraigned of Felony before a Temporal Judge, and the prisoner prayeth his Clergy, *viz.* To have his Book; then the Judge doth command the Ordinary to try, if he can read as a Clerk in such a Book and place thereof, as the Judge shall appoint

appoint; and if the Ordinary shall certify the Judge that he can read, then he is not to lose his life, but is to be burnt in the hand only, which was called *Aufer in le maine*. But if he could not read, and the Ordinary doth so certify to the Judge, then he must be hanged: And if he pray his Clergy before Judgment given, (as he may) he is called a Clerk Convict. If after, he is called a Clerk Attaint. And this benefit of Clergy was at first given to Clergy men only (for their scarcity to be found to be placed in Religious Houses, and was allowable to them for all offences whatsoever, except Treason, and robbing of the Churches of their Ornaments: And then only upon the request of the Ordinary. But at this day it is grantable to all persons, Laymen as well as Clergy men, and that without any delivery of them to the Ordinary, which was the ancient course, for being found guilty, they are put to read at the Bar. *Terms of the Law, Co. on Littl. 2. 11.*

For Answer to this Question, we are to know these things.

1. That a man cannot have his Clergy in cases of High Treason, Petit Treason, nor in cases of other Felonies, by Murder, Robbery, Sacrilege, burning of dwelling Houses, or Barns of Corn, stealing of Horses, Geldings, or Mares, Rape, taking away of Goods from the person of another privily, stabbing any person within the Statute of 1 Jac. 8. In case where a man is a Recusant, and do not abjure according to 35 Eliz. 5. In case of Conjuring and Witchcraft, against 1 Jac. 12. In case of Buggery with mankind or Beast, upon 23 H. 8. 6. 5 Eliz. 17. In case of Accessary to Petit Treason, or Murder, 45 Ph. & Ma. 4. In case of Forgery upon the second Conviction, 5 Eliz. 14. In case of a Soldier or Marriner offending against 2 Ed. 6. 2. 5 Eliz. 5. 39 Eliz. 17. In case of a Counterfeit Egyptian, 1, 2 Ph. & Ma. 4. 5 Eliz. 20. In case of taking away a Woman against her will, 39 Eliz. 9. In case of relieving a Jesuit, 27 Eliz. 2. *Stamf. pl. Cor. 2. 43.*

2. But in case of Accessary to stealing of Horses and Mares, for Man-slaughter only, and for ordinary Theft, and in all other Felonies not before named, this benefit is grantable.

3. This benefit is grantable but once, and therefore he that doth demand his Clergy, and hath it once, shall never have it the second time, 4 H. 7. 13. 1 Ed. 6. 12. See for this matter more, 8 Eliz. 4. 14 Eliz. 4. 6, 7. 23 Eliz. 2. 29 Eliz. 2. 31 Eliz. 12. 39 Eliz. 9. 15. 29 Ed. 3. 34. 5 H. 4. 4. 4 H. 7. 13. 12 H. 7. 7. 4 H. 8. 2. 1 Ed. 6. 12. 5, 6 Ed. 6. 4. 8 Eliz. 4. 18 Eliz. 6. 39 Eliz. 9. 1 Jac. 18. 25 H. 8. 3. *Crompt. Jur. 80. 90. 126. Co. 11. 58. Kelw. 87. Finches Law 462. Co. 11. 31. Co. 3 part Inst. cap. 50.*

The Corruption of Blood, which is part of the punishment for Treason, and other Felonies, is an infection of the Blood, growing to the estate of a man attainted, and his issue; so that as he cannot be Heir to any other above him, so can no other be Heir to him that is beneath him: And therefore it is that a Remainder to his right Heir can never take effect. And if the eldest son be attainted, during his fathers life, and then he over-live him, neither he nor his issue after him (if he die before) can inherit: So neither can the younger Brother, but it will rather Escheat. But if the eldest son in this case die in his Fathers life, without any issue; in this case the younger son may inherit as Heir to the Father, and the Corruption of Blood in the Brother will not hinder. By this Corruption of Blood, also the Nobleman and Gentleman doth lose his Nobility and Gentility for ever, *Crompt. Jur. 20. Co. upon Littl. 391. Broo. Co. 42. Dyer 48. 22 H. 6. 38.*

This punishment falls upon all Felonies by Common Law, but in cases of Felony by Statute Law, the Statute doth usually except it, and then it is prevented, it will be needful for the knowledge of this point to see the Statutes, by which the offence is made Treason, 25 H. 8. 6. 18 Eliz. 6.

Mis-prison may be either of Treason or Felony; and both these offences may be many ways. It is properly the Concealment of these offences, when one doth know of another man that hath committed the offence, and doth not disclose it to a Magistrate: This if it be of a Treason, the offender doth thereby forfeit his Goods for ever, and the profits of his Lands, during his life, and his Body is to be imprisoned, during the Kings pleasure. But if it be of a Felony only, the offender is to be fined

Aufer in le maine, what.

Clerk { Convict
Attaint

where this is grantable, or not.

Self. 16.
Corruption of Blood, what.

where it shall be, or not.

Misprison of Treason, or Felony, what.

at

at the discretion of the Justices, and imprisoned till he pay it, or put in Sureties for it: For this see *Crompt. Jur.* 70. 76. *D. & St.* 163. *Finebes Law* 23: *Co.* upon *Littl.* 287. *Dyer* 296. *Stamf.* 1. 38. *Broo.* 311. 429. 464. 1, 2 *Ph. & Ma.* 10. 43 *H.8.* 12. *Co. 3 part Inst.* 65.

Theftboot, what.

Theftboot is where the owner of the Goods stolen, doth not onely conceal the Felony, but taketh his Goods again of the Felon, or amends for the same, to favor and maintain him, or not to prosecute him: This is worse then Concealment. See for it *Co. 3 part Inst.* 61.

There are divers other offences of a lower nature, as Extortion, Night-walking, Barrettry, Fornication, Quarrelling, Libelling, Spreading of false news, getting money by counterfeiting Letters, and many others which we shall say somewhat to in their proper places.

The way to bring a man in question for his life, in Treason or Felony, is by Indictment or Presentment; and for some Felonies, there is a third way by Appeal. For lesser offences also a man may be convict by Indictment or Presentment.

Appeal, what.

Appeal is a Plaint or Writ made by one man against another, of purpose to attain him of some offence committed: As if one commit a Robbery, Murther, or Maim upon my person, my Wife, or my Heir, after my death, for killing me, or my self in my life time, for robbing or maiming me, may have this Appeal within the year and day after the offence; and if the party be attainted, he must be executed, and the King cannot pardon it: But if he be acquitted, the Appellor will be fined, and imprisoned, and the party appealed, will recover damages. For this see *Gloc.* 9. 3 *H.7.3. Westm.* 2. 12. 28 *Ed.1. Co. 3 part Inst.* 57. 1 *H.4. 14. Stamf.* 2. 6. *Co.* 9. 119. *Co.* 4. 47. 48. upon *Litt.* 287. *Flou.* 476. *Dyer* 50. *Broo.* 383. 445. *Crompt. Jur.* 80. *Mag. Chart.* 14. *Westm.* 1. 14. *Gloc.* 14. *Westm.* 2. 12. 1 *H.4. 14. Statute of Appeals.*

Señ. 17.
Indictment,
what.

Indictment is a Bill or Declaration formally made, containing an accusation of a man for some offence done, by a Jury, to be found of purpose to put the offender to answer to it. And to this the offender must plead, and thereupon shall be tried by another Jury, whether he be guilty of the thing whereof he is indicted, or not. And this differeth little from a Presentment.

Presentment,
what.

Presentment is defined to be an enquiry and finding of some offence that hath been done against the King: This sometimes called an Indictment. They both differ from an Appeal in this, That this is always at the suit of the party, and the other two are at the suit of the King: But see for these things more in my Books of *Justice of Peace*, *Co.* upon *Littl.* 126. *D. & St.* 135. *Dyer* 284. And in many other places, *Co. 2 part Inst.* 739. *Co. 3 part Inst.* 62.

Arraignment,
what.

Arraignment is the next step of proceeding against an offender after the Indictment is found, or Presentment made, for then must he be brought to the Bar of Justice to be tried; and this is called an Arraignment. The manner whereof see in Sir *Thomas Smiths Commonwealth*, f. 89. After this is the Attainder, which is the Conviction of the offender of the crime, whereof he was not before convict. And this is either before his appearance, which is by outlawry, or after appearance; and this is by Verdict or Confession. And thereupon Judgment of death followeth, except he can pray his Clergy; and then he preventeth the Judgment, and is called a Clerk Convict. His Judgment where he doth plead, is, That he shall hang by the neck till he be dead. But if upon his trial he stand mute, and will not answer at all, or not directly, or challenge above twenty peremptory; in this case the Judgment is, That he shall be pressed to death, which is called *Judgment de paine fort & dure*, *Co.* 4. 124. *Stamf.* 2. 33. *Co. 3 part Inst.* 47. For the fallifying of an Attainder, see *Co. 3 part Inst.* 104. And for Judgment and Execution, *Co. 3 part Inst.* 101.

Judg. *of life*
ment *of paine*
of *fort &*
dure.

Ignoramus,
what.

Ignoramus is a word used by the Grand Enquest, charged with the enquiry of causes criminal, and written upon the Bill, whereby any crime is offered to their consideration, when as they mislike their evidence as defective and too weak to make good the Presentment; then they use to write upon the back of the Bill, *We are Ignorant*, and then he is delivered without further answer; but if they do like it, then they say, *A true Bill*, and then cry, *He stands indicted by it, and must answer to it, whether he be guilty, or not*: And if he deny it, it must then be tried by another Jury, and as they finde it, so it must stand. See *Indictment*. Hue

Hue and Cry, it signifieth the pursuit of one that hath committed Felony by the High-way side or elsewhere: For if the party robbed, or any of the company of him that is murdered or robbed, come to the Constable of the next place, and willet him to raise Hue and Cry, and to make pursuit after the offender, and describe him, and which way he is gone, as near as he can; the Constable must call upon the Parish, and they must seek presently there for him: And if he be not to be found there, they must tell the Constable of the next Parish, and there they must search likewise, and so in every Parish, until the offender be taken or pursued to the Sea-side: And if Officers or others, be negligent herein, they may be punished. And in some cases if the offender be not taken, as in cases of Robbery, the Hundred may be charged to the party grieved, and he may recover his money lost of it. And such as raise these Hues and Cries, must take care against whom they send them; for if they do it, without cause, they may be punished for it, *Co. 2 part of Inst. 173. See Arrest, Dyer 137. Westm. 1. 9. 2. 46. Winchester 1. 6. 23 Ed. 3. 11. 27 Eliz. 13. And in my First part of the Marrow of the Law, 205. Co. 3 part. Inst. 52.*

Fresh-Suit is such a present and earnest pursuit, and following of an offender, as never ceaseth from the time of the offence committed, or espied, until he be apprehended. And where this is done by the party robbed, he shall have his Goods again; and when the offender is tried, the Judge before whom he is tried, may give him a Warrant to take, and have his Goods again; whereas otherwise, if he fail to make this Fresh Pursuit, the King shall have the Goods stolen as forfeit to him. See for this, *Stamf. 3. 16. Co. 3. 52. 21 H. 8. 11. Winchester 1. 6. 28 Ed. 3. 11.*

A Fugitive is, where one that is in question, doth flee and will not abide the Trial of Law; and this is either in Deed, when he doth actually flee, or in Law, when albeit he doth not flee, yet he doth not appear, till he be outlawed. In both these cases, whether he be guilty of the Felony, or not, he doth forfeit his Goods. See for this, *Stamf. 3. 25. 3 Ed. 3. 35. 4 H. 7. 18. 5 H. 4. 32. 29 Ed. 3. 3. Co. 3 part. Inst. 84.*

To Reprieve a prisoner, is to take him back from the proceeding, and execution of the Law, especially for that time.

To Abjure, is to forswear the Realm for ever, and depart into a Foreign Land: For where one had committed a Felony, and did flee to a Church, or other privileged place, before he was apprehended, he might have abjured; and so avoided the Trial of Law: And this may be for a time only, and then is called *Relegation*.

The Sanctuary was a privileged place, which an offender might have fled to for the safety of his life: But these places, and this Gift, are now taken away, *Stamf. 2. 40. 2. 10. Co. super Litt. 133. 22 H. 8. 14. 25. Co. 3 part. Inst. 512. 7. 3. H. 11.*

The Execution of the Corps, is the inflicting of the corporal punishment upon the Body of the offender, according to the sentence of the Judge. *Co. 3 part. Inst. 101.*

Torment is the putting of a man, that is a suspected Malefactor, to excessive pain on a Rack, or otherwise to make him confess himself or his Complices guiltiness. But this is seldom or never used amongst us.

This is the clearing of a man from a crime, whereof he was suspected, and for which he hath been once questioned: Wherein are these things to be known, First, That if a man be accused by Presentment of a Jewry, he cannot be clear, otherwise then by a Jewry. Secondly, If he be once legally acquitted, he can never afterwards be questioned again for the same offence, *Fitz Cor. 44. Finch. 71. Sir Tho. Smiths Commonwealth, f. 88.*

This Court was applied to the proceedings in the Spiritual Court also.

An Approver or an Appellor, is he which hath committed some Felony, which he confesseth, and now he accuseth others that they were helpers with him, in doing the same or some other Felony; which thing, he saith, he will approve, and therefore is called an Approver, *Stamf. 2. 52. Fitz Corone 231. Co. 11. 30. Co. 3 part. Inst. 56.*

Burning in the Hand, is the punishment to be inflicted upon a man that hath the benefit of his Clergy, and can read; for having prayed his Clergy in cases of Manslaughter,

Hue and Cry.

Self 18.
Fresh Suit,
what.

Fugitive, what.

Reprieve, what.

Abjuration or
Exile, what.Relegation,
what.
Sanctuary,
what.Execution of
the Corps,
what.

Torment, what.

Purgation or
Acquittal, what.Approver or
Appellor, what.Arser in le
maine, or Burn-
ing in the
hand, what.

CHAP. LXI.

Of Custom and Prescription.



His word Custom is sometimes used for the Tribute or Toll that Merchants pay to the King, for the carrying in and out of their Merchandises: But here it is taken for a Law or Rite not written, which being established by long use, and the consent of our Ancestors hath been, and is daily practised, *Co. 9. 75. Co. 1. 110. upon Littl. 38. 110.* The word is taken in divers other senses, *Co. 2. part. Inst. 58.*

Señ. 1.
1. Custom, what.

Customs within this Nation are innumerable; and of these some are general, and run all the Country over, and

The kinds of it.

so they are but the Common Laws, which are but the Common Customs of the Country: And some are particular, used and applied onely to some Countries, as the Custom of *Gavelkind* to *Kent*; others, some Cities and Burroughs, as the Custom of *Burton-Engliss*, and the Customs of *London*, and other places; and others to Villages, Parishes, and Manors, *Co. 1. 110. of Copiholds, 68. 69.*

Prescription is, where a man claimeth any thing for that, he, his Ancestors or Predecessors, or those whose estate he hath, have had, or used any thing all the time, whereof no minde is to the contrary: And herein, the having, using, and enjoying of the thing, according to the thing, is needful to be shewed, *Co. 4. 32. 9. 36. Terms of the Law.* And so it is as good as a Grant; for it is *Titulus ex usu & tempore substantiam capiens ab auctoritate Legis, Co. super. Littl. 113.*

2. Prescription, what.

For Answer hereunto, these things are to be observed.

1. That Custom, Prescription, and Usage, are cousin-germans, and much of one nature; and therefore Regularly, what is good in a Prescription in one, is good in a Custom in many: And so on the other side, what ever thing (for Substance) many men may claim by a Custom, one man may claim and have by a Prescription: For Prescription is, where one man, time out of minde, hath right to have, and hath had something of another: But Custom is, where divers have time out of minde, a Right to have, and have had something of another.

Wherein Custom and Prescription agree, and wherein they differ. Prescription.

2. Usage is by continuance of time, the efficient cause of Custom and Prescription: both; for there are two Essential parts of Custom.

Usage:

First, Time out of minde.

Secondly, Usage, viz. a peaceable Usage without interruption, and to both long continuance is necessary.

3. But herein lieth the difference, between Custom and Prescription.

First, That is and must always be alleged to be in many persons; and so it may be claimed by Copiholders or the Inhabitants of a place: This always is one person. That he and his Ancestors, &c. And if all but one be dead, in the case of Custom the Custom is gone.

Secondly, That is always local, claimed in the Land, and within a Country, City, Parish, Manor, or Neighborhood, and goeth with it: But this is personal, and goeth always with the person.

Thirdly, That needs not by common Intendment, a lawful Commencement; but is applied to things insensible, as the Custom of *Gavelkind* and *Burton-Engliss*: But this must have a reasonable Intendment by some Grant, Act, or Agreement.

4. Prescription extends to Fee-simple for Tenant; for life, years, or in tail, cannot prescribe in what estate: But Custom doth extend to all Interests and Estates whatsoever, *Brund. Rep. 198. Co. 9. 56. Brund. 453. Co. 4. 32. Dyer. 114. Co. super. Littl. 113.* So that they agree in this, That both of them must have Possession, Usage, and Time, and the Possession must be long, continual, and peaceable. They must be both precisely proved by them that claim them: and they must be both of them alleged

leaged as they can be proved: But a Prescription is of more force; for that as to Commons, Ways, Rents, Franchises, and the like, will give a man as good a Title, as a Grant will do, *Plow. 322. Co. super Littl. 114.*

For Answer to this Question, these things are to be known.

1. That a Custom may be good for Substance, and bad for the manner of claiming of it.

2. That the Customs that are good and allowable, must have these Incidents: First, They must be claimed, alleaged, and applied to some certain special Country, City, or place, as, within one County, a Hundred, Manor, Parish, City, Burrough, Hamlet, &c. For a Custom alleaged or claimed, to be all *England* over, is not good. Secondly, They must be of long continuance, time out of mind, for a hundred years at least: And therefore an Allegation or a Claim of any thing for any other time, is not good. Thirdly, They must be reasonable according to Common Right, viz. It must have some appearance of consideration, and lawful beginning in it; but in this the Law is not exact, for it is sufficient in case of Custom, that it be *ex certa causa rationabili usitata*, though it cannot be well conceived how it began. But Customs that are against Reason, are usurpations, and not to be admitted. Fourthly, They must be certain. Fifthly, They must be alleaged in the Affirmative, and not in the Negative.

3. The Customs that may be claimed, and good in one place, cannot be claimed, or good in another place; as Burrough-English cannot be claimed in Upland Towns, that are not Cities nor Burroughs: And yet such Upland Towns may alleage a Custom to have a way to their Churches, to make By-laws, or the like.

4. And being such, they have the force of Laws, and may take away the force of other Laws that oppose them. For the Rule is in this, *Consuetudo pro Legge quandoque servatur in partibus ubi fuerit more utentium approbata, & vicem Legis obtinet; longue enim temporis & consuetudinis non est vitia auctoritas. Longa possessio facit jus, pariter jus possidendi, & tollit actionem veri domini. Co. super Littl. 110. 112. 6. 60. Dyer 54. 35. Hic. 25.*

5. The Law doth allow for good Customs, these Customs that do follow, viz.

Common. That the Inhabitants of a Parish shall have Common in such a Waste of the Lords.

Modus decimandi. That the Inhabitants of a Parish shall pay no Tithe, but something in lieu thereof.

Surrender. That if the Tenantes of such a Manor will alien his Lands, he must do it in the Lords Court by Surrender.

Herriot. That the Lord shall have the best Beast of his Tenant upon his death or Surrender, or else that the Lord shall enter and seize his Tenants Land.

That if any Tenant of such a Manor do alien his Land by Deed or Will, that it must be presented at the next Court of the Manor, or else that it be void.

Way. That every Inhabitant of Dale shall have a way to Church, Market, &c. over such a ground.

That if the Freeholders do not pay their Rent, they shall lose their Land.

Rent. That an Infant of sixteen years old may Alien, or Devise his Land; that an Infant at any other age of discretion, under one and twenty years, may Alien or Devise his Land, so he name a certain age.

Woman Covert. That a Woman Covert and her Husband, may after examination of the Wife, by the Steward in the Lords Court make Surrender and dispose of her Land; and that this shall binde as a Fine at Common Law.

Common. That one man may Ear and Sowe Land, and then that other men shall feed upon it, and have the Pasture of it.

Fishing at Sea. That Fishers on the Sea, and great Rivers, may go over any mans ground to fish.

Officers. That Parishioners shall chuse their own Constables yearly.

Houf-boot. That all the Tenantes of a Manor, shall have and take sufficient Houf-boot in the Lords Woods.

Relief. That every Tenant of a Manor shall pay two shillings for a Relief when it happens.

Pound-breach. That if any of the Lords Tenants break the Pound, he shall pay three pounds to the Lord.

That a Jury may be amerced by another Jury, in a Leet for Concealment.

That

That if a strangers Sheep do eat up of the Pasture of the Tenants by day, such *Foldage.*
Tenants may Fold the same Sheep by night upon his Land.

That none of the Inhabitants of such a Village shall put in their Beasts into such *Common.*
a place, after the Corn is cut and carried, till *Michaelmas.*

That the Tenants of the Manor shall chuse their Bedle to be Collector of the *Officer.*
Lords Rents.

That if one be in quiet possession forty weeks, he shall not be outed, but by the
Kings Writ.

That if a Tenant die that hath divers Houses, which he holdeth of the Lord, that *Herriot.*
then the Lord shall have the best Beast for an Herriot, and the Parson the next best
Beast for a Mortuary.

That the Heir of the deceased shall have Heirlooms, and that is the best of the *Heirlooms.*
Ancestors goods, of every kinde some.

That if any one finde any Royal fish, that he must bring him to such a place, or *Royal Fish.*
else be presented and amerced.

That he that makes an Affray or Bloodshed, within such a place, shall lose 20. s. *Affray.*

That such as Ear Land, may turn the Plough upon the Head-Land of another.

That a Woman shall be barred of her Dower, if she receive part of the money *Joynture or*
which was had for the Land sold. *Dowers.*

That the owner of the ground shall have a Land-Bird out of an Eyrie of Cignets.

That a Woman shall have all or half her Husbands Land for her life, or Widows
estate for her Dowre.

That the Lord of a Manor may amerce his Tenants, for doing Trespas to him in *Trespas.*
his Leet or Court-Baron.

That if an Estray come into a Hundred, and any of the Resiants therein esloyn *Esloyning an*
him, that the Lord may distrain him till he have brought it again, seems good. *Estray.*

That men of such a place, may not Devise their Land longer then for life; but it
seems the Statutes have altered this. *Sett. 3.*

That the Parson of the Parish shall always keep a Bore and a Bull for the Parish, *Devise of Land.*
and every Parishioner that hath loss by his Nonresant, may have an Action of the Case. *Parson of a*
Parish.

That a Copiholder for life, under a hundred pound, may name his Successor to the *Copiholder.*
Lord.

That every one that doth Land Goods to go by Sea, or carry Goods, and lay on *Toll.*
such a ground to be carried by Sea.

That every one that goeth over such a ground shall pay a certain sum of money *Wharfage.*
for Toll.

That all that hold Land of the Lord of the Manor that hath a Grift Mill, shall *Grinde at a*
grinde at that Mill, and the Lord must grinde it. *Mill.*

That the Lord of a Manor may grant Copihold estates in Fee, tail, or for life, and *Copihold Mann*
in Possession or Reversion. *or.*

That the Copiholders may have Common in the Lords, or in anothers Soil. *To grant Estates.*
Common.

That the Inhabitants of *Dale* shall have Common in a great Waste.

That such a Country or Hundred shall pay no Tithe. *Tithe.*

These and such like Customs as these are good, *Co. 9. 58. 6. 60. 4. 55. 5. 84.*

upon *Littl. 139. 140. 110. 112. Hubbard. Rep. 113. 129. 122. 229. 301. 313. 370.*

March. Rep. f. 3. 15. 16. 28. 54. 83. 91. Goldsb. Rep. f. 102. 103.

6. All these and such like Customs that are good for the Substance and Matter,
may be yet bad for the manner, if they be uncertain, or mixed with any other Custom
that is unreasonable, and so entire, that they cannot be sundred, may be bad for this,
Brownl. 2 parts. f. 198.

7. The Customs of *London, the Isle of Man, of Halifax, of Kent, as Gavelkind,* *Burrow-Eng-*
and of Towns, as *Burrow-English,* and the rest, are allowed good, *Hubb. Rep. f. 158.* *lish.*

Brownl. Rep. f. 284. 217. 8. 11. 6. 11. 3. H. 7. 9. March. Rep. f. 54. 55. *Gavelkind.*

8. Those Customs that are unreasonable, and against Common Right, are void
and disallowed, as are these following.

That Fishers shall dig and fix stakes in other mens ground to tie their Nets. *To fish.*

That if one break the Pound, he shall forfeit three pound to the Lord, though he
be a stranger. *Pound break.*
That

- Woman Covert.* That a Woman Covert may devise her Land by Will.
- Fraternity.* That one Guild or Fraternity should make another.
- Harriot.* That the Lord of such a Manor shall have the best Beast of a stranger, Levant and Couchant on his Tenants ground at his Tenants death, if the Tenants have esjoynd his best Beast.
- Sell Wood.* That the Lords Tenant may sell as much Wood as he will in the Lords Woods.
- Distress.* That a man may distress anothers Cattle, Damage fasant in his ground, and keep them till the other give him what he will have.
- Make Leases.* That the Lords Bailiffs or Steward may make Leases of Freeholds.
- Common.* That the Inhabitants of a Village shall have Common in anothers ground, *Raison commorantia & residentia*, in the Houses.
- To make Leases.* That all Leases, Devises, or Estates, made by him that hath the Fee-simple for above six years, are void.
- To Amerce.* So that if a Verdict in a Leet by a Petit-Jury be found false, by a Grand-Jury true, that the Petit-Jury shall be amerced.
- To beat one.* That one may beat another, that doth come upon his ground, or burn anothers House wherein his Goods are.
- To retain Rent.* That the Lessee shall retain his Rent, if the Lessor will not repair the Houses.
- To be free from the Leet.* That if men be sworn to the Constable, they shall be exempted from coming to any Leet.
- Common.* That no Commoner shall put in his Beasts into the Common, till the Lord put in his first.
- To take away a Distress.* That the Lords Bailiff may take the Beasts from the Kings Officers, distressed for the Kings debt, and put them three days in Pound, and then if the party agree, he may have them again.
- To put Beasts in the Lords Pound.* That every Tenant that doth distress any Beasts Damage fasant, shall put the Beasts in the Lords Pound, or else be amerced.
- Estray.* That if an Estray be unruly, he may be fettered.
- To take the best Beast.* That the Lord shall have the best Beast of his Tenant, except it be as a Harriot.
- To take Tithe.* That all the Cattle of the Parish shall be cast together, and the Parson shall have the Tenth of the whole.
- Copihold Manor.* That a Copiholder for life shall fell all his Trees on his Copihold, seems not good; and yet by this a Custom in a Manor, some say is good, but not good by a Prescription.
- Tithe.* That a man that dieth in one Parish, and is carried to be buried in another Parish, shall pay a certain sum to the Church-wardens of the Parish where he dies.
- That one Parish shall not pay Tithe, or any thing in lieu of it: But this Custom claimed for a Country, may be good.
- All these and such like Customs as these are void, *Co. lupton Litt. 139, 140. C. 5: 84. Dyer 199. 358. 21 H. 7. 10. C. 46. Habb. Rep. 51.*
- So that if any Tenant of the Manor shall marry his Daughter, without leave of the Lord, he shall pay a Fine to him, *Co. upon Litt. 139.*
8. It is a good Custom to alkeage, that the Church-wardens or the Clerk, may cut Grasse in the Soil of another, to straw the Church, *March. Rep. f. 16.*
9. That the Inhabitants of such a place, that they have a Chappel at Ease, and use to Bury at the Mother Church, and have been used to repair part of the Wall of the Church, and for this to be discharged of the repair of the rest of the Church; or that they repair the Chappel of Ease, and therefore are discharged of the repair of the Church, are good Customs, *March. Rep. f. 91. 250.*
10. Custom, that none shall use the Trade of a Diet in such a Town, without leave of the Lord or his Bailiff; Or to have a Fair in his Town for ten days, and none in the next Town, during that time. That none shall Bake any Bread to sell in the Lords Bake-house. That all Ships laden and unladen in such a Haven, shall be unladen in such a place. These Customs have been allowed good, *Co. 8. 127. 2 H. 4. 924.*

11. That the Steward of a Manor may make By-laws or Ordinances, for the well-ordering of the Common, and affels a penalty on the Breakers thereof, and distrain for it, is a good Custom, *Marob. Rep. f. 28.* So a Custom to make By-laws in, or out of a Court, by a Jury, or without a Jury by a Neighborhoods common consent may be good. But see for this afterwards.

To make By-laws.

12. Custom, That none shall put in his Beasts in the Common, till the Lord put in his: That none shall carry by Land but in his Coach, or by Water but in his Boat, these are not good; and yet a Custom, That the Lord shall buy first in a Market or Fair, it seems is good: But a Custom is good in many places, where a Prescription will not be good. As a Prescription, that a Copiholder of Inheritance may sell the Trees, is not good; but such a Custom amongst Copiholders, is good: So if a Tenant that is a Freeholder, prescribe to have Wind-falls, and all the Trees withered in the top; and if the Lord make them in Cole, to have so much in money; this is not good in a Prescription in one person: But being alleaged as a Custom, and to be burnt in the house, is good as Appendant, *Brownl. 2 Rep. 198.*

Out of all which may be collected, That no Custom can be good that hath not these Properties in it,

1. It must be somewhat reasonable and congruous, for Reason is said to be the Father, and Congruence the Mother of it.

2. There must be usage in the case, the thing claimed must be oft done before, for Custom is said to be *Constitutio ex diversis actionibus saepe iteratis*; hence it is, that Usage is said to be the Nurse of Custom.

3. This Usage must be time out of memory, for otherwise the other two will not serve, *Brownl. 2 part. f. 198.*

For Answer to this Question, these things are to be known.

1. That a Prescription may be good for the matter of it, and yet void for the manner of it.

And for this, these things are to be known.

First, A Tenant in Fee-simple may prescribe in his own name, but a Tenant for life, years, by Elegit, or the like Tenant, cannot prescribe in his own name, but must prescribe in the name of him in Reversion, *Co. 6. 60.*

Secondly, If a Copiholder prescribe for any Rent, or profit to be taken out of the Land of another, and not out of the Manor, he cannot do it in his own name, but must do it in the Lords name, and he cannot prescribe against the Lord: But he may alleage a Custom within the Manor, for himself, against the Lord, *Dyer 70. Co. 432.*

Thirdly, If one that is Lord of a Manor prescribe in his own name, and the name of his Tenants at will, it seems it is not good, *Broo. Prescription 3.*

Fourthly, If one prescribe for himself, and all those who had his Tenure before him, this is not good, *Broo. Prescription 15.*

Fifthly, If one prescribe that all the occupiers of a ground are to be charged with the fencing of it; this is not good, for it is too general: But he must say, *All those whose estate he hath, and he have been used, &c.* And yet such a Prescription, That all those that are occupiers for payment of money have been discharged of Tithes, *M. 37, 38 Eliu. Co. B. Caria.*

Sixthly, One that hath onely an office for life, it seems cannot prescribe for profits thereunto appurtenant in him, and his predecessors, *Dyer 10. 40.*

Seventhly, One cannot Regularly prescribe in the Negative, *To pay no Toll*, but he must say, *They have been used to buy and sell, without payment of Toll*, *Broo. Prescription 17. 44.*

Eighthly, When the Prescription is for such a thing as may be Appendant or Regardant to a Manor, it may be in him that doth prescribe, and those whose estate he hath: But if the Prescription be for such things, as cannot be granted without a Fine or a Deed, as a Villain in Gross, Hundred Rent, or the like, there it must be in him and his Ancestors, whose Heir he is, *Broo. Incident 39. 19 H. 6. 34. 12 H. 7. 8.*

Ninthly, One cannot (as it seems) prescribe for eight loads of Wood to be cut and

See 4.
What Prescriptions shall be allowed to be good, or nor,

and taken as appertaining to a Messuage: But one may prescribe for Estovers to be employed upon repair of the Messuage, or to be spent in it, *Brownl Rep. 1 part. f. 35.*
 Tenthly, A Commoner (as it seems) may prescribe thus: That he hath *Libertatem vendendi* the Conneys in the Common, &c. and this is good, *M. 9 Jac. B. R.*
 Eleventhly, That the Lord of the Manor, for the time being, hath had and been used to have the best Beast, &c. *Dyer 199*
 Twelfthly, If it be for a way, through a private ground, he must say, *Unde, a quo ad quem & per quem*, *39 H. 6. 6. 128 H. 6. 9. 20 Aff. 18.*
 Thirteenthly, If one prescribe to be discharged of Tithes in kinde, for payment of about a peny an Acre of the Land, or for payment of not above one peny an Acre of Land; these Prescriptions are void for incertainty, *Allens case, M. 7 Jac. Co. B.* By the Court.
 These Prescriptions that follow, are instances and examples of good and bad, and they are particular, as they follow, *viz.*

For the Lord of a Manor.

For the Lord of a Manor.

For a Parson of a Parish.

For the Lord Chief Justice.

For a Sheriff.

For Fishers.

For any Man.

For the Lord of a Manor, To amerce his Tenants in his Leet or Court-Baron, if they do commit Trespas against him, in the opinion of some; or to distrain for Amercements and Fines in a Leet or Court-Baron; or to have a free Warren in any of his Tenants grounds; or to have a Park belonging to his Manor, or twenty shillings Fine of all that do make an affray or bloodshed within his Manor; or to have a Fine upon the Alienation of his Tenant; or to have a certain sum of money of all the Reliants within his Manor, *pro curto Leta*; or so, and that he hath been used to distrain for it; or that all his Tenants must bake at his Bake-house, or grind at his Mill, and not elsewhere; or to have the folding of all the Sheep in the Village, within and without his Seignior, and that none may Fold but him; or to have a Harriot after the death of every of his Tenants of his Manor for life, or years; these may be good Customs. But the Lord of a Manor may not prescribe to have a Harriot of every one that doth die within the Manor, for a stranger may die there; this is not good. So to have three pound of any man-stranger or other that shall make a Pound breach; But to have it of his Tenants only, may be good. So to have every mans Beasts, that come within the Manor, is not good. So to deliver the Beasts that are distrained and take Bond; these and such like are not good Prescriptions.
 A Parson of the Parish may prescribe to a certain sum of money for every one Buried in the Church. And a Parson of a Parish may prescribe for Tithes out of his Parish, but he cannot prescribe for Tithes within his Parish, for that is due by the very Law without Prescription; *New Book of Entries, fol. 85.* See my Book of Tithes.

The Chief Justice may prescribe to dispose the Offices incident to their Offices for the life of the Officer placed by them, and good, *22 Ed. 4. 18.*

The Sheriff cannot prescribe to have of every one within his Leet twelve pence, for his good will or reward, nor a sum of money for holding of his Leet in such a place.

Fishers may prescribe to draw or dry their Nets upon the grounds adjoining to the River, &c. *18 Dyer 167.*

Any Man may prescribe for a Court, a Way, an Office, Rent, or sum of money, Common, Estovers, a Waif, an Effray, an Advowson Appendant to a Manor, or Land to an Office, Wreck, Treasure, Trove, Market, Fair, Warren: But one cannot prescribe to Land, or to the Goods of Felsons, Outlawed persons, or Fugitives, *24 Hen. 6. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.* And yet one may prescribe *Tenacium placita* in his own Court, and that shall be good, *Plow. 322. Co. 5. 109. 9127. 1188. 1. H. 3. 28. 1. H. 4. 30. 1. H. 5. 34. 1. Co. upon Little 288. Brownl. Rep. 1. part. 121. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.*
 Adj. *judg. B. R.* So that another must scoure the Ditches, and make the Mounds and Fences between him and me; *Brook. Prescription 16.*

So that if a mans Beasts may escape in the next ground, and be there Damage-fesant, and that they may not be taken Damage-fesant, if the stranger do make fresh pursuit after them, *Bro. Prescrip.* 25. So to have a Rent out of anothers Land, and to distrain for it, is a good Prescription, 19 *H. 6.* 34. 13 *Ed. 4.* 16. So to have a Leet or Court-Baron, and to distrain for Fines, Pains, and Amerciaments there, *Bro. 34.* So to stop or turn water, to repair his Mill or Banks, *Bro. Prescrip.* 44. So to fold the Sheep at night, that do feed in his ground by day, 5 *H. 7.* 9. That the chief Pledg within the Leet shall pay him Ten shillings for all the Pledges, and that he shall have Contribution against the rest of the Pledges, 9 *H. 6.* 44. So that he is Keeper of such a Wood, and that every one that hath Common there, is to pay him Twelve pence a year; and he that hath a Gate, a Hen yearly, to look to it, 11 *H. 6.* 10. *Pr. Bro. 95.* So to have a Penny of every one that doth go through his ground, 5 *H. 7.* 9.

But to have a sum of money for going upon the High-way, is not good, unless it be to repair a Bridge there. So to have a Fair or Market, and set up a Booth in anothers Land, *Bro. Prescrip.* 57, 98. So to have a sum of money for Common, and to distrain for it being behind, *Bro. Pres.* 1. So to have two Bushels of Corn for suffering a Water-course to come to such a Mill, *Dyer* 322. So to dig in a mans several ground next the Sea, to make Bulwarks against the Enemies, *Dyer* 60. So to pay a small sum of money in lieu of Tythes; or to be discharged of Tythes for a small Tythe in lieu of payment of part, as the Tenth Fleece of Wooll in satisfaction of the Locks of Wooll, 36, 37 *Elix. Co. B. Jessops Case.* So to pay a Buck and Doe for all the Tythes of a Park, or the Left-shoulder of every Deer, *Mich. 4 Car. B. R.* So to have an Isle, or Seats in a Church, for repairing it. *New Book of Entries.*

Modus decimandi.

3. These Prescriptions that follow, are particular Instances and Examples also of both kinds, but most of them bad. As, To be quit of Tythes in *Dale*, when every one there besides him doth pay Tythes. For a Lay-man cannot prescribe in *Non decimando*; but he may prescribe in *Modo decimandi*. Also a Spiritual person, or his Farmer, may prescribe in *Non decimandi*. So to prescribe to be discharged of Tythes in one place, because he doth pay Tythe in another; or for one thing, because he doth pay Tythe of another: As of Lambs, because he payeth Tythe for Wooll; or of Cattel, because he payeth Two pence for every Cow; these are not good, *Co. 2.* 44. *Fleetwoods Case*, 7 *Jac. Co. B. M.* 5 *Jac. B. R.* So to prescribe to have such a Common in anothers Soil, as to exclude the Owner of the Soil all the year long, this is not good. So for Estovers, or Fishing. And yet one may prescribe for *Solum Vesturam*, and exclude the Owner for part of the year. So to prescribe to Common without number, and not to say of Beasts levant and couchant, or appurtenant to such a thing, or to have Common appendant to Meadow or Pasture, or the like, it seems not good, *Co. upon Lis.* 122. See more in *Common. Mar. Rep.* 38. *Brownl. Rep.* 2. 45. 101. 65. *Co. 4.* 37.

Sec. 5. For Tythe.

So a Prescription to have a corporate or compounded thing to belong to a corporate thing, or an incorporate to an incorporate, are not good, *Co. 4.* 37. *Plow.* 168. 26 *H. 8.* 4. Or one thing belong to another that by Law is not appendant, as Wastes to a Leet, or Common to a Fair, or the like. Or for a thing not prescribable, or against any Law, as to have *Silva cadua*, or the like: Or that is *malum in se*, as to be drunk, or the like: Or *malum prohibitum*, as to make a Pound-breach, or to lay Blocks in the High-way. Or to have one thing as belonging to another time out of mind, when the thing to which it doth belong is within the time of memory, as a Fee to an Office newly erected. All these Prescriptions are naught, *Co. 4.* 37. 9 *H. 6.* 44. 14 *Ed. 3.* 44. *Co. Super. Lit.* 115. *Bro. Prescrip.* 2. *Doll. & Stu.* 24. *Co.* 11. 89. *Dyer* 29. 28.

So a Prescription or Custom, that an Infant may alien when he can measure a Yard of Cloth, is void for incertainty. So if one prescribe to sell the Beasts he doth distrain Damage-fesant, or to keep them till the Owner of the Cattel pay him Three pounds, or to keep them until the Owner make him amends; or that he shall make himself amends, or the like: These are not good Customs or Prescriptions, *Dyer* 276. 8 *Ed. 4.* 18. *Co. Super. Lit.* 140. 21 *H. 7.* So to prescribe to do a thing one may do

Ecc

by

by Law, as distrain for Rent, Service, or the like, is void, *Plow.* 345. So if one do prescribe against that which another hath by Prescription; as to stop his Light or Way, or disturb his Leet, or the like; this is not good, *Co.* 9:56. *Bro: Prescrip.* 41. So to be discharged from service to a Leet, because he is Constable; from paying Tythe of one Land, because he doth sow, sever, and pay the Tythe of other Land, and the like, are not good Prescriptions.

And out of all these things may be collected,

1. That no Prescription can be good, that hath not these properties in it. 1. That it be reasonable for the thing to be had or taken; and in the creation, that it may be conceived how at the first it did begin. 2. That it be certain. 3. That it be lawful to be done, which is claimed.

5. How a Custom or Prescription shall be taken.

2. That which in many will be good or bad in a Custom, that regularly in one will be good or bad in a Prescription. For Customs and Prescriptions both, they are for the most part taken and expounded strictly, and must be strictly pursued: And therefore if a Custom be, that an Infant may make a Feoffment; he may not by this Custom make a Lease and Release, or declare his Will upon the Feoffment. And yet the Customs of *London*, and *Gavelkind*, are expounded favorably. *Dyer* 262. 196. 11 *H.* 4. 29. 21 *Ed.* 4. 24.

6. Where and how a Custom or Prescription may be destroyed and gone, or not. Custom.

For Answer to this Question, these things are to be known.

1. Where the Custom doth run with the Seignior, as that the Tenant shall pay a Fine, Heriot, or the like to the Lord, or be his Collector of his Rents, or the like; there Unity of possession in the Lord will extinguish it. But if the Custom run with the Tenants in the Land, as the Customs of *Gavelkind*, and the like, there it is otherwise. 14 *H.* 4. 2.

2. For a Custom of Common, how it may be extinct or suspended by Unity of possession or otherwise, See *Brownl. Rep.* 1 par. 181. 174. 130. 47. 2 par. 309, 210. 297.

3. How Copihold-Customs may be gone, See *Co.* of Copihold 77, 78, 79. and my Book of Copihold, fol. 148, 149. And see here *Suspension* and *Extinguishment*.

Prescription:

4. And a Prescription may be determine divers ways also. As, 1. by a Grant; as if I have a Rent, Common, or the like profit out of anothers ground, and I take a Grant from him of it; this will determine it, 21 *H.* 7. 3. 2. By Unity of Possession; as if I have Common out of anothers ground, and after I purchase the ground it self, the Common is gone. See *Extinguishment*: 3. By alteration of the state of things: As if I prescribe to Estovers to spend in the Hall of my house, and after I convert this Hall into a Kitchin or Malt-house, it seems the Prescription is gone. And yet if one have Estovers belonging to his house, and he alter any of the Rooms or Chambers, the Estovers doth continue still. And if one have a Water-course by Prescription to his Mill or Conduits, or Windows to his House; and the Tucking-Mill is turned to a Grist-Mill, or the House be fallen or turned into a Barn; yet the Prescription doth continue, *Co.* 4. 87. So if a Corporation that have a good Prescription, change the name of their Corporation, yet the Prescription doth continue, *Dyer* 270. *Mich.* 2 Jac. Agreed per Curiam. And if a man have been used to pay a Shoulder of a Buck for all manner of Tythes of his Park, and after it is disparked and sown to Corn, the Prescription is gone, and Tythes must be paid in kind. But if some of the Park only be sown, and the rest remain a Park still, it is otherwise. *Shipdams Park*, 37 *Eliz.* *M. Brown.* 1 par. 31. 4. By alteration of the payment: If there be an antient Prescription of payment, and of latter time the payment hath varied from the usage, this will not hurt. *Co.* upon *Lit.* 114. by Baron *Henden* at *Gloucester*-Assises, 17 *Car.* 5. By interruption in the passage; as if I have an antient Way to my house by Prescription, and for twenty years together it hath been stopped, or I have had another Way set out for me which I have used, yet my Prescription is not gone. So if one have a *Modus Decimandi* by Prescription, and he hath of late for divers years paid Tythe in kind; this doth not determine the Prescription. But otherwise it is when there is an Interruption of the Right, as in case of Extinguishment by Unity. *Co.* upon *Lit.* 114. See more in *Tythes*, *Franchises*, *Rents*, *Copihold*. *Brownl. Rep.* 1 par. 31, 32, 35. 2 par. 35:

By-laws

By-laws are Orders made by the common consent of a Town, Parish, or Corporation, for the good of the place, and of them that make them, to tie them further than the publick Law doth bind. Of this sort are the Ordinances of the City of London, and of other Incorporations. *Co. 5. 63. Kitch. 45.*

For the Answer of this, and the opening of this Learning, these things are to be known.

Self. 6.
By-laws, what.

What By-laws
are good, or
not; and who
shall be bound
by them, or
not.

1. That the Inhabitants of a Village or Town, without any Custom or Prescription, may amongst themselves by common agreement, and out of, and without any Court, make any By-laws or Ordinances for the publick good, as the Repair of the High-ways, Bridges, Church, or the like. And in this case the greater part, without Custom, shall bind the rest. But if it be for their own private profit, as for the well-ordering of their Commons, or the like; there without a Custom they cannot make By-laws. And if it be in such a case, the greater part cannot bind the lesser part, without a special Custom for it. *Co. 5. 63. Hob. Rep. pl. 266. 44 Ed. 3. 19. Dyer 322: 21 H. 7. 20. 40. 11 H. 7. 13. 21 Ed. 4. 54. 8 Ed. 2. iir. Affise, 413.*

2. Corporations by Prescription or Patent, may without question make Ordinances or Constitutions for publick good, without any Custom or Prescription. But if it be for any thing that concerns themselves only, some say they must have Custom or Prescription for it: Others say, by the very incorporating it is included and incident, as to sue and be sued, so to make By-laws for the better government of it self. And this I take to be the Law. *Hob. Rep. f. 182. Co. 5. 63. Doff. & Sin. 74.*

3. If a Lord of a Leet or Court-Baron claim a power to make By-laws in, or belonging to his Court, he must claim it by Prescription, and prove the usage by the making of those By-laws, and the punishment of offenders for the breaking of them. *Brownl. Rep. 2 par. 180. Goldsb. Rep. f. 79.*

4. In these cases where they have power, they may make an Order for a Rate to raise money to Repair, or the like: And they may appoint a common Officer to receive it, and give him power to distrain for it; who after demand may do it. Or they may make an Order, That such a man as is bound to repair, shall do it; or upon any man to do such a thing, and put a penalty on his head if he do it not, and appoint an Officer to levy it; and all this without any special Custom for it. And it is best to give the Penalty for not repairing of High-ways, to the Lord; and for not repairing of Churches, to the Churchwardens. *44 Ed. 3. 19. 11 H. 7. 14.*

5. So by the very Common-Law, the Churchwardens with consent of the major part of a Parish, may tax the Inhabitants and all others that have Land in the Parish, towards the Repair of the Church; and they may make a By-law for the levying of it; and all this without any Custom alleged for it. *Co. 5. 66. 11 H. 7. 14. 21 H. 7. 20.*

6. These Taxes and By-laws will not charge strangers, and those that dwell out of the Town, Village, or Precinct of the Leet, that hath not Land there; except it be in London, and some special places and cases for publick good. One Parish therefore cannot by a By-law bind another Parish. *Co. 5. 63. Brownl. 2 par. 180. 22 H. 7. 40: 44 Ed. 3. 18.*

7. By-laws made for a Parish, must be such as are for the common good of the Parish; or else they will not bind any body within, or without the Parish. And therefore such as are made for the good of the Lord of the Manor only, as that no man shall carry Hay on his Land; or for the good of one of the Parish only, as that no man shall break the Hedg of *7. S.* or the like; it seems these are not good. *Goldsb. 79. pl. 13.*

8. By-laws also that are against Common reason, or the Publick good, or the Fundamental Laws, are not good, or binding to any persons within or without the place, be it in a Corporation or elsewhere. And therefore a By-Law with a Penalty of Imprisonment, is adjudged void, *Co. 5. 64.* The Town of *Newbury* made a By-law, That none should exercise any Trade there, that had not been Apprentice there for seven years, and lived five years within the Town; was adjudged void, *Hil.*

14 Jac. B.R. The City of London made a By-law, That none there of such a Trade should take to his Apprentice the son of an Alien; and that the Obligations and Covenants for the binding of him should be void. This will not make the Assurances void. *Trin 33 Eliz. 49. Degrel vers. Powk's Case.*

9. No By-law made by any Corporation against the Kings Prerogative, or the common profit of the people, is to be allowed or put in use, till it be allowed by the Lord Chancellor, Lord Treasurer, or Chief Justices of either Benches, or three of them. *Stat. 9 H. 7. 7. Co. 11. 53. Co. 63, 64.*

10. When it is so allowed by them, if it be unreasonable, or against Law, it may be afterwards disallowed by the Judges, *Co. 11. 54.* See more, *Stat. 33 H. 8. 27. 28 H. 8. 5. 19 H. 7. 7. See Ordinance. Brownl. 2 par. 284.*

CHAP. LXII.

Of Debet and Solet, Detainer or Retainer, and Departure out of the Realm.

Debet and Solet, what.



Debet and *Solet* are certain formal words used in Writs, which are not to be omitted in them, that are used according to the diversity of the case. As if one sue to recover any Right whereof his Ancestor was disseised by the Tenant or his Ancestor, then *Debet* is used only in the Writ: But if he sue for any thing that is now first of all denied, then he useth both these words. And so it is of *Debet*

and *Detinet. Regist. 140.*

Detainer and Retainer.

Detainer or *Retainer*, is the keeping of a thing in the nature of a Pledg, till he satisfie a Duty. So an Inn-keeper may keep his Guests Horse, till he be paid for his own and his Horses meat: A Tailor the Garment made, till he be paid for the making of it: A Sheerman or Dyer the Cloth, till he be paid for sheering or dying, as a Pledg only, *Co. 8. 147.* See *Action of the Case*, and *Desinne*, in my First Part of the *Marrow of the Law*; and in *Visitors. Brownl. 2 par.*

Departure out of the Realm.

It is said by some, That if one depart out of the Realm without Licence, he doth forfeit his goods. But we find no such Law at this day, nor any Restraint herein, but that men may go and come as they please, if there be no special Prohibition by the Lord Protector. But such a Law there was, That none might go out of the Realm without the Kings leave, and some punished in the *Star Chamber* for going without leave; which is repealed. But it is said, if a Subject be out of the Land, and commanded home by the King, and he refuse, that he may seise his goods. See for this, *Stat. 5 R. 2. cap. 2. 7 R. 2. c. 14. 13 R. 2. c. 20: 21 Jac. 18. Cromp. Jur. 31. 84. 109. Dyer 375.*

CHAP. LXIII.

Of a Deed.



Deed is a Writing or Instrument written in paper or parchment, sealed and delivered; to prove and testify the Agreement of the Parties whose Deed it is, to the things contained in the Deed. *Terms of the Law. Co. super Lit. 35.*

A Deed, what.

All Deeds are either Indented, or Poll. The Deed indented (which is that which is called an Indenture) is, when the paper or parchment is cut and indented. And it is defined to be a Writing containing a Conveyance, Bargain, Contract, Covenant or matter of Agreement between two or more, and is indented

The kinds:
Indenture.
Deed-Poll.

in the top or side, answerable to another that likewise doth comprehend the self-same matter. And this is so called, because it is so indented; for albeit it be called an Indenture; and begin in these words, *Hac Indentura, &c.* yet if it be not actually indented, it is no Indenture: And of the other side, if it be not so called, or these words be omitted, yet if it be indented, it is an Indenture. And this was antiently called *Charta cyrographata vel communis*, because each party had his part. *Terms of the Law. Co. super Lit. 229, 143. 38 H. 6. 23.*

The Deed-Poll is that which is plain without any indenting, when the parchment or paper is polled or cut even: And this was antiently called *Charta de una parte*: And this is single, and but one; which the Feoffee, Grantee, or Lessee for the most part hath.

The Deed indented is also sometimes Bipartite, *i.* of two parts, when there are two parties, and two parts of the Deed. And then commonly the Feoffor, Grantor, or Lessor hath the one part, and the Feoffee, Grantee, or Lessee hath the other part. And sometimes it is Tripartite, *i.* when there are three parties and three parts; and then commonly each party hath a part of the Indenture. And sometimes it is Quadripartite, &c. And according to the parts, they do seal interchangeably one to another.

And amongst these parts, the part sealed by the Feoffor, Grantor, or Lessor, is said to be the Principal or Original; and the rest are called but Accessary, Counterparts or Copies; and yet all of them in Law do make up but one entire Deed. *Lit. sect. 371, 372.*

These Deeds also are sometimes in the First person, as, *Know ye that I A. B. &c.* And albeit it be an Indenture so made, yet it is good enough. And sometimes they are made in the Third person; as, *This Indenture witnesseth that A. B. hath granted, &c.* The Deed-Poll is usually made in the First person; but if it be made in the Third person, it is good enough. *Bro. Oblig. 51. Co. super Lit. 35, 36. West. Symb. lib. 1. par. 1. sect. 46.*

There are divers other distinctions of Deeds: For some are publike that do concern Countries, some of the Prince; and some are private between particular persons, and those private persons or Subjects: And these only are intended here. And of these some are absolute, and some conditional; some are inrolled, and some not inrolled; some concern the Realty, and some the Personalty; and some are mixt. And some of these also contain matter of Grant or Gift; amongst which Feoffments, Gifts, Bargains and Sale, Grants and Leases are the chief. And some of them contain matter of Discharge; as Releases, Acquittances, and Disencumbrances, and such like: And some of them contain other matter, as Confirmations, and such like. Or as others distinguish; some of them are constitutive and making, and some are remissory or liberatory.

See. 1.

And

And the first sort are some of them creating, (*i.*) such whereby any Estate, Property or Obligation not having essence before, is newly raised and created; as the first Grant of a Rent, Common, Way, &c. Estate tail, for life, years, &c. And some of them are conveying, (*i.*) such by which Estates, Properties, and the like, being already created, are conveyed to others; as Feoffments, Bargains and Sales, Grants over, or Assignments, Surrenders, and the like. Those that are of the last sort, are such as do describe and testify some precedent Contract for a duty or fact to be paid, performed or done, released or discharged: Of which sort are all Acquittances, Releases, and other such like matters of Discharge.

Note.

But here by the way two things are to be observed.

1. That there may be, and are divers other kind of Deeds besides those which are named before: For every Agreement put in writing sealed and delivered, becometh a Deed; and Attornments, Exchanges, Surrenders, Partitions, Authorities, Commissions, Licences, Revocations, and the like, are usually made given, done and granted by Deed: And there are divers other Instruments concerning Merchants, and other affairs. If therefore any of these be done by Deed, such a Deed is for the most part subject to the Rules of Deeds herein laid down. See 778.

Sym. 1 part.

2. Albeit that Feoffments, Gifts, Bargains, Leases, Attornments, Exchanges, Surrenders, and such like things, may in divers cases be as well made and done without, as with a Deed: Yet if a man will make his Claim to any thing given or granted by such Feoffment, Gift, &c. by Deed, the Deed must be such a Deed as is a good and perfect Deed by the Rules herein after laid down.

3. The parts of a Deed.

In every Deed or Writing there are two parts considerable. 1. The external or material part, *i.* the parchment or paper, wax and writing. 2. The internal or intellectual part, *i.* the sense, force, virtue and operation of the words and matter therein contained. And in the writing, context or matter contained in divers Deeds, as Feoffments, Grants, Leases, and the like, there are certain formal or orderly parts which make up the whole; of which the Law doth take special notice, *Co. sup. Lis. 6. 229. 2. 3. As,*

1. The Premises; the office whereof is rightly to set down the name of the Feoffor, Grantor, Lessor, &c. Feoffee, Grantee, Lessee, &c. and to comprehend the certainty of the thing granted or leased. And herein in some Deeds there is also a Recital of some things; and in some Deeds an Exception of some part of the thing granted before by the Deed.

2. The *Habendum*; the office whereof is to name again the Feoffee, Lessee, &c. and to set forth what Estate he shall have, and for what time he shall hold the thing given or granted.

3. There is set down and expressed upon what terms and conditions the Estate of the thing granted shall be held. And therefore there is sometimes contained therein a *Tenendum*, to set forth by what Tenure the Grantee shall hold the Land granted.

2. A Reservation or *Reddendum*, to set forth by what Rent he shall hold the Land.

3. A Condition. 4. A Warranty. 5. Covenants. 6. The Conclusion after this manner, *In cuius rei testimonium, &c.* Wherein is set forth the Date of the Deed, containing the day, month and year, and the stile of the King, or year of our Lord. And all these are sometimes contained under the Premises, and the *Habendum*.

4. The nature of a Deed indented, and a Deed-poll; with the difference that is between them.

All the parts of a Deed indented, in Judgment of Law do make up but one Deed; and every part is of as great force as all the parts together; and they are esteemed the mutual Deeds of either party, and either party may be bound by either part of the same, *Plow. 134. 38 H. 6. 24, 25. Lis. fol. 370. 9 H. 6. 35. 35 H. 6. 34.*

And the words of the Indenture are the words of either party. And albeit they be spoken as the words of the one party only, yet they are not his words alone, but may be applied to the other party, if they do more properly belong to him: For, every word that is doubtful, shall be applied and expounded to be spoken by him to whom they will best agree according to the intent of the parties; and they shall not be taken more

more strongly against one, or beneficially for the other, as the words of a Deed-Poll shall.

If therefore *A.* by Indenture enfeoff *B.* upon Condition, and then doth enter for the Condition broken; in this case it hath been held, that *A.* in his pleading may shew forth the Deed that he himself sealed, and that this is sufficient. 11 H. 7. 22. *per Brian.* And therefore also it is thought, that an Indenture made in the First person, is as good in Law as an Indenture made in the Third person, when both parties have to this put to their Seals. For if in an Indenture made in the Third person, or in the First person, mention be made that the Grantor only hath put to his Seal, and not the Grantee; then is the Indenture only the Deed of the Grantor: But when mention is made that the Grantee also hath put his Seal to the Indenture, it shall be said to be the Deed of them both. *Lis. feli. 373.*

And although both parts of the Indenture are but as one part; yet the Deed of the Grantor is as the Principal, and the other is but a Counterpart. And therefore if the Lessor only seal, and not the Lessee, yet it is as good as if both had sealed: And if there be any difference between the Parts, the Counterparts shall be made to agree with the Principal, and it shall be deemed the misprision of the Clerk. *Finch's Law, 109.*

This Deed is the strongest kind of Deed of the two; for this worketh an Estoppel, *Estoppel.* i. doth bar and conclude either party to say or except any thing against any thing contained in it. For if a Lease be by Indenture, both parties are concluded to say, that the Lessor had nothing in the Land at the time of the Lease made: So that if the Lessor hap to have the Land after by purchase or descent, the Lessee may enter upon him by way of conclusion; and the Lessee by Estoppel shall be forced to pay his Rent. But it is otherwise of a Deed-Poll; for this is commonly but of one Part, which is sealed by the Feoffor, Lessor, &c. only. And this shall be expounded to be the sole Deed of the Feoffor, Lessor, &c. and the words therein contained shall be said to be his words, and shall bind him only, and be expounded altogether in advantage of the Feoffee, Lessee, &c. and against the Feoffor, Lessor, &c. and this doth not work any Estoppel against either party, *Plow. 434. 431.* But if a Deed be indented or poll, and there be therein reciprocal Covenants between them from one to another; albeit there be but one Part, yet if each of them seal it and deliver it the one to the other, this is good for both parties; and each of them that can get the Deed into his hand to shew or plead, may take advantage thereof against the other. And in this case the Deed is usually kept by one indifferent between them both, *Trin. 38 Eliz. Co. B. per Curiam. Co. super Lis. 143.*

Note here first of all, that some Deeds are void from the beginning, and do never take effect; and amongst these some are absolutely void, and void against all persons, and some are void only to some purposes and against some persons. Some also that are not void from the beginning, are notwithstanding voidable; and that sometimes by the party himself that made them, or any others; and sometimes by others, and not by himself. And some Deeds are good in their first creation, and well made at the first, but become void by some matter *ex post facto.* And this may be either by an Extrajudicial act, as Rasure, or the like; or by a Judicial act, i. when by the sentence of a Court a Deed is damned, and made void, which is called a Vacate of the Deed.

To the making of every good Deed containing any Agreement, these things are requisite.

1. Writing; i. That it be written in parchment or paper, and that the Agreement be legally and formally set down, and be sufficient in Law for the composition and frame of the words. And this is called the Legal part, the Judgment whereof belongeth to the Judges of the Law.

2. That there be a person able to contract, and to be contracted with; and a thing to be contracted for; and that all these be set down by sufficient names.

3. Reading; i. That if it be an illiterate man that is to seal the Deed, and he desire to hear it read, that it be truly read, or the Contents thereof truly declared to him.

4. Sealing,

Stat. 1.
5. When and where a Deed shall be said to be good and sufficient; and when and where not, but void or voidable *ab initio.*
A Vacate of a Deed.

Things requisite to make a Deed good.

4. Sealing, *i.* That the Deed so written be sealed by the party, or some other by his appointment, for a further testimony of his consent thereunto. See *infra*.

5. Delivery, *i.* That the Deed so written and sealed be delivered by the party, or some other by his appointment, as his Deed, *Perk. sect. 137, &c.* And these last things being matters of fact, are to be tried by Jurors. And then a Deed doth begin to take effect, when it is first delivered. And therefore if a Bond be made by *7. S.* and dated while he is an Infant, but delivered when he becomes of full age, it is good, *Brownl. 1 par. 30, 31.*

6. That the ground, foundation, end and purpose of making the Deed, be good and not against the Law. Otherwise in most of these cases the Deed is void *ab initio*. Also in some cases to perfect the Contract, and make the Conveyance of the thing intended to be passed thereby good, some other ceremonies or complements are requisite, as Inrollment, Livery of Seisin, Attornment; otherwise the Deed in part at least becometh fruitless and vain. For a Deed may be void, either for that the Writing is not in parchment or paper; or being so, is not legally and formally drawn; or being so, there doth want a person able to give or make, or capable to have or take, or a thing to be contracted for: Or if so, for that it is not duly sealed and delivered; or if so, for that it is not truly read at the time of the sealing and delivery; or if so, for that it is made void by some special Law, as being made upon an Usurious contract, by Durels, or the like. Or it may at least in part lose his force afterwards by neglect of Inrollment, Livery of Seisin, or Attornment, in cases where these things are requisite.

1. In respect of the writing of it.

Every Deed well made must be written, *i.* The Agreement must be all written before the sealing and delivery of it: For if a man seal and deliver an empty piece of paper and parchment, albeit he do, therewithall give commandment that an Obligation or other matter shall be written in it, and this be done accordingly, yet this is no good Deed, *Perk. sect. 118, Co. super. Lit. 171.*

2. This Writing must be in paper or parchment: For if an Agreement be written on a piece of Wood, Linnen, the Bark of a tree, a Stone, or the like, and this be sealed and delivered; this is no good Deed, *Co. super. Lit. 229. F.N.B. 112. Lit. 27 H. 6. 9.* But it may be written in any language, or in any hand. And therefore it is held, that a Deed written in French or Latine, and in Text, Court, or Roman hand, is as good as a Deed written in English, and in a Secretary hand, *Co. 2. 3.* And albeit the writing be besides the lines, or the lines be written crooked, yet this will not hurt the Deed, *Perk. sect. 123.* And if there be any alteration, rasure, or interlining made in any part of the Deed before the delivery of it, this will not hurt the Deed, *Perk. sect. 151. Co. super. Lit. 229.* But in such cases it is policie to make a *Memorandum* of it upon the back of the Deed, and to give the Witnesses notice of it; for otherwise if it be in any place material, as in the name of the Grantor, Grantee, in the limiting of the Estate, or the like, and especially if it be in a Deed-poll, the Deed is greatly suspicious.

3. The matter written must be legal and orderly for manner and matter, *i.* There must be words sufficient to set forth the Agreement, and bind the parties; for a Deed may be void and lose its virtue in all or part, for repugnance, incertainty, and divers other matters. (whereof see in exposition of Deeds *infra*.) *Co. super. Lit. 229.* But it is not material whether the Deed be in the first, or in the third person, so as the words be aply applied, *Fitz. Feud. & Feoffments, 3. Dyer 6.* For if a Deed-poll be in the third person, or an Obligation be in the third person, these are good Deeds, notwithstanding the Statute of 38 E. 3. cap. 4. which is meant only of Obligations made beyond the Seas. So if the words of a Deed indented run in the first person, it is as good as if it were in the third person. Neither is it necessary that the English or Latine whereby it is made, be true or congruous; for false and incongruous Latine or English seldom or never hurteth a Deed: For the Rules are, *Falsa orthographia non vitiat chartam. Falsa grammatica non vitiat concessionem.* Neither is it necessary that every Deed have all the parts of a Deed before set down, as Premises, *Habendum, &c.* For a Deed may be good without *Habendum*, Warranty, Reservation, or Covenant. And a Deed is good, albeit these words in the close thereof,

thereof, *In witness &c.* be omitted; and albeit there be no mention made in the same that the Deed was sealed and delivered, so as in truth it be duly sealed and delivered, and it can be proved. Also a Deed is good, albeit it mention no time or place of date or making, or have a false date: 1. be dated at one time, and delivered at another; and albeit it have an impossible date, as the 30. of *February*, or the like: For antiently until the time of *E. 2.* and *E. 3.* the Deeds had no date, because the Law was then held to be, That if a Deed were dated before the time of memory, it was not pleadable, except it were of Record; but it might have been given in evidence. But he that doth plead such a Deed without any date, or with such an impossible date, must set forth the time when it was delivered. *Co. 2. 5. Dyer 19. Keln. 70. Co. 2. 5. 5. 117. Dyer 28. Perk. sect. 120. Co. super Lit. 6.*

The second thing required in every well made Deed is, That the person making it be able to give, grant, make, or do the thing contained in it: That the person to whom it is made, be capable of the thing to be given, granted, made or done thereby. For if it be made by, or to any such persons as are disabled, as Infants, Aliens, Women covert, Persons attainted of Treason or Felony, Ideots, and such like, it will be void in all or part. But any person natural, male or female; or politique, as sole Corporations, or Corporations aggregate of many, Ecclesiastical or Temporal, not disabled by Law, may give or take by Deed. Also there must be some matter whereabout the Contract may be conversant: It is therefore said, that in every Grant there must be Grantor, Grantee, and a Thing to be granted; and in every Obligation an Obligor, Obligee, and Thing to which the Obligor is bound. And so of Feoffments and other Deeds. *Brownl. 1 par. 120. Co. 11. 73. Plow. 555. Perk. sect. 1. 119. Feoffments infra Numb. 12. See the Titles.*

A Lease was made, and the Lessee was not made or named in the Premises of the Deed, but in the *Habendum* only; yet it was judged to be good by the two Chief Justices, *Car. Rep. f. 85.* There must be a convenient Certainty in all these things, the Persons and Things; otherwise the Deed will be void. See *Grant.*

The third thing required in every well made Deed, is, That if the party that is to seal it be a blind or an illiterate man, and desire to hear it read, that it be so: For if such a man be to seal a Deed, and he desire to hear it, or to hear the contents of it read or declared to him first, and it be not done, and he afterwards seal and deliver it, this is no good Deed. So if upon or without any such request made by him that is to seal and deliver it, the party himself to whom it is made, or a stranger shall read the Deed, or declare the contents thereof falsely and otherwise then in truth it is, the Deed will be void, at least for so much as is so misread or misdeclared. But if the party himself that is to seal and deliver it, before the sealing and delivery thereof cause another that is a stranger covinously to read it, or to declare the contents thereof falsely to him, and otherwise then it is, of purpose to make the Deed void; this will not hurt the Deed. So if the party that is to seal the Deed can read himself, and doth not, or being an illiterate or a blind man doth not require to hear the Deed read, or the contents thereof declared; in these cases albeit the Deed be contrary to his mind, yet it is good and unavoidable. *Co. 2. 9. 3. 11. 27. 14. H. 8. 26.*

The fourth thing required in every well made Deed is, That it be sealed. But this sealing of Deeds in times past was not used. For the Saxons used only to subscribe their Names, and to add the sign of the Cross, and to set down a great number of Witnesses. And afterwards the Normans brought in with them the Sealing of Deeds but by degrees: For first the Kings and a few of the Nobility used it, and to seal with their Seals of Arms; afterwards all the Nobility used it, and then the Gentlemen; and about the time of *E. 3.* all men began to use Sealing of Deeds, which hath been continued ever since, so that now it is of necessity; inasmuch that if a Deed be never so well written before, and delivered afterwards, yet if it be not sealed between the writing and delivery, it is not a good Deed. But if a stranger seal it by the allowance or commandment precedent, or agreement subsequent of him that is to seal it before the delivery of it, it is as well as if the party to the Deed did seal it himself. *Terms of the Law. Fair. Co. super Lit. 225. Co. 2. 4. 5. Perk. sect. 129. Perk. sect. 130. 131. 134.*

Date.

3. In respect of the persons parties thereunto, and matter therein,

3. In respect of the reading of it.

4. In respect of the sealing of it.

And therefore if another man seale a deed of mine, and I take it up after it is sealed and deliver it as my deed; this is said to be a good agreement to, and allowance of the sealing, and so a good deed. And if the party seale the deed with any Seale besides his own, or with a stick or any such like thing which doth make a print, it is good. And although it be a Corporation that doth make the deed, yet they may seale with any other seale besides their common Seale and the deed never the worse. And if there be 20. to seale one deed, and they seale all upon one piece of wax and with one Seale, yet if they make distinct and severall prints; this is a very sufficient sealing & the deed is good enough. *Perk. Sect. 136. 137. 138. Perk. Sect. 134*

2. In respect of the delivery of it. And what shall be said a good delivery or not.
3. In respect of the person that doth make it:

The fifth thing required in every well made deed is: That there be a delivery of it. And for this it must be known, that delivery is either actual, & by doing something and saying nothing, or else Verball, & by saying something and doing nothing, or it may be by both. And either of these may make a good delivery and a perfect deed. But by one or both of these it must be made, for otherwise albeit it be never so well sealed and written, yet is the deed of no force. And though the party to whom it is made take it to himself, or hap to get it into his hands, yet will it do him no good nor him that made it any hurt untill it be delivered. And a deed may be delivered by the party himselfe that doth make it, or by any other by his appointment or authority precedent or assent or agreement subsequent, for *omnis ratihabitis mandato aequiparatur*. Every Ratification is equivalent to a command, And when it is delivered by another that hath a good authority and doth pursue it, it is as good a deed as if it were delivered by the party himselfe: but if he do not pursue his authority when it is otherwise. And therefore if a deed or the contents thereof be read or declared to a man that is to seale him; and he (being illiterate) doth deliver him to a stranger, and bid him examine him, and if it be so as it was read to him, then to deliver him as his deed, otherwise to redeliver him to him againe that made it; in this case if the deed be in truth, otherwise then it was read; and yet notwithstanding he to whom it was delivered doth deliver him to him, to whom it is made; this delivery shall not avail, neither is the deed by this delivery become a good deed. *Co. 2. 4. 5. Perk. Sect. 137. 9 H. 6. 37. Perk. Sect. 137. 9 H. 6. 37. Co. 11. 28. 3. 35. 47 E. 3. 3.*

4. In respect of him to whom it is made.

And so also a deed may be delivered to the party himself to whom it is made or to any other by sufficient authority from him: or it may be delivered to any stranger for and in the behalfe, and to the use of him to whom it is made without authority. But if it be delivered to a stranger without any such declaration, intention or intimation unlesse it be in case where it is delivered as an Escrow, it seems this is not a sufficient delivery: And yet if an Obligation be made to the use of a third person expressed by the deed, and the obligor deliver it to him to whose use it is made, this is said to be a good delivery. And albeit it be delivered before or after the day of the date of it, yet it is good enough: but if it be delivered before it be sealed it is nothing worth. And where it is delivered before the date, yet in the pleading of it it must not be so set forth. *Dyer. 167. Perk. Sect. 137. 8 H. 26. Co. super Lit. 36. 3. 26. 5. 119. 10. H. 16. 25. 13 H. 4. 8. Dyer. 192. Co. 2. 4. Plow. 492.*

3. In respect of the time.
4. In respect of the manner and order of delivery.

Sect. 4.

If I have sealed my deed, and after I deliver it to him to whom it is made, or to some other by his appointment and say nothing, this is a good delivery. So if I take the deed in my hand and use these or the like words; Here take him, or this will serve, or I deliver this as my deed, or I deliver him you; these are deliveries. So if I make a deed of land to another, and being upon the land I deliver the deed to him in the name of Seisin of the land; this is a good delivery. So if the deed be sealed and lying in a window, or on a Table, and I use these or the like words, there he is, take it as my deed; this is a good delivery and doth perfect the deed, for as a deed may be delivered by words without deeds, so may it also be delivered by deeds without words. But if a man seale and acknowledge before a Major or other Officer appointed for that purpose a writing provided for a Statute or a recognisance this acknowledgment before such an Officer shall not amount to a delivery of the deed so as to make it a good obligation if it happen not to be a good Statute or Recognisance. *Co. 9. 137. Dyer. 192. 167. Co. super Lit. 36. 49. 35. Ass. pl. 6. Adjudged Trin. 37. Eli B. R.*

The

The delivery of a deed as an Escrow is said to be where one doth make and seale a deed and deliver it unto a stranger untill certaine conditions be performed, and then to be delivered to him to whom the deed is made to take effect as his deed. *As an Escrow Deed.*

And so a man may deliver a deed, and such a delivery is good. But in this case two cautions must be heeded. 1. That the form of words used in the delivery of a deed in this manner be apt and proper. 2. That the deed be delivered to one that is a stranger to it, and not to the party himselfe to whom it is made. The words therefore that are used in the delivery must be after this manner. I deliver this to you as an Escrow to deliver to the party as my deed; upon condition that he doe deliver you 20l. for me, or upon condition that he deliver up the old bond he hath of mine for the same money, or as the case is. Or else it must be thus. I deliver this as an Escrow to you to keep untill such a day &c. upon condition that if before this day he to whom the Escrow is made shall pay to me 10l. or give to me a horse, or infeeoffe me of the Manor of Dale, (or perform any other condition) that then you shall deliver this Escrow to him as my deed. 19. *H.8. Kelm.* 88. 14 *H.8.* 22. 14 *H.6.* 42. *Perk. Sell.* 141. 140. 142. 138. 143. 144. *Fitz. Feoffments & Feit.* 4. 13. 15. Co 9. 137. *super Lit.* 48. 36.

For if when I shall deliver the deed to the stranger, I shall use these or the like words. I deliver this to you as my deed; and that you shall deliver it to the party upon certain conditions: Or, I deliver this to you as my deed to deliver to him to whom it is made when he comes to London, in these cases the deed doth take effect presently and the party is not bound to perform any of the conditions. So it must be delivered to a stranger, for if I seale my deed and deliver it to the party himselfe to whom it is made as an Escrow upon certaine conditions &c. in this case let the form of words be what it will, the delivery is absolute, and the deed shall take effect as his deed presently, and the party is not bound to perform the conditions; for, *Intraditionibus Chartarum non quod dictum sed quod factum est inspicitur.* (i) the Law looks upon what is done. But in the first cases before where the deed is delivered to a stranger, and apt words are used in the delivery thereof, it is of no more force until the conditions be performed then if I had made it and layd it by me and not delivered it at all, and therefore in that case albeit the party get it into his hands before the conditions be performed, yet he can make no use of it at all, neither will it do him any good.

But when the conditions are performed, and the deed is delivered over, then the deed shall take as much effect as if it were delivered immediatly to the party to whom it is made, and no act of God or man can hinder or prevent this effect then if the party that doth make it be not at the time of making thereof disabled to make it.

He therefore that is trusted with the keeping and delivery of such a writing ought not to deliver it before the conditions be performed, and when the conditions be performed he ought not to keep it but to deliver it to the party. For it may be made a question whether the deed be perfect before he hath delivered it over to the party according to the authority given him. Howbeit it seems the delivery is good, for it is said in this case that if either of the parties to the deed dye before the conditions be performed, and the conditions be after performed, that the deed is good, for there was *traditio inchoata*, delivery begun in the life time of the parties, & *postea consummata existens*, finished by the performance of the conditions, it taketh his effect by the first delivery without any new or second delivery, and the second delivery is but the execution & consummation of the first delivery. And therefore if an Infant, or woman covert deliver a deed as an Escrow to a stranger, and before the conditions are performed the Infant is become of full age, or the woman is become sole, yet the deed in these cases is not become good. And yet if a disseisee make a deed purporting a lease for years, and deliver it to a stranger out of the land as an Escrow, and bid him enter into the land; and deliver it as his deed, and he do so, this is a good deed, and a good lease, so that to some purposes it hath relation to the time of the first delivery, and to some purposes not. *Brownl. Rep.* 1. part. 53. See *Alts, Fitz. Feit. & Feoffment* 13. *Idem.* Co. 3. 35. Co. 5. 84. 3. 36. Co. 3. 35, 36.

Relation.

Double Delivery.

In case where a deed is merely void and doth take no effect by his first delivery, as where a woman covert doth seale and deliver a deed, or the like, and she after being sole after her husbands death doth deliver the deed againe, in this case the deed is become good. So where a deed originally good doth become void by matter *ex post facto*, as by breaking the Seale or the like, if the party to the deed seale and deliver it again; by this means the deed is become good again. But regularly there may not be two deliveries of a deed, for where the first delivery doth take any effect at all, the second delivery is void. *Brownl. 1. part. 104. Perk. Sess. 154. 11 H. 6. 17.*

And therefore it is held that if an Infant or a man by dresse of imprisonment do make seale and deliver a deed &c. (in which cases the deed is not void but voidable) and after the Infant being of full age, or the man imprisoned being at large, doth deliver this deed again the second time; this second delivery is void: *Debile fundamentum fallit opus*. See *Brownl. Rep. 30*. But if an Infant within age doe write and seale and deliver when he is of full age this is good. So if a man be disseised and make a lease for years in writing and deliver the deed, and after deliver it upon the ground, this second delivery is void, for the first delivery made it his deed; but if he had delivered it as an Escrow to be delivered as his deed upon the ground, this had been a good second delivery. And by all this that hath been said it appeareth, that the putting to or subscribing of the parties name or mark to the deed he is to seale is not essentiall, for a deed may be good albeit the party that doth seale it doth never set his name or his mark to it, so as it be duly sealed and delivered. But it is the best and surest way notwithstanding to have the name or mark of the party subscribed, for by this means the deed may be the better proved when the witnesses are dead. *Perk. Sess. 154. Co. 5. 119. Co. super Litt. 48. New Terms of the Law in Fair. 9. Jac. Scors. Case.*

Subscribing of the parties name or mark not necessarie.

Note.

Note here, that albeit a writing or Escrow that is not sealed and delivered in manner as aforesaid may not be used nor pleaded as a deed; yet it may serve and be used as an evidence and prooffe of the agreement contained therein. And whatsoever may be done by word without any writing may much more and better be done by writing unsealed or sealed, though it be not delivered as aforesaid.

Sess. 5.
6. In respect of the ground & end of it.

And the last thing required in every well-made deed is, that it have a good foundation, and be to a good end, for albeit a deed have all the qualities of a good deed before required, *viz.* that it be well made, read, sealed, and delivered, yet it may be void or at least voidable for others causes, as when it is either unjustly gotten and obtained, or corruptly in pursuit and execution of some dishonest agreement, or to a dishonest end or purpose made. A deed therefore, whether it be a feoffment, gift, grant, lease, release, confirmation or obligation that is made or obtained by *manasse*, or *dresse*, that is forced by feare of beating or Imprisonment, or made in pursuit of an usurious contract or for that it was made fraudulently, or made against the statute 23 H. 6. it may be voyd or voidable at least. See the Titles and obligation. Co. 2. 9. *Perk. Sess. 16. Dyer. 143. 45 E. 3. 6.*

6. where a deed good in his creation may become void by matter *ex post facto*. And what will make such a deed void or not.
1. By Rasure.

If a deed that is well and sufficiently made in his Creation shall be afterwards altered by rasure, interlining, addition, drawing a line through the words (though they be still legible) or by writing new letters upon the old in any materiall place or part of it, as if it be in a deed of grant, in the name of the grantor, grantee, or in the thing granted or in the limitation of the estate, or if it be in an Obligation, when the word [Heires] shall be inserted, or the summe increased, or in the date of either, or the like; be the same either by the party himself that hath the property of the deed or any other whomsoever, except it be by him that is bound by the deed; and be the same with or without the consent of him to whom it is made or doth belong; in this case and by either of these meanes the deed hath lost his force and is become void. Co. 11. 27. 5. 11. 9. *Dyer. 59. 261. Perk. Sess. 123. 135. Kelsw. 162. Fitz. Release. 27. 14 H. 8. 25. Bro. Fair. 9.*

And if the alteration be made by the party himself that oweth the deed, albeit it be in a place not materiall, and that it tend to the advantage of the other party and his owne disadvantage, yet the deed is hereby become void.

But

But if the alteration be made by the party himself that is bound by the Deed in any materiall or immateriall part thereof, or a stranger without the privity or consent of the owner of the Deed shall make any such alteration in any part of a Deed not materiall; (as if it be a Deed of a grant containing a lease for years, and there be inserted between [To have and to hold] and [for 30 years] these words [from henceforth :] Or if it be an obligation and there be inserted between [*Obligatus*] and [*per presentes*] these words [*Executores meos*] in both which cases those words are needless and without any fruit at all ; hereby the Deed is not hurt, but it remaineth good notwithstanding. But if the alteration be before the delivery of the Deed, be it whatsoever or by whomsoever, it will not hurt the Deed. And herein it must be observed that then a rasure, &c. is most dangerous; and the Deed thereby most suspicious when it is in a Deed Poll and there is but one part of the Deed ; and when the rasure or other alteration is in any materiall part of the Deed ; and when the alteration makes to the advantage of him that doth owe the Deed, and to the disadvantage of the other that made it; and when there doth appeare some other thing to be written before, and when there is no other part of the Deed, recitall, defence, or other matter to which this may be compared, and that may make it appeare to be before the delivery ; and when there be other parts of the Deed or other matters whereunto this being compared doth not agree in that part wherein the alteration is, and when the Deed hath been in the smoke, or any such like means hath been used to cover the alteration. And in these cases the matter was anciently used to be tried by the Judges upon the view of the Deed; but it is now used to be tried by Jurors, whether the rasure, or other alteration were before the delivery of the Deed or not. *Perk. siff.* 123. 124. *Bro. Fait* 6. *Perk.* 129. 127. 128. *Co. super Litt.* 225.

And if after the sealing, delivery and perfection of a Deed, the seale thereof happen to be broken off, or to be utterly defaced, so that no signe or print thereof can be seen, or it appeareth to have been broken off and it is glued, or the wax new heat and set on again; or the labell of the Deed hath been broken off from the Deed and is sewed on again; or the Deed is new sealed with oser wax, be the same by whatsoever means, or whomsoever, unless it be by him and his means that is bound by the deed; in these cases and by either of these means the deed is become void. If *A. B.* and *C.* be bound joyntlie and severally in a Bond, and the Seales of *A.* and *B.* are eaten off with Mice and Rats, it seems by this the Deed is become void as to all 3 of them. *March* 127. *Pl.* 204. But if any piece of the seale remain fixed to the Deed, and there be any print left upon that peece, the Deed doth continue good. And if after the seale of a Deed be broken off the party that sealed it doe seale and deliver it *de novo*; by this means it seems the Deed is become good again. *Dier.* 59. *Co.* 11. 28. 5, 23. *Dier.* 112. *Perk. siff.* 135. 136. *Bro. Oblig.* 83.

And if a Deed be delivered up to the party that is bound by it to be cancelled and it be so: or if he that hath the Deed doth by agreement between him and the other cancell the Deed; by either of these means the Deed is become void. But if an Obligee deliver up an Obligation to be cancelled, and the obligor doe not afterwards cancell him, but the obligee happen to get him again into his hands, and sue the obligor upon him, the obligor hath not any plea to avoid him, for the Deed remains still in force. *Trin.* 38 *El. Co. B. Dier* 112.

And if an Obligation be delivered as an Escrow to a stranger to be delivered to the obligee on certain conditions, or to a stranger to the use of the Obligee, and when this is after tendered to the Obligee he doth refuse it and disagree to it; or if an Obligation be made to a feme covert, and her husband disagree to it, in all these cases the Deed is become void. And like Law is of other Deeds in divers such like cases, but the party bound by the Deed may not in these cases plead *non est factum* to the Deed. And in these cases when the party hath once by his agreement made the Deed good, he cannot afterwards by his disagreement make it void: and when once by refusal and disagreement he hath made the Deed void, he cannot by agreement on acceptance afterwards make it good. *Co.* 3. 26. 5. 119. *Dier* 167.

2. By breaking or defacing of the Seale.

3 By redelivery or cancelling of it.

4 By disagreement.

Agreement.

5. By Judgment of a Court.
Vacat of a Deed.

7. When and where a Deed may be good in part and void in part. Or good against one person and void against another. Or not.

A Deed also good in his Original Creation may be afterwards damned or avoided by sentence and order of a Court, and this is usually done in the Starr-Chamber and in the Chancery, and it is when it appeareth that the Deed was obtained by some fraud, force, circumvention or such like practise, or when it doth appear to be forged, or the like, or otherwise; see *Brownlow Rep. 1 part. 45. 51. Crim. Jur. 29. 40. Bre. Fait. 38.*

For the answer of this question these differences must be observed: 1. When a Deed is void *ab initio*, and when it doth become void by matter *ex post facto*. 2. When the Deed which is void in part from the beginning is entire, and when it doth consist of severall clauses: and when it doth consist of severall cluses when the severall clauses are absolute and distinct, and when they are severall and yet the one hath dependency upon the other. For if any of the Covenants of an Indenture, or the conditons of an Obligation be against Law, and the rest of the Covenants or conditions be good and Lawfull; in this case those that are against Law and the Deed as to that part are void *ab initio*, and the rest and the Deed as for that part are good *ab initio*. So if three distinct Obligations are written upon a peece of parchments, and the one of them only, read to the Obligor, and he being an illiterate man seale and deliver the Deed, in this case this is a good Deed for that which was read; and void for the rest *ab initio*. But if an Obligation be for 20 l. and it be read to the Obligor an Obligation of 20 s. this is void for the whole *ab initio*. *Co. 11. 27. 14 H. 8. 27. 28. 29.*

If a Deed be read as containing the grant or gift of an estate taile, and a Letter of Attorney to give Livery of Seisin, and in that sence the party doth seale it, and in truth it is a Feoffment and conveyance of an estate in Fee-simple; in this case albeit the Letter of Attorney were truly read, yet because it hath dependence on the estate, it is void for all. *Co. 11. 27. Kew. 703 E. 30. 31.*

If a man be indebted to me 20 l. on a Contract, and 100 l. on an Obligation, and he pay me this 20 l. and I am to make a release for it, and the intendment of the release is no more, and it is read to me being an illiterate man, but in truth it is a general release, in this case it seems it is good for so much as it is intended, and was declared void for the rest. *Co. 11. 28. Fitz. Feoffments & Faits. 57. 47 E. 3. 3.*

If the condition of an obligation be altered by rasure, &c. the Obligation also is hereby become void, because the condition and obligation are one Deed, but if the rasure, &c. be in the defeasance of an Obligation, this will not make the Obligation void. *Dier. 27.*

If a Deed containe divers distinct and absolute Covenants, and any of these Covenants be altered by Addition, Interlineation, Rasure or the like, by this means the whole Deed and not that part only is become void. *14 H. 8. 25. 26. Co. 11. 28.*

If there be divers Grantors, Obligors, &c. named in a Deed and one of them only doe seale the Deed, this is a good Deed as against him that doth seale and void as to all the rest that doe not seale. And if divers enter into Covenants by a Deed severally, and the seale of one of them is broken from the Deed; in this case the Deed is good still as to all the rest, but void as to him. But if an Obligation, or the Covenants of a Deed be joynt and not severall, or joint and severall, and the seale of one of the Obligors or Covenantors is broken, or the Obligation or Covenants be altered by rasure or the like, hereby the whole Deed is become void. *Co. 5. 23. 11. 28. 14 H. 7. 5.*

And it is a Rule that if an Obligee by his Act or his own Lachesse discharge one of the Obligors, where they are ioyntlie and severally bound, this doth discharge them all. *March 126. pl. 206.*

If I be bound in an Obligation to a Monk and I. S. this Deed is void as to the Monk, but good as to I. S. So if a Monk and I be bound to another; this is good as against me, but void as against the Monk. And so it is in case of a Grant. *14 H. 8. 29. Perk. f. 2.*

By a power of revocation or a condition a Deed may be made void in part and continue in his force for another part. And therefore it seems in the usuall case where a Deed is made upon condition that if such a thing be, or be not done, that the

the Deed shall be void, or that these presents shall be void; that in these cases the whole Deed and all the Covenants therein contained are void; But if the frame of the condition be, that upon such a thing to be or not to be done, it shall be lawful for the Feoffor, Lessor, &c. to re-enter, or that the demise shall be void, without more words; in these cases the estate only and those Covenants that are incident thereunto, as for quier enjoying and the like, and the Deed as to that part only is void: and for other Covenants that are Collaterall and have no dependence upon the estate that the Deed doth remain in force and is good still, for a man may grant two acres upon condition to re-enter into one of them. If it be intended that the whole Deed shall be void, the best way is to use these words [then these presents and every thing therein contained shall be utterly void.] Co. 1. 173. *Dier.* 127. See in *Leake's Numb.* 13.

All Deeds doe take effect from, and therefore have relation to the time not of their date but of their delivery: and this is alwayes presumed to be the time of their date unless the contrary doe appear. And hence it is, That if a Statute be acknowledged the 26. day of May, and the Conusee make a release of all demands dated the 25. day and deliver it the 27 day; that by this release the Statute is discharged.

And if the defeasance of a Statute doe bear date before, and the delivery of it be after the Statute; that the conusor may shew this and take advantage of it in avoidance of the Statute. And that if a writing be dated in the minority of an Infant and be sealed and delivered by him when he is of full age, that this is a good Deed and will bind him: And that if a release be supposed to be made by a husband to barr a duty due to the Wife, and it be dated during the Coverture but in truth it is sealed and delivered by the Husband before the Coverture; that this shall not barr the Wife: the time therefore of delivery of a Deed is materiall in all these and the like cases, and this is alwayes to be tried by a Jury. And hence it is also, That if the next presentation to a Church be granted to two severall persons by severall Deeds of severall dates, and the Deed that beareth the last date be first delivered; in this case he to whom this Deed is made shall have the Presentation, and not the other whose Deed albeit it be dated first yet is delivered last. And hence it is also that if a Lease be made for years, to begin from henceforth, or *à confessions presentium*, or *à die confessionis*; that this lease shall be said to begin from the time of the first delivery and not from the time of the date. Co. 2. 4. 5. 5 H. 7. 26. *Plow.* 491. *Dier.* 307. 315. *Fitz. Feoffments & saiss.* 87. 63. 95. *Fitz. Feoffments & Faiss.* Barro 147. Co. 5. 1.

And where Deeds have a kind of double delivery, as in Case of a delivery as an Escrow, there they shall take effect from, and have relation to the time of the first delivery or not; *ut res valeat*, for if relation may hurt and for some cause make void the Deed (as in some cases it may) there it shall not relate. But if Relation may helpe it, as in case where a feme sole deliver an Escrow and before the second delivery she is married or dieth, in this case if there were not a relation the Deed would be void, and therefore in this case it shall relate. And yet in *Goldsb.* 163. *Gawdie Fenner and Popham* Judges doubted of a Deed delivered by an Infant, and after the condition is performed in the time of his full age. And they affirme that a Deed delivered by a woman that hath a Husband as an Escrow to be delivered as her Deed, when her Husband is Dead and he die, and then it is delivered as her Deed, this is not good, for in both these cases they say the first Act is void. So if one disseise me of two acres of Land in D. and I release to him all my right in my Lands in D. and deliver it to an estranger as an Escrow, &c. untill a time and before that time he disseise me of another acre there; in this case this release shall not by relation extend to this other acre to barr me of that also. But as to collaterall acts there shall be no relation at all in this case. And therefore if the Obligee release before the second delivery the release is void and will not barr the party Obligee of the fruit of his Obligation. Co. 2. 35. 36. 1 H. 8. 2. 27 H. 6. 7. *Plow.* 244.

It is further to be observed that Deeds for the most part consist of these things. The exposition of Deeds. viz. the Premises, *Habendum*, *Tenendum*, *Reddendum*, or Reservation, Condition, Warranty, & Covenant. And in the Premises there is sometimes a Retitall, & sometimes

3 How and to what time a Deed shall have relation, and when it shall begin to take effect.

Relation:

See Relation.

The exposition of Deeds.

times an Exception contained. But all these are not essential parts of a Deed; for a Deed may be good, albeit it it have not all these parts, or it be not so formal and orderly drawn and made.

1. Premises,
what.

The Premises of a Deed, is all the forepart, of the Deed before the *Habendum*. And yet this word is sometimes taken for the thing demised or granted by the Deed. And the office of this part of the Deed is rightly to name the Grantor and Grantee, and to comprehend the certainty of the thing granted, either by express words, or by that which by reference may be reduced to a certainty; and the Exception, or thing to be excepted, if there be any. And in this part of the Deed is the Recital (if there be any in the Deed) for the most part contained. And herein also is sometimes (though improperly) set down the Estate. *Co. sup. Lit. 6. 7. 12. 51. 2. 53. Pl. 196.*

2. Habendum,
what.

The *Habendum* of a Deed, is that part of a Deed which doth begin with, *To have and to hold*: And this doth properly succeed the Premises. And the office hereof is to set down again the name of the Grantee, the Estate that is to be made and limited, or the time that the Grantee shall have in the thing granted or demised, and to what use. And herein also is sometimes, though needlessly, set down again the thing granted. *Co. super. Lit. 6. 7. 10. 107.*

3. Where a
Deed is good,
notwithstand-
ing some seem-
ing fault in
the Premises
or Habendum.

But the Deed that doth usually consist of all these parts, may be good, notwithstanding some of them be omitted, and it be not so formally made. For an Estate may be made by a Deed, without any *Habendum* at all: As if one give or grant Land to another and his Heirs, without any more words in the Deed: Or if one give or grant Land to another, and limit no Estate, without any *Habendum* in the Deed, and seal and deliver this Deed, and make Livery accordingly; in both these cases the Deed is good; and in the first case an Estate in Fee-simple is made, and in the last case an Estate for life is made. And if the name of the Grantee be not contained in the Premises, yet if it be in the *Habendum*, it may be good enough: As if one give or grant Land *Habendum* to B. and his Heirs, and he is not named in the Premises, yet this is a good Deed to make an Estate in Fee-simple. *Butlers Case, 22 Eliz. per two Chief Justices, accord. Car. Rep. 85.* And yet if the thing granted be only in the *Habendum*, and not in the Premises of the Deed, the Deed will not pass it. And therefore if a man grant Black-acre only in the Premises of a Deed, *Habendum* Black-acre and White-acre; White-acre will not pass by this Deed, *Pl. 152. Dyer 96. Perk. 352.* But if the thing newly added be implied in the thing granted by the Premises of the Deed, as being an Incident thereunto or otherwise; or it be the same thing, and expressed in other words only; in these cases the Premises and the *Habendum* may stand together. As if one grant a Manor, *Habendum* the Manor with the Advowson appendant to the Manor; or if one grant a Reversion of Land by the name of a Reversion in the Premises, *Habendum* the Land it self; in both these cases the Deed is good, and the Advowson and Reversion will pass. So also if Livery of Seisin be made of the thing newly added, in this case perhaps it may pass by the Livery. And if the thing granted be left out in all, or part in the *Habendum*, yet the Grant is good. And therefore if one grant Land to A. *Habendum* to A. his Heirs &c. or if one grant White-acre and Black-acre to A. *Habendum* Wh-acre, and omit Bl-acre; yet these Deeds are good, and all that is contained in the Premises of the Deed doth pass in both cases. And if a Feoffment be made to one, *Habendum* to him and his heirs, without the word *Assigns*; this is a good Feoffment, and the Estate thereby made is assignable: As where a Lease is made to one, his Executors and Administrators, without the word *Assigns*, this is a good Lease and assignable. So if one grant Land to A. *Habendum* to him for 100 years, or *Habendum* to him and his Assigns for 100 years; these are as good Leases as the Lease that is made by these words, *Habendum* to A. his Executors, Administrators and Assigns for 100 years. So if a Lease of Land be made to A. *Habendum* the Land to him and his Heirs for 100 years; this is a good *Habendum*, and the word [Heirs] is void, and it shall go to his Executors, &c. As also where Land is granted to A. *Habendum* to him and his Successors for 100 years; this is a good Lease, and the word [Successors] void, for it shall go to Executors, &c. And if a Lease be made *Habendum* for years, and say not how many years; this is a good *Habendum*, and a Lease for two years. *Lit. 1. Co. super. Lit. 46. Co. 6. 35. New Terms of the Law, iii. Assigns.*

A Recital is the setting down or report of something done before.

When a man is to take any new estate from the King of a thing, whereof there is any estate in being, there the former estate if it be good and of record must be rehearsed and recited in the deed, or else the second grant will not be good: but in case of a common Person there needs no such recital, neither when a man is to derive an estate out of a former, or assigne over a terme of years, is it needfull there should be any recital of the former estate in being: *Co* 1. 45. *Dier*: 77.

If one recite or rehearse an estate made for terme of years, and then after grant over that terme to another, and mistake in the recital; this mistake may make all void. As if a *Fieri facias* come to a Sheriffe to levy a debt, and he by writing recite that the defendant hath a terme of years, and doth suppose it to begin 1. *Massi*, 2. *Jaci* when in truth it doth begin the 20. of *August*, and then sell the same terme; in this case this sale is void. But if he adde withall these words in the deed [And al the interest that the defendant had in the land] or if he make sale of it for a certain number of years only; this grant may be good notwithstanding the misrecital: *Co*. 4. 74.

If one recite a former lease to be made such a day to *I S* and then make a new lease to begin after the end of the former lease, and mistake the date of the old lease; in this case the deed is good notwithstanding this mistake: *Dier*: 93. 160.

If one grant a reversion, and in reciting the lease in possession mistake the date of it only and recite all the rest truly; this will not hurt the grant: No more then where a man doth recite that the lease came to him by forfeiture; and then doth grant it by fine: for in this case albeit it did not come to him by forfeiture but by surrender, yet this mistake will not hurt. And yet in case of the King such a misrecital may make the grant void. 8 *H. 7. 3. Fitz. Grant*.

If I grant to *I S* all the lands in Dale which I purchased from *I D* or which came unto me by descent from *I D*, or I give all my goods to *I S* which I have as executor to *I D*, and in truth I have no such lands or goods, but I had them by some other meanes or of some other; in these cases and by this mistake the deed is void. But if I grant to *I S* all my lands in Dale by name, as white acre, which I purchased of *I D* and in truth I did purchase them of another; in this case this mistake will not hurt the deed. So if I grant 20. load of wood in Dale in the great wood which I had of the grant of my father, and in truth I had not of the grant of my father, but of the grant of another; in this case the grant is good. But of this matter see more in *Grant*, *Numb*: 4. *part*. 5. *Dier*. 50. 87. 376.

An Exception is a clause of a deed whereby the feoffor, donor, grantor, lessor, &c. doth except somewhat out of that which he had granted before by the deed: And this doth most commonly and properly succede the setting down of the things granted, and is made by one of these words *Except*, *Preter*, *Salvo*, *Si non*, or such like. And hereby the thing excepted is exempted and doth not passe by the grant, neither is it parcell of the thing granted: as if a manor be granted excepting one acre thereof, hereby in Judgement of Law that acre is severed from the manor: But this may be in any part of the deed and so hath it bin resolved. *Hil*. 17. *Car. Pl*. 361. 195:

In every good Exception these things must alwaies concur, 1. This Exception must be by apt words. 2. It must be of part of the thing granted and not of some other thing: 3. It must be of part of the thing only, and not of all, the greater part, or the effect of the thing granted. 4. It must be of such a thing as is severable from the thing which is granted, and not of an inseparable incident: 5. It must be of such a thing as he that doth except may have and doth properly belong to him. 6. It must be of a particular thing out of a generall, and not of a particular thing out of a particular thing or of a part of a certainty. 7. It must be certainly described and set downe. *B R Fregunns Case*. *Perk* *sett*. 62. & *c. Plow*: 19. *Co* *super* *List*. 47.

As for examples. If a man grant all his lands in *Essex* saving, besides, or except his lands in Dale, or all his lands in Dale excepting one house, or one acre in certain; or one house excepting one chamber in certain; these and such like Exceptions are good. *Plow*. 195: *Perk* *sett*. 641.

And if one grant a manor excepting one Tenement (parcell of the manor) or excepting the services of *I S* (who doth hold of the manor) or excepting one Close

3. Recital. *Quid*
4. Where it is needfull; or not

Sett. 8
5. Where misrecital will hurt a deed; or not.

6. Exception, *Quid*.

7. what shall be said a good exception; or not.

or excepting one acre, or excepting the advowson appendant, or excepting the woods, or excepting twenty acres of wood or excepting all the groffe trees; these are good exceptions. *Brownl. 1 part. 141. Dier. 103. Plow. 104. 361. 67. Co. 8. 63. 11. 47. 5. 11. Perk. Sett. 642. 3 H. 6. 35.*

And if one grant a messuage and houses thereunto belonging excepting the bayne or excepting the dove-house; it seemes this is a good exception, for they may passe by the grant of a messuage &c. And if one grant land excepting the Timber trees thereupon, or excepting the trees thereupon; or if a man sell a wood excepting 20 of the best oakes, and shew which in certain; these are good exceptions: So if one have a manor wherein is a wood called the great wood, and he grant his manor excepting all the woods and underwoods that grow in the great wood and all the trees that grow elsewhere, this is a good exception. *14 H. 8. 1. Co. 8. 63. 5. 23. In the case of Haward & Fulcher. Hil. 3. Car. B. R. Co. 11. 64.*

And if one grant a messuage and all the lands and tenements thereunto belonging excepting one cottage; this is a good exception: And if one grant a reversion excepting the rent; this is a good exception of the rent and doth keep it from passing by the grant: So if a man have a rent charge out of land and he release his right in the land except the rent; So if the Lord release to his Tenant *Salvo domino suo &c.* these are good exceptions. And if one grant all his horses except his white horse; this is a good exception of the white horse: *Per. Sett. 113. 644. Dier. 571. Plow. 361.*

And if a man be seised of a manor, and lease it by deed indented for life excepting & reserving quod bene liceat to the lessor *succidere, dare, & vendere omnes grossos arboris in dicto manerio crescentes &c.* it seems this is a good exception of the woods: But if the exception be of another thing then the thing granted. As if one grant a manor or land excepting 12 d or excepting the Tithes, or excepting one acre of ground which is no partell of the manor or of the land before granted; or if one grant the land descended to him of the part of his father excepting the land descended to him of the part of his mother; these exceptions are void. Or if the exception be such as it is repugnant to the grant and doth utterly subvert it and take away the fruit of it, as if one grant a manor or land to another excepting the profits thereof; or makes feoffment of a close of meadow or pasture, reserving or excepting the grasse of it; or grant a manor excepting the services; these are void exceptions. *2 H. 6. 45. Perk. Sett. 643. Perk. Sett. 639. Dier. 59. Plow. 361. 57. 370. Dier. 97. 264. Co. super Lit. 47. Plow. 153. 103. 104. 14 H. 8. 1. Doff. & stud. 98. Dier. 59. 263.*

So if one grant his house, chambers, cellars, and shops, excepting his shops; it is said this is no good exception. And by the like reason if one grant his meadow and pasture grounds except his meadow grounds, this exception is not good no more then if one grant two manors or two acres excepting one of them. And of this opinion was the Chief Justice in *B. R. Hil. 3. Car.* in the case of *Haward and Fulcher.*

And yet if a man make a lease for yeares of a Mill excepting the profits thereof during the life of the lessor; it is said, this hath been adjudged a good exception.

But I doubt of this case, for the exception of the profits of a thing is the exception of the thing it selfe. And a man cannot grant an estate and reserve a part of the estate as make a feoffment in fee and reserve a lease for life, or grant an Advowson and reserve the Presentation for his life. Or if the exception be of an inseparable incident and a thing that cannot be granted by it selfe and from another, as if a manor be granted excepting the Court Baron, or land be granted excepting the common appendant thereunto belonging; these exceptions are void. But exceptions of severable incidents are good. *Plow. 524. Dier. 264. Br. grant. 60. 38 H. 6. 38. Co. super Lit. 150. Co. 5. 12. Hil. 9. Jac. B. R. per Curiam.*

Or if the exception be of such a thing as the grantor cannot have nor doth belong to him by law; as if a lessee for yeares assigne over all his terme in the land excepting the Timber trees, earth or clay; this exception is not good. *This difference hath been agreed.*

But if lessee for life make a lease for years, or lessee for 21. years make a lease for 20. years; or tenant by the countess or in dower grant over their estate excepting the Timber trees; these are good exceptions. And if a lessee for life or years open a Cole-mine and then assigne over his estate excepting the mine or the profits thereof; these are void exceptions. Or if the exception be of a particular thing out of a particular thing, as if one grant white acre and black acre excepting white acre or grant 20. acres of land by particular names excepting one acre of them; these exceptions are void.

Or if the exception be set downe incertainly, as if one grant a house excepting one chamber; or grant a manor excepting one acre, but doth not set forth which chamber or which acre it shall be; these exceptions are void. *Co. super Litt. 47. Plow. 3. Perk. Sect. 643. 641.*

A *Tenendum* is a clause of the deed whereby the tenure was heretofore created. And this doth most commonly and properly succeed the *Habendum*, and was made by this word *Tenendum per servitium &c.* But sithence the Statute of *Quia emptores terrarum* when the fee simple doth passe the tenure is alwaies of the chiefe Lord and is thus set forth, *Tenendum de capitalibus dominis &c.* And this clause at this day is for the most part omitted altogether. *Co. super Litt. 6 & Co. 9. 130.*

A Reservation is a clause of a deed whereby the feoffor, donor, lessor, grantor &c. doth reserve some new thing to himselfe out of that which he granted before. And this doth most commonly and properly succeed the *Tenendum*, and is made by one or more of these words *Reddend^o, reservand^o, solvend^o, faciend^o, inveniend^o*, or such like. This doth differ from an exception which is ever of part of the thing granted and of a thing in *esse* at the time, but this is of a thing newly created or reserved out of a thing demised that was not in *esse* before; so that this doth alwaies reserve that which was not before or abridge the tenure of that which was before. *Co. 10:107. Plow. 132. Co. super Litt. 47. Perk. Sect. 625.*

In every good reservation these things must alwaies concur:

1. It must be by apt words. 2. It must be of some other thing issuing or coming out of the thing granted and not a part of the thing it selfe nor of some thing issuing out of another thing. 3. It must be of such a thing whereunto the grantor may have resort to distraine. 4. It must be made to one of the grantors and not to a stranger to the deed. As for examples, If a man grant land yeelding and paying money or some such like thing yearly, this is a good reservation. But if the grantee covenant to pay such a summe of money, or to doe such a thing yearly; this is no good reservation; but a covenant to pay a summe of money in grosse and not as a rent. If a lease be made for years rendering a rent to the lessor or his heirs, in the disjunctive; or rendering a rent to the lessor, without saying [and his heirs &c.] or rendering a rent during the said term; and doth not say to whom; or rendering 10 l. to the lessor and 5 l. to his heirs; all these reservations are good. But if a lease be made rendering rent to the heirs of the lessor; this reservation is void because the rent is not reserved to himselfe first. *Plow. 132. Perk. Sect. 626. Co. 8. 71. Plow. 132. Co. 5. 121. 8. 71. super Litt. 214. 213. 99.*

If one grant land, yeelding for rent, money, corne, a horse, spurs, a rose, or any such like things; this is a good reservation: but if the reservation be of the grasse, or of the vesture of the land, or of a Common or other profit to be taken out of the land; these reservations are void. If one grant a manor, mesuage, land, meadow, or pasture, or the vesture or herbage of land, meadow or pasture, rendering a rent; this is a good reservation. *Co. super Litt. 142. Co. super Litt. 47. Co. 5. 3. Perk. Sect. 626.*

But if one grant Tithes, rents, commons, advowsons, offices, a corody, mulcture of a Mill; a Faire, market, priviledge, or liberty, reserving a rent; this reservation is void: And yet such a reservation also in case of the King is good. And in case of a Subject also, if a lease be made by deed in writing of any such thing for a terme of years reserving a rent; this may be good by way of contract to produce an action of debt, though not as a rent to be distrained for: And thus by apt words an apt rent out of manors and such like memorable things, or divers rents may be reserved upon one grant: *Co. 5:55. Dier: 308. Co. super Litt. 47:164, 213:*

As if one grant the Manors of *A. B. and C.* rendering for *A.* 20s. for *B.* 20s. and for *C.* 20s. these are good Rents and severall. So if one grant the manors of *A. B. and C.* rendering 3 *l. viz.* for *A.* 20 s. for *B.* 20 s. and for *C.* 20 s. this is a good reservation, but in this case the rent is intire. Also one may reserve one Rent one year and another Rent another year; as 10 s. one year, and 20 s. another year, or one may reserve a Rent to be paid every second or third year, and no Rent the other years; or one may reserve one kinde of rent one year, and another kinde of rent another year; and these reservations are good. *Co. super Lit.* 225. 8 *H. 7. 9. Bro. Fine* 36. *Reservation* 4.

And these reservations may be by Fine as well as by Deed, or it may be in case where the Lessor hath a reversion of the land, or upon a partition to make an equality without any deed at all. But if it be upon an exchange to make an equality, it is not good except it be by deed. If two Joint tenants joine in the grant of their land by deed indented, and the rent is reserved to one of them; this is a good reservation and shall goe to him alone. But if it be by word or by deed Poll that the lease is made the rent shall goe to them both. And if a man possessed of a Terme joine his wife with him, and they both assign over this Terme by indenture rendering a rent to them two and the survivor of them, and shee doth not seale the deed; in this case the reservation as to the wife is void. And if the reservation be of the rent to a stranger that is no party to the deed and to him only, this reservation is void. And therefore if the father and his son and heire apparant by indenture lease his land for years to beginne after the fathers death rendering rent to the son, it is void. See *Brownl. 1. part. 30; 31. 39. 80. Co. super Lit.* 214. 143. 47. *Dier.* 222. *Adjudge Mich 8. Cases in Blands case. Hobarts Rep.* 274. *Oates & Fish Co.* 3.

10. Condition, what.

A Condition is a clause of restraint in a deed or a bridle annexed and joyned to an estate staying and suspending the same and making it incertain whether it shall take effect or no.

11. Warranty, what.

A Warranty is a clause or covenant made in a deed by the one party unto the other, whereby the feoffor, donor or lessor doth for him and his heires grant to warrant and secure land granted to the feoffee, donee or lessee and his heires during the estate.

12. Covenant, what.

A Covenant is a clause of agreement contained in a deed whereby either party is bound to doe, performe or give something to the other. And of all these see at large afterwards.

Self. 10
13. How & to what purpose a deed of grant in grosse shall enure and be construed and taken.

In the Constrution of deeds it must be considered, 1. How a deed in the grosse shall be taken and enure. 2. How it shall be taken and expounded in the severall parts and pieces of it. And for the first these Rules are to be known. 1. If divers joine in a deed and some are able to make such a deed and some are not, this shall be said to be his deed alone that is able, as if divers joine in the grant of a thing by deed & one alone hath all the estate and the rest have nothing in the thing granted; it shall be said to be his grant alone that hath the estate. And so *et converso*. If a deed be made to one that is incapable and to others that are capable, in this case it shall enure only to him that is capable. 2. A deed that is intended and made to one purpose may enure to another, for if it will not take effect that way it is intended it may take effect another way. And therefore a deed made and intended for a release may amount to a grant of a Reversion, an Attinment, or a Surrender, or *et converso*. *Co. super Lit.* 302. *Perk. Self.* 66. *Dier.* 251. *Co.* 2: 35: & *super Litt.* 49:

And if a man have two ways to passe lands by the common law and he intendeth to passe them one way, and they will not passe that way; in this case *ut res valent* it may passe the other way. As if a man be seised of two acres of land in fee, and letteth one of them for years, and after intending to passe them both by feoffment maketh a Charter of feoffment and maketh livery in the acre in possession in the name of both the acres; in this case the acre in possession only doth passe: but if the lessee of the other acre attayne then the reversion of that acre wil passe also. But where a man may passe lands by the Common law or by raising of a use and seeling it by the Statute therein many cases it is otherwise.

As if the father make a Charter of Feoffment to his son, and a letter of Astutney to

to make livery, and no livery is made; in this case no use shall arise to the son. So if a man in consideration of marriage make a Feoffment with a letter of Attorney to give livery, and no livery is made; in this case no use will arise. And so was it held by Ch. Justice *Popham B. R.* for the intention of the parties doth work much in the raising and direction of uses. And therefore it is said that when a man doth intend to pass land one way it shall never pass another way contrary to his intent: as if one covenant for good considerations to levy a fine of Land to the use of *I. S.* and his Heirs, if no fine be levied, no use shall arise upon the covenant. If one by words of Bargain sell, give and grant, make a Feoffment of his house for money, and intending to pass it by way of Bargaine and sale and Inrolment the Deed being made there being a Master of the Chancery in the house whereof the Feoffment is made, he doth acknowledge and deliver the Deed before him, in this case if the Deed be not inrolled the conveyance is void and that delivery shall not amount to a livery of seisin. *Dier 96. 19. Eliz. Thorold & Gordons case. Experientia.*

And yet when the intent is apparent to pass it one way or another there it may be good either way, as where one doth make a Feoffment in Fee with a Letter of Attorney to make livery, and in the same Deed doth covenant in case livery of seisin be not had to perfect the Deed to stand seised to the uses of the Feoffment, in this case albeit no livery of seisin be made or attornment had to perfect the Feoffment or grant, yet if it be in such a case where there is a consideration sufficient to raise the uses by the covenant, the uses will arise by the covenant. 3. When a Deed may enure to divers purposes, he to whom the Deed is made shall have election which way to take it and he may take it that way as shall be most for his advantage. As if a Deed of grant be made by the words *Dedi & concessi*; this in Law may amount to a Grant, Feoffment, Gift, Lease, Release, Confirmation or surrender, and it is in the choice of the Grantee to plead or use it the one way or the other. So if a lease for years be made to me of Land for money by the words Demise, Grant, bargain and sell; I may take and use this by way of bargain and sale, or by way of demise at my pleasure. So if one have a Rent out of Land whereof I and my wife are jointly seised, and he doth by his Deed release, give and grant this Rent to me, in this case I may use this as a release to extinguish the Rent, or as a grant of the Rent as it may make most for my advantage. *Et sic de similibus.* But where any inconvenience may grow by such an election, there the Grantee shall not have an election but it shall enure as it may, as where a man may pass Land by the common Law or by raising of use and settling it by the Statute there sometimes it is so. And therefore if in the same case before, a Father make a Charter of Feoffment to his son and a Letter of Attorney to make livery, and no livery is made; hereby no use will arise to the son as it will in case of a covenant. And if a lease for years be made of a Manor by the words bargain, sell, demise and grant, and this is to begin at a day to come; in this case it must pass entirely as a demise at the common Law or entirely as a bargain and sale, and the Lessee hath not election to take or use it otherwise or to use it for part one way and for part another way. *Co. super Litt. 301, Dier. 241. Ca. 2. 36. Dier 30. 302. Dier 109. 319. Ca. 2. 35. 36.*

4. It shall enure as much as may be according to the apparent intent of the parties. And therefore it is that if a Feoffment be made of a Manor with an advowson appendant; or a bargain and sale of Land in possession and Land in reversion together be made and the Feoffment is not well executed for want of livery of seisin or Attornment, or the Deed of bargain and sale is not inrolled; in these cases albeit the advowson may pass without livery or Attornment and the reversion without inrolment, yet because the intent doth appeare to be that all shall pass together, therefore neither the advowson nor the reversion will pass by this Deed. *Finches law. 58.*

5. When a Deed is made it shall enure as it may, and so as it may have and take the most and best effect that may be according to reason, as if Tenant for life or years and he in remainder or reversion in fee joine in a Feoffment by Deed; this shall enure in the first case as the lease of the Tenant for life and the confirmation of him in the remainder or reversion, and in the last case as the Feoffment of him in the reversion; &c. and the surrender of the Lessee for years to the Feoffee and no forfeiture of the estate in the Lessee for life. But

Forfeiture,

But if in this case the Feoffment be by word, it seems it shall enure first as a surrender of the estate of the Tenant for life and then the Feoffment of him in reversion *ut res valeat*. And if *A.* be Tenant for life the remainder to *B.* for life the remainder to *D.* in taile the remainder to the right Heirs of *B.* and *A.* and *B.* joine in a Feoffment by Deed, in this case this is the Feoffment of *A.* and confirmation of *B.* but a forfeiture of both their estates whereof the Tenant in taile may take present advantage. If Tenant for life grant a rent charge to him in reversion in Fee, and he by his Deed doth grant this rent over to another and his Heirs; this is a good grant and confirmation also to make the rent pass to the second Grantee in Fee simple. So if a Disseisor make a Lease for life the remainder to the Dissee and the Dissee doth grant the remainder over; this is a good grant and confirmation also. If *A.* doe bargain and sell his Land to *B.* by indenture, and before inrolment they doe both grant a rent charge to *C.* by Deed and after the indenture is inrolled; in this case after the Inrolment this shall be said to be the grant of *B.* and the confirmation of *A.* and if the Deed be not inrolled it shall be said to be the grant of *A.* and confirmation of *B.* If one make a Charter of Feoffment of one acre of Land to *A.* and his Heirs, and another Deed of the same acre to *A.* and the Heirs of his body, and deliver seisin according to the forme and effect of both Deeds; it seemes this shall enure by moities, *viz.* he shall have an estate taile in the one moiety with the Fee-simple expectant and a Fee-simple in the other moiety.

Estoppel:

If two severall Tenants of severall Land joine in a lease for years by Deed indented; these be severall leases and severall confirmations from each of them from whom no interest passeth and doth not worke by way of Estoppel. If *B.* Tenant for life of *C.* and he in remainder or reversion in Fee of the same Land joine in a Lease for life or years by Deed indented; this shall enure during the life of *C.* as the Lease of *B.* and the confirmation of him in reversion or remainder, and after the Death of *C.* as the lease of him in reversion or remainder and the confirmation of *B.* without any Estoppel. *Plow.* 140. 59. *Co. super Litt.* 302. *Co.* 5. 15. *Co. super Litt.* 147. *Cor super Litt.* 21. *Co. super Litt.* 45.

If Tenant in taile and he in reversion grant a rent charge in Fee, it shall be taken the grant of the Tenant in taile and the confirmation of him in reversion, but when the Tenant in taile dieth without issue, it shall be taken the sole grant of him in reversion. If two Jointenants bee in Fee of an acre of Land and they lease it to a stranger for life, and the Lessee grant his estate to one of the Lessors; in this case it seemes it shall enure for a moiety by way of grant, and for the other moiety by way of Surrender: see *Brownl.* 1. part 141. 2. part 51. 52. 291. *Perk. selt.* 80.

Selt. 11.

If there be Lord and Tenant, and the Lord grant his Seigniorie to his Tenant and to a stranger; this shall enure for a Moitie to the Tenant by way of Extinguishment, and for the other moitie to the stranger by way of grant. If Tenant for life of the grant of a woman sole grant his estate to the husband of the wife, this shall enure for the whole by way of grant, *Perk. selt.* 81. *Dier* 140. *Perk. selt.* 82. 83.

If a Lease be made for life the remainder for life to a stranger and the Lessee grant his estate to his Lessor; this shall enure by way of grant. If there be Lord and two joint-tenants in Fee, and the Lord grant his Seigniorie to one of his Tenants in Fee, it seems this shall take effect for the whole by way of extinguishment, if there be Lessee for life and the reversion descend to two coparceners, and one of them take a husband and the Lessee grant his estate to the husband and wife; this shall enure by way of grant for the whole. If the Dissee and the heire of the Disseisor (being in by descent) make a Feoffment by one Deed and livery of seisin thereupon; this is the Feoffment of the heire only and the confirmation of the Dissee. *Co. super Litt.* 372. *Co.* 7. 14. 1. 147. 148. 5 *E.* 4. 2.

6. If one have divers estates in Land and he make any charge or grant upon or out of it; this shall issue out of all his estate. And if one have a possession and an ancient right, and grant a rent charge out of the Land, or make a Lease of the Land; this shall issue out of both the estates and it shall enure from him having severall estates as it shall enure from severall persons having the same estates, *Per.* f. 392.

6. If one that hath a rent charge out of a manor by grant reciting his grant, grant

grant the same rent to a Lessee for life of the manor out of which the rent doth issue to have and pertain to him and his Heirs, and surrender to him the Deed; this shall not enure to extinguish the Rent but by way of grant, of which the Heir of the Lessee for life may take advantage if he do not by granting away the rent, purchasing the reversion of the manor or making a Feoffment of the manor and thereby committing a forfeiture, or by some such like means prejudice himself, for by these means the rent will be extinct and determined. If a Disseisor grant a Rent to the Dissee, and he by his Deed doth grant it over to another; or the Dissee make a Lease for life or gift in tail the remainder to the Dissee, and the Dissee doth grant over this remainder, and the Tenant accorne; these grants of the Dissee shall be taken for a grant and a confirmation also *in respect*. If there be Lord and Tenant of white acre and two other acres, and the Lord grant by Deed to his Tenant that he will not distrain his Tenant in white acre for his service; this grant shall not enure to determine the Seignior in any part, but as a covenant, so that if he doe distrain in white acre, the Tenant may have an action of Covenant. If a man have a wood of 200 acres, and he grant it to another for life or years, and that he shall cut therein 4 or 5 acres every year; in this case albeit the wood be granted and the grant shall enure to pass it, yet the Grantee can cut no more but 4 or 5 acres by the year. And yet the Grantor as this case is, cannot himself cut any of the wood during the time, as in case where a man doth grant to another that he shall cut every year 4 or 5 acres in such a wood; for in this case the grantor may notwithstanding cut as much as he will. And here note that in all the cases before according to the construction that the Law makes of the Deed so must the party that is to use it, set it forth and plead it, as when it shall enure as a lease then it must be pleaded as a Lease, &c. See more in *Release Numb. 9. Surrender Numb. 7 Confirmation Numb. 7. Co. super Litt. 382. Perk. fell. 69. Mich. 37 & 38. Fitz. B. R. Ch. 14.*

In the construction of Deeds it must be observed that there are some general rules that are applicable to all the parts of all kinds of Deeds, and some that are applicable only to some kind of Deeds and to some part of the Deed only. In the construction therefore of all parts of all kinds of Deeds these rules are universally observed: *Co. super Litt. 313. Litt. fell. 563. Plow. 160. 154.*

1. That the construction be favourable and agree to the minds and apparent intents of the parties as possibly it may be and law will permit. The interpretation of Deeds must be favourable for the simplicities of lay men. And the words must follow the intent, and not the intent; the words, as if there be Lord and Tenant and the Tenant grant the Tenements to one man for Terme of his life the remainder to another in Fee, and the Lord grant the Services to the Tenant for life in Fee; in this case howbeit a grant may enure by way of release, and a release to the Tenant for life shall enure to him in remainder and is an extinguishment, yet because this is contrary to the intent, it shall be taken for a suspension only of the services during the life of the Tenant for life, and the services shall goe afterwards to his Heire. But if the intent of the parties be apparently against law then the construction shall not apply the Deed to their intent, as if one give land to another and his Heirs for 20 years; in this case the executor, and not the Heir, shall have this land after the death of him to whom it is given. So if one by Deed intending to give land to another, and his Heirs give the Land to him To have and to hold to him, or to him and his assigns for ever, without these words, [and his Heirs] this is but an estate for life at the most. *Doff. & Stud. 39 Litt. cap. 2. Plow. 161. 16 H. 8. 10. Dier. 15. Fitz. Barr. 237. Bro. Don. 14. 17 E. 3. 7. 46 E. 3. 17.*

2. That the construction be reasonable and according to an indifferent and equall understanding, and therefore if I grant to another Common in all my Manor, this shall be expounded to extend to commonable places only, and not in my Gardens, Orchards, &c. And if I grant to one Estovers out of my Manor; he may not by this cut down my fruit-trees. And if one grant me (a Barrister) a Fee *pro consilio*; this shall be taken for counsell in Law only. And so in case of a Physitian. And if one grant to me to dig in all his Lands for tione; I may not by this grant dig under his house. And if one grant me Common for all my beasts; this shall be taken for

14. How a Deed or Grant shall be construed and taken in all the parts and branches thereof, General Rules.

for all my commonable beasts, and not for goats and the like. And if one grant me all his trees in his manor, by this I shall not have his apple trees. And if one lease to me his house and Land to the end that I may make profit thereof in the best manner: by this grant I may not prostrate the house or make wast:

3. That too much regard be not had to the native and proper definition, significations and acceptance of words and sentences to pervert the simple intentions of the parties; for a manor may pass by the name of a messuage, or a Knights Fee, if it be used so to be called, *et sic e converso*, on the other side a messuage by the name of a manor a remainder may be granted by the name of a Reverter, a Reversion by the name of a Remainder: for the Law is not nice in grants, and therefore it doth oftentimes transpose words contrary to their order to bring them to the intention of the parties: neither false Latine nor false English will make a Deed void when the intent of the parties doth plainly appear. It is therefore held that two negatives doe not make an affirmative when the apparent intent is contrary. *Plow. 154. 170.*

134. Dix. 46. Co. super Litt. 223. 146. 217. Co. 9. 48. 10. 143.

4. That the construction be made upon the entire Deed, and that one part of it doth help to expound another, and that every word (if it may be) may take effect and none may be rejected, and that all the parts doe agree together and there be no discordance therein. If a man make a Feoffment of all his Land in *D.* with Common *in omnibus terris suis*; this Common shall be intended in the Lands granted in *D.* only, and not elsewhere, for it must be understood *secundum subjectam materiam*. The best exposition is from the Coherence, and by that which doth goe before and follow after. It is an ill exposition that doth corrupt the Text, according to the subject matter. *Plow 160. 161.*

5. That the construction be such as the whole Deed and every part of it may take effect and as much effect as may be to that purpose for which it is made, so as when the Deed cannot take effect according to the letter it be construed so as it may take some effect or other; words must be understood with effect, and that the matter intended may have force. And therefore if an Annuity be granted *pro confilio impendendo*, or a Feoffment made *ad erudiendum filium*, or *ad solvendum* 10s. these shall be construed conditionall grants without any words of condition, for otherwise the party will be without remedy. *Lit. selt. 283. Fines Ley. 60 Plow. 160. 154.*

6. That all the words of the Deed in construction be taken most strongly against him that doth speake them and most in advantage of the other party, the words of Deeds are taken most strongly against the speaker. *Co. super Litt. 183. Fines Ley. 6.*

Seff. 12.
Forfeiture.

And therefore if one seised of Land in Fee grant it to another, and say not for what time, this shall be taken an estate for life. But this is to be understood with this limitation, that no wrong be thereby done, for it is a Maxime in Law. *Quod legis constructio non facit injuriam*. The Law doth injurie to none. And therefore if Tenant for life grant the Land he doth hold for life to another, and doth not say for what time; this shall be taken an estate for his owne life, and not the life of the Grantee, for then it would be a forfeiture. So if one be seised of some Lands in Fee, and possessed of other Lands for years, all in one parish, and he grant all his Lands in that parish (without naming them) in Fee simple. or for life; by this grant shall pass no more but the Lands he hath in Fee simple. So if a man have a house wherewith there hath been Copyhold Land and other Land usually occupied; and and he let this house and all his Land thereunto belonging; in this case and by this demise the Copy hold land doth not pass; for in both these cases then there would be a Forfeiture. But otherwise by these words all the Lands in both cases would pass. *Co. super Litt. 112.*

7. That if there be two clauses or parts of the Deed repugnant the one to the other, the first part shall be received, and the latter rejected, except there be some speciall reason to the contrary, and therefore herein a Deed doth differ from a Will, for if there be two repugnant clauses in a will, the first shall be rejected, and the latter received.

8. That that which is generally spoken be generally understood, unless it be qualified by some speciall subsequent words, as it may be; for if one be seised of a manor

9. That if the words may have a double intendment and the one standeth with law, and the other is against law, that it be taken in that sence which is agreeable to law: and therefore if tenant in taile make a lease of land to B for term of life, and doe not mention for whose life it shall be; this shall be taken for the life of the lessor and not for the life of the lessee, as it shall be if such a lease be made by tenant in fee simple: 9 Ed 4: 4.

10. That things doubtfully set down be applied to him to whom they doe properly belong. As if I S make a feoffment to one of his own name, and there is a covenant in the deed that I S shall deliver the deeds, this shall be taken of I S the feoffor and not of S the feoffee: Co 9: 48 10: 143.

11. That such a construction be made of abbreviations as the deed may not lose his force, as if one grant *tot' ill' Maner' de D & C*, if it be but one manor, the words shall be taken for *totum illud Manerium*, if two manors, then it shall be taken for *tota illa maneria*. And here note that most of all these rules run through all the cases of exposition hereafter following. *Fin. Grant. 41: Plow. 317. Co. 5. 12. 22. aff. Pl. 61. Perk: Stff. 110.*

Touching things granted these rules are first to be known.

1. When any thing is granted all the means to attaine it and all the fruits and effects of it are granted also and shall passe *inclusive* together with the thing by the grant of the thing it selfe without the words *cum pertinentiis*, or any such like words.

As by the grant of Conuſance of pleas is granted the Ordinary proceſſe to bring causes to judgment. By the grant of a ground is granted away to it. By the grant of Trees is granted withall power to cut them down and take them away, by the grant of Mines is granted power to digge them; and by the grant of fish in a mans pond is granted power to come upon the banks and fish for them.

2 The incident, accessory, appendant, and regardant shall in most cases passe by the grant of the principall without the words *cum pertinentiis*, but not *à converso*, for the principall doth not passe by the grant of the incident &c: *Co. super Litt: 152: Litt. Stff: 72. 229: Co. 4. 86, 87: 8 H. 7. 4: Bro: Grant: 86. 144. 43 Ed: 3. 22. Co. 10 64: super Litt. 307.*

And therefore by the grant of a reversion without naming the rent the reversion after an estate taile, for life, or years and the rent reserved upon the estate will passe; so as the tenant attorne to the grant: but by the grant of the rent the reversion will not passe. So by the grant of a manor, the Court Baron thereunto belonging will passe. by the grant of a house or ground, the wayes thereunto belonging doe passe, by the grant of errable land: the common appendant thereunto will passe; by the grant of Mills, the waters, flood-gates, and the like that are of necessary use to the Mills do passe; by the grant of a house, the estovers appendant thereunto will passe; by the grant of a manor, the advowsons appendant and villaines regardant thereunto passe; by the grant of a Faire, the Court of Pipowders will passe; by the grant of homage or rent, the fealty will passe; and by the grant of Escuage, homage and fealty will passe. But divers things that by continuall enjoyment with other things are only appendant to others, as warrens, leetes, waifes, estraines, and the like, these will not passe by the grant of those other things; and therefore if one have a Warren in his land, and grant the land, by this the warren doth not passe. And yet if in these cases he grant the land *cum pertinentiis*, or with all the profits, privileges &c. thereunto belonging; by this grant perhaps these things may passe. And here know that a reversion may be parcell or appendant to a thing in possession, and passe by the grant of it, but a possession cannot be parcell or appendant to a thing in reversion. And therefore if one make a lease for life of a manor excepting 20 acres of it, and after grant the reversion of the manor; by this grant the 20 acres will not passe. 38 H. 6. 38. Co. 11. 47: 50. Plow. 103. Bro: Grant: 60. 129, Co. 1: 7 28.

So if one be disseised of an acre parcell of a manor, or of common appendant to the manor. and before an entry or recontinuance of the acre or common he grant the manor to a stranger; by this the acre of land or common will not passe: But otherwise it is in case where a lease for years only is made of parcell of a manor.

H h h

And

The exposition of the severall parts of the deeds of grant. And how the words and sentences therein shall be taken.

1. In the premisses, and what doth pass by the grant of a thing.

And if a lease be made for life of 20 acres parcell of a manor, and after the manor it selfe is granted; by this the reversion of the 20 acres is granted and will passe also. See *Brownlo: 1 part. 184. 185. 2 part. 193.*

And if a man make a feoffment in fee of an acre of land parcell of a manor, and after repurchase it, and then grant the manor, this acre will not passe by this grant, for it is not united by the new purchase: But it is otherwise of trees, for if a man make a lease for life of a manor or other land excepting the trees, and after grant the reversion of the manor or land to another; hereby the trees doe passe. And if a man make a feoffment in fee of a manor excepting the trees, and after the feoffee buy the trees, in this case the trees are united againe, so that if the feoffee sell the manor, the trees shall passe with it. If I lease an acre of land to which an advowson is appendant for terme of life reserving the advowson, and after doe grant the reversion of that acre with the appurtenances; hereby the advowson doth not passe. But if I grant the advowson for terme of life reserving the acre, and after grant the acre with the advowson *cum pertinentiis*; by this the advowson doth passe. If land be appendant to an office, there by grant of the office with the appurtenances the land will passe without livery of seisin. And if an office be appendant to land, there by the grant of the one the other will passe. 3. That which is parcell or of the essence of a thing albeit at the time of the grant it be actually severed from it, doth passe by the grant of the thing it selfe. And therefore by the grant of a Mill, the millstone doth passe albeit at the time of the grant it be actually severed from the Mill. So by the grant of a house, the dores, windows, locks, and keyes, doe passe as parcell of it, albeit at the time of the grant they be actually severed from the house. 4. By the grant of the land, or ground it selfe, all that is *supra*, as houses, trees, and the like is granted, also all that is *infra*, as Mines, earth, clay, quarres, and the like. And by the grant of a house, the ground whereon it doth stand doth passe. 5. When any matter of interest or profit is granted, the grant shall be taken largely. But when any matter of ease or pleasure only is granted, as a walk, or the like, the grant shall be taken strictly. 6. When a man doth grant all his lands, or all his goods; by this grant doth passe not only what he is sole seised or possessed of, but also what he is joyntly seised or possessed of with another. And so *è converso*. If two men joyn together and grant all their lands, or all their goods; hereby doe passe not only all they have joyntly and together, but all those they have sole and apart. 7. Some words in deeds are large and have a generall extent, and some have a proper and particular application; the former sort may containe the latter, as *Dedi*, or *Concessi*, may amount to a grant, a feoffment, a gift, a lease, a release, a confirmation, a surrender: and it is in the election of the party to whom the deed is made, to use it to which of these purposes he will. And hence it is that if a Lord by the words of *dedi & concessi* grant to his tenant that doth hold of him his rent; or one that hath a rent charge out of land doth grant it to the tenant of the land; that in these cases the rent is extinguished albeit it be by way of grant. But a release, surrender, confirmation &c. cannot amount to a grant &c. nor a surrender to a confirmation or a release &c. because these be proper and peculiar manner of conveyances and are destinato to a speciall end. 14 H. 8. 25. Co. 11 50. 14 H. 8. 1. Co. *super Litt. 4.* 12 H. 7. 25. Plow. 289. 19 H. 6. 4. Co. *super Litt. 301. Litt. 543. 544.*

See 13
The terms
whereby things
are granted,
expounded.

Amongst words whereby things doe passe some are collective, compound, or generall comprehending many things, as hereditaments, lands, tenements, honors, Isles, villages and the like including lands of severall sorts and qualities. And some words are simple or particular, as Meadow, Pasture, Wood, Moore and the like. Co. *super Litt. 5. 6. Co. 4. 88.*

Hereditament.

The word [Hereditament] is of as large extent as any word, for whatsoever may be inherited, be it corporeall or incorporeall, reall, personall or mixt, is an hereditament. By the grant therefore of all hereditaments do passe honors, Isles, Castles, Seigniories, Manors, Mesuages, Lands, Meadows, Pastures, Woods, Moores, Marishes, Furfes, Hesths, Reversions, Commons, Rents, Vicarages, Advowsons in grosse, and the like things which the grantor hath in fee simple at the time of the grant, whether he hath it by purchase or descent. And

And the word [Tenement] is of large extent also, and it seemes doth comprehend as much as the former. And therefore by the grant of all Tenements will passe as much as by the grant of all Hereditaments. *Co. super Litt. 6. 16. Perk. sect. 114. 115. 11 H. 6. 22. Bro. Grant. 143 Co. super Litt. 6. Perk. sect. 411.*

The word [Land] strictly doth signifie nothing but errable land, but in a larger sense it doth comprehend any ground, soile, or earth whatsoever. And therefore by the grant of all Lands, doth passe errable lands, meadowes, pastures, woods, moores, waters, marishes, furses, heath, and such like, and the Castles, houses, and buildings thereupon, but not rents, advowsons, and such like things. Also by grant of any land in possession the reversion thereof will passe. And yet by the grant of a reversion of land the land in possession will not passe. *Co. super Litt. 4 Co. 4. 891. Perk. sect. 114. Co. 11. 47. 30. 10. 107.*

But here it must be observed that in cases of grants and gifts of all hereditaments, tenements, or lands, consideration is had of the estate of the grantor, for if a man be seised of some lands in fee, and have other lands for life, or years only, and all these are lying within one parish, and he grant all his lands, tenements, or hereditaments in this parish to another in fee simple, fee taile, or for life, and give livery of seisin in the lands whereof he is seised in fee, in the name of all the rest; by this doth passe no more but his lands whereof he is seised in fee, for otherwise it would be a forfeiture for those lands. But if the livery of seisin be made in any part of the lands he hath for life or yeares, then that part wherein the livery is made will passe and no more. And if the conveyance be by bargain and sale and deed inrolled, then the lands whereof he is seised in fee simple and for life shall passe, and not the land he hath for a terme of years. And yet if in this case the grant be for yeares, then all the lands will passe, for then there will be no forfeiture in the case. Howbeit it is said in *Bro. Done 48. pro lege*. That if a man give or grant all his lands and tenements in B, that by this leases for yeares doe not passe, and that these words doe intend franktenements at the least: *Edw. case Mich 9. Jac. curia 9. H. 7. 25. Bro. Grant. 87. 11. H. 6. 22.*

These words [Honor, Isle, and Commote] are compound words and of large extent. And therefore by the grant of them may passe one or more seigniories, manors and divers other lands. Also a Castell may containe one or more manors. And therefore by the grant of a Castell may passe one or more manors. And so sometimes *decurse* a Castle may passe by the grant of a manor. But by a Castle most commonly is signified no more but the house or building and the parcell of ground inclosed wherein it doth stand: *Co. super Litt. 5. Plow. 169.*

This word [Village or Towne] is of large extent also. And by the grant of it a manor, land, meadow, and pasture, and divers such like things may passe. *Co. super Litt. 5. Plow. 168.*

This word [Manor] is a word of large extent and may comprehend many things: And therefore by the grant of a manor without the words of *Cum pertinentiis* doe passe damages, rents, and services, lands, meadowes, pastures, woods, commons, advowsons appendant, villaines regardant, Courts Baron and perquisites thereof that are in truth at the time of the grant parcell of the manor. *Co. super Litt. 5. 58. Perk. sect. 116. Co. 5. 11. Plow. 168. Dier. 233. 14 H. 8. 1. 9. Jac. B R. Dyer. 30. 8 H. 7. 4. Baintons case. M. 9.*

But nothing that in truth is not parcell of the manor, albeit it bee so reputed, will passe by the grant of the manor, and therefore if one have a manor, and after purchase the lawday or a warren to it, and then he grant away the manor, hereby the lawday or warren will not passe. And yet if by union time out of mind they have gotten a reputation of appendancy, perhaps by the grant of the manor *cum pertinentiis* these things may passe: By the grant of a manor also divers townes may passe:

An Honour also may passe by this name: And so also may a Castle or a hundred: And one manor also that is parcell of another manor may passe by the grant of that manor whereof it is parcell: *Brownlo. 1. part. 155. Co. super Litt. 5. 26. Aff. Plow. 54. 2 H. 7. 36.*

The word [Knights-fee] is a compound word also and may comprehend many things. And therefore by the grant of this may passe land, meadow, and pasture as parcell of it. And sometimes by this doth passe so much land as to make a Knights fee. And some say it doth containe eight hides of land. And it seems also that a manor may passe by this name if it be usually called so. *Co. super Litt. 5. Plow. 168. 17 E. 3.*

Grange.

The word [Grange] is a compound word also, and by the grant of a Grange will passe a house or edifice: not only where corne is stored up like as in barns but necessary places for husbandry also, as stables for hay, and horses, and stables and sties for other cattle and a curtilage and the Close wherein it standeth at the least. And where land, meadow and pasture &c. belonging to such houses are called all together by the name of a grange, there perhaps by this word the whole may passe. *Co. super Litt. 5. Plow. 167.*

Farme.

The word [Farme or Ferme] called in Latine *firma* is also a compound word and doth comprehend many things And therefore by the grant of a Ferme will passe a messuage and much land, meadow, pasture, wood &c. thereunto belonging or therewith used, for this word doth properly signifie a capitall or principall messuage and a great quantity of demesnes thereunto appertaining. Also by the grant of all Farmes or all Fermis it seems leases for years doe passe. *Co. super Litt. 5. Plow. 195. Bro. Grants 155*

Oxgange of
land.
Halfe a Plow
land.

This word is a collective word also, for by the grant of *unam bovatarum terre*, or of one, or of an oxgange of Land may passe land, meadow and pasture, and it doth properly intend as much as an Oxe can till. And *jugum terre*, or halfe a Plow land is as much as two Oxen can till, and by the grant of halfe a plow land may passe meadow, and pasture *Co. super Litt. 5.*

A Plow land
or a Hide of
land.

The words [Plow land, and a Hide of Land] are *Synonyma* and are collective words also. And therefore by the grant of *Carnatarum* or *Hidarum terre*, or of a Plow land, or of a hide of land may passe 100 acres of land, meadow and pasture, and the houses thereupon, but it doth properly intend as much land as one plow can till in a year. *Co. super Litt. 5. Plow. 167.*

A yard of land
Halfe a yard
land.

This word [A yard-land] is also collective and doth comprehend many things, but it is not certaine. for in some Countries it doth containe 20 acres, and in some Countries 24 acres, and in some Countries 30 acres, by the grant therefore of *virgatarum terre*, or a yard land will passe that quantity of land meadow and pasture that is called by this name. And so by the grant of halfe a yard, or a quarter of a yard land. *Co. super Litt. 5.*

Fold course.

The word [Fold course] is also compound, for by the grant of a fold course lands and tenements may passe: *Et sic de similibus*. And finally by the grant of any such compound thing as before for the most part there doth passe thereby so much as in common reputation is accounted part of that thing and is usually called by that name. *Co. super Litt. 6. Plow. 167.*

Parsonage
Rectorie,
Vicarage.

By the grant of a Rectory or Parsonage will passe the house, the glebe, the tithes and offerings belonging to it. And by the grant of a Vicarage will passe as much as doth belong unto it, as the Vicarage house &c. *8 H. 7. 1. Bro. Grant. 86.*

Messuage.
Curtilage,
House.

By the grant of a messuage, or a messuage with the appurtenances doth passe no more but the dwelling house, barne, dove-house, and buildings adjoining, orchard, garden, and curtilage. A little garden, yard, field, or peece of void ground lying neer and belonging to the messuage; and houses adjoining to the dwelling house, and the close upon which the dwelling house is built at the most. *Plow. 85. 13 171. 178. 569. Litt. Bro. Sess. 31. 185. Co. super Litt. 5. Co. 10. 65. Kely. 57. 27 H. 6: 2.*

And so much also may passe by the grant of a house; so that the quantity of an acre of ground or thereabouts in Orchard, Garden, and out-let may passe by either of these names, but more then this will not passe by the grant that is made in either of these words, albeit more have been occupied with it, and albeit more be intended to be passed by the grant. And therefore if there be a messuage or dwelling house and divers acres of land thereunto belonging called all together by the name of Hedge:

And

And a grant is made by these words; of all that mesuage with the appurtenances commonly called by the name of Hedges; by this grant nothing shall pass but the mesuage, Garden, and curtilage.

And yet if a manor or farme be commonly called by the name of a mesuage, thereby the grant of a mesuage the whole manor or ferme may pass. And by the grant of a mesuage or house and all the Lands thereunto appertaining will pass all the Land usually occupied therewith. Also by the name of a mesuage a Chappell or a Hospitall may be granted. *Brownl. 2 part. 53. See before: Litt. Br. fess. 185. 160. Br. Leases 55. Plow. 170. 13 Aff. Pl. 2. Co super Litt. 4.*

By the grant of a Cottage doth pass a little dwelling house that hath no land belonging to it.

By the grant of all a mans errable land there doth pass no more but that kind of land. And by the grant of all a mans meadow ground, or all a mans meadows, doth pass no more but that kind of ground: And by the grant of all a mans pastures doth pass no more but the Land or ground it selfe imployed to the feeding of beasts, and also such pastures and feedings as he hath in another mans soile.

If a man have divers acres or peeces of Wood, and grant to another *omnes boscos suos*, or all his woods, or all his woods growing in such a place; by this grant doth pass all the high-wood and under-wood, and not only the wood growing upon the land or soile, but the land or soile it selfe wherein it doth grow.

But in this case if the grantor have in the same place divers peeces of wood and divers closes wherein there are divers trees growing in the hedges; it seems in this case these trees in the hedges shall not pass by this grant in these words, especially if the case be so that the cutting of them will be a wast: And yet if the grantor have no peeces or groves of wood in the place, nor trees but what are growing in the hedges and grounds, in this case it seems all the trees except the apple trees doe pass, but not his hedges and hedg rowes. And in case where the trees only doe pass, as where the grant is of all a mans trees, there shall pass no more of the soile but so much as shall serve for the Nutriment of the trees, and the owner of the soile shall have the grass growing thereupon also.

If a man grant to another all his salable underwoods within his manor which have been usually sold by the owners of the manor with free entrie, egress and regress for felling, making and carrying the same away at all times convenient; in this case it seems the soile doth not pass, but the wood only. And yet if those words with free entrie. &c. be omitted, *contra. 14 H. 8. 1. Perk. fess. 116. Co. 3 11. Br. Done 14. Co. 5. 11. 11. 50. Curia. Hill. 16. Jac. B. R. Pinchcombe case.*

If one devise, grant and to Terme let a farme with all maner of timber, wood, underwood land hedg rowes except the great oakes in such a close, to have and to hold the Farme for 21 years, in this case albeit there be the word Grant, and that the trees be not named againe in the *Habendum*, yet the other trees doe not pass by this grant otherwise then in other leases, and if the Lessee cut any Timber to sell, it is wast in him. *Dier 374. Co. 11. 48.*

A Toft is a place where a mesuage hath stood; and by this name in a grant such a thing will pass.

Bruera is a heath or heathy ground. *Frassetum* is a wood or peece of ground that is woody. *Alnetum* is a wood of Elders, or place where Elders grow. *Salicetum* a wood of willows or place where willows grow. *Selda*, a wood of fallowes, willowes or withies, or place where such things grow. *Filicetum* is a brake ground or place where such things grow. *Fraxinetum*, a wood of ashes, or place where Ashes grow. *Lupulicetum*, a hopyard or place where hops doe grow. *Arundinetum*, a place where reeds grow. *Runcaria* or *Runcaria* a place full of bryars or brambles. *Iuncaria* or *Iuncaria* or *Iampna* (which are all one) a place where rushes doe grow. *Ruscaria* a place where kneeholme or butchers prickles or broom doth grow. *Mariscus* a fenne or marish ground. *Mora*, a more barren and unprofitable ground then a marsh.

And

Cottage.

Errable land,
Meadow,
Pasture.

Wood. Trees

Toft.

Bruera *Frassetum*.
Alnetum.
Salicetum. *Selda*.
Filicetum.
Fraxinetum.
Lupulicetum.
Arundinetum.
Runcaria. *Iuncaria*.
Ruscaria. *Mariscus*.
Mora.

Vacaria. Porcaria Stagnum. Gurgis.

And by grant of these and such like things, or of 20 acres of such ground, these particular kinds only or so many acres thereof doe pass. *Vacaria*, is a Dairie-house. *Porcaria*, a Swinestie. *Bercaria* a Tann-house: and by these names these things will pass. By the name of *Stagnum* or Pool, or *Gurgis* a gulf, the water, Land, and fish in the water will pass. *Co. super Litt. 4. 5: Co. super Litt. 5.*

Stadium. Ferlingus. Quarantena terra. Selio terra. Acre of Land, Rood of Land.

By the grant of *Stadium, Ferlingus*, or *Quarantena terra* doth pass a furlong or furrow long, which anciently was the 8 part of a mile. By the name of *Selio* or *perca terre* doth pass a ridge of land which is sometimes longer and sometimes shorter. By the grant of an acre of Land doth pass so much as in an acre by measure in that Country by the Ordinary account and measure of the Country. By the grant of a Rood of Land doth pass 10 pearches the 4 part of an acre. And by the grant of 6 foot in length and two foot in breadth, so much only doth pass. And by these and such like names land may be granted: *Co. Idem.*

Mines.

By the grant of *Mineras* or *Fodinas plumbi &c.* or Mines of Lead, &c. the Land it selfe will pass if livery of seisin be made thereof, but otherwise it seems not, and then the Grantee hath by the grant a power to dig only granted unto him. *Co. super Litt. 6. Co. 5. 12.*

Trench.

If one grant to me to dig a Trench in his ground from such a place to such a place to convey water by a lead pipe, or otherwise; hereby also *inclusive* is granted a liberty at any time after to dig to amend it as occasion shall be. *Park. sect. 111.*

Turks.

If one grant to me to dig turfs in his land or soile and to carry them away at my will and pleasure; by this is not granted the land it selfe, the houses or trees thereupon or mines therein. *Co. super Litt. 4.*

Common.

If one grant to another Common for all his beasts in his Land; hereby is not granted Common for Goates, Pigges, and such like beasts and cattell that are not commonable. But if the grant be of common for all manner of beasts *contra*. And if one grant to another common without number in his Land, the grantor is not hereby excluded to common there with the Grantee. *Brownl. 1 part 53. Co. super Litt. 4. Park. sect. 108. 109: Brownlows rep. 1 part in toto. 2. part. 53.*

And if one grant to me common of pasture for 10 King in his Lands in Dale; by this grant I shall have common in his commonable grounds and lands only and not in any other lands. And if a man grant common of pasture to me for my beasts *whicunque averia sua ierint*, and he occupie 100 acres of Land with his beasts, and after he keep no beasts yet by this grant I may keep my beasts in those 100 acres. But if he grant to me Common, of pasture for my beasts wherefoever his Cattle shall goe &c. by this grant I shall have no common but when the Grantor doth use his common with his Cattell, &c.

Estovers.

By the grant of Estovers will pass house-boot, hay-boot, and plow-boot; But if a man grant to me Estovers out of his manor, I may not by this grant cut down any of the fruit trees within his manor. *Park. sect. 116.*

Way.

If Land be granted to me; hereby also implicitly is a way thereunto granted to me also. So that if one have 20 acres of Land and grant me one acre in the middle of it, hereby *inclusive* there is granted me a way to it. And yet if a man have two Closes and he use to goe over one of them for his ease to the other Close by a new way; and after he grant the further Close *cum pertinentiis*; by this grant the new way doth not pass. *14 H. 8. Clar. case Trin. 5. Jac. B. R. Per Williams & Telverton Justices. Mic. 3. Jac.*

Forest, Park, Chase, Warren.

If a man have a Forest, Park, Chase, Vivarie, and Warren in his own ground, and he grant this Forest, Park, Chase, Vivarie or Warren; hereby not only the priviledge but the Land it self doth pass. But if the ground be anothers; or if it be his own and the grant be onely of the game, &c. in these cases the Land or soile it self will not pass. *Co. super Litt. 5. Rice & Wiseman's case. Mic. 9. Jac.*

Fishing.

If a man be seised of a river, and by his Deed doth grant *separatam piscariam*, or *agnam suam* in the same, and maketh Livery *secundum formam carte*; by this grant doth pass only a liberty to fish within the water, and not the soile nor the water it selfe: and therefore the grantor may take water still, and if it be drie he may take the soile also. *Co. super Litt. 4. Fitz. Barr. 237.*

And

And if one grant all his fish in his pond; by this is granted a power to come and fish for them, but the Grantee may not hereby dig a trench, and let out the water to take the fish, albeit they may not be otherwise taken.

If one be seised of 20 acres of land, and he grant to another and his heirs the vesture, or the herbage of it, and maketh livery of seisin in it *secundum formam cartę*; by this grant doth pass the corn, grass, underwood, sweepage, and the like; and for these things the Grantee may have an action of trespass for any wrong done to him in them. But hereby the land it self, the houses, and great trees thereupon, and mines therein doe not pass. And if one grant the herbage or vesture of a wood; hereby is granted the grass and underwood onely, and not the timber or great trees. But if a man so seised of 20 acres of land, grant to another the profits of this land to have and to hold to him and his heirs, and maketh livery *secundum formam cartę*; hereby the vesture, herbage, trees, mines, and all whatsoever parcell of that land doth pass. *Co. super Litt. 4. Dier 285. Trin. 5. Jac. B. R. accord.*

Vesture or
Herbage of
land.

Profits of
lands.

If one grant to another all his Deeds, or all his muniments; hereby will pass all his charters, Feoffments, Leases, Releases, Confirmations, Letters of Attorney and the like. *35 H. 6. 37.*

Deeds.

If one give or grant to another *Omnia bona*, or all his goods; by this doth pass all his moveable and immoveable, personall and reall goods, as horses and other beasts, plate, jewels, and household stuff, bowes, weapons, and such like; and his money, and his corn growing on the ground, also all the obligations and bills that are made to him, and in his own name doe pass by this, but not the debts due by such obligations and bills. *Co. super Litt. 118: 39 H. 6. 35. Dier 59. Perke sett. 115. 12 H. 8. 4. Bro. Grant 96. 51 Done 39. 47. Dier 5 Co. 8. 33.*

Goods.

And some say that leases and termes of years of Houses, Lands, Rents, Commons, &c. Rents charge for years, Wardships of Tenants in Capite, and by Knights service, and the interests that a man hath by Statute Staple, Statute Merchant, or Elegit, doe pass by this grant, but of this others doubt. And if a man give or grant to another *omnia catalla sua*, or all his chattels; hereby doth pass as much as by the grant of all his goods, and by this without question leases for years, &c. doe pass. But by neither of the grants doe pass those goods or chattels which the grantor hath by delivery in keeping for another, or the like. Neither doth any estate of inheritance or freehold, or the charters concerning any freehold pass under these words. Neither doth any thing in action, as debts or the like, nor hawkes, hounds popinjays, or the like pass by this grant. And yet if an Executor grant *omnia bona & catalla sua*, all his goods, hereby the goods and chattels he hath as Executor as well as his other goods and chattels will pass. And if one grant all his leases for years which he hath by any conveyances; hereby the leases for years which he hath as Executor as well as other leases for years will pass. *Perch. Just. B. R. 21 Jac. Adjudged 3 Jac. Ketw. 64. 10 Col. 4. 1. Per Flemming Just. 7 Jac. B. R.*

Chattels,

Sett. 15.

If one grant to another all his Utensils; hereby will pass all his household stuffe, but not his plate, jewels, or any such like thing. *Dier 59.*

Utensils,

If a man be seised of land in Fee-simple or for life, and have an estate in it for years by Statute Merchant, Staple, Elegit, or the like: and he grant all his estate, or all his right, or all his title, or all his interest of and in the land; by this grant all his estate, and as much as he is able to grant doth pass. And if Tenant for life of land, the remainder to the stranger in taile, the remainder to the right heirs of the Tenant for life doe grant by these words; hereby both his estates do pass. And if a Tenant in tail grant all his estate in the land, hereby doth pass as much as he can grant. And all these words also do cary and pass reversions as well as possessions. And if a man have a terme of years of Land, and he grant his term, hereby doth pass the term of years, and all his estate and interest of the Land. *Co. super Litt. 545. Litt. sett. 613. Plow. 161. Co. 1. 153.*

Grant of all a
mans estate,
right, &c.

And note that by all these names these things may be granted, and that for such things as are grantable without Deed, when they pass by a verball grant in any of these words, the words shall have the same exposition as they have in Deeds. *Fine. Brief. 581.*

Note.

Certeintie
and Incerteintie,
Misnaming
how it doth
hurt or not.

If one grant all his goods in such a place *si quæ fuerint* if any be there, by this grant nothing doth pass; but the goods that are in such a place at the time of the grant, and not any other goods that shall be there afterwards. *H. 6.*

If two men have goods in common, and have other goods severally, and they give me all their goods, by this grant is given all their goods they have in common, and likewise all the goods they have in severalty. *Bro. Done 12.*

If two Tenants in common, or others severally seised of Land, join in the grant of a rent of twenty shillings, or a horse, out of the Land whereof they are so seised by this grant the Grantee shall have two twenty shillings or two horses.

Plow. 17. 1. 140. Co. 10. 106.

If a man grants a Rent of ten pound to me, To have and to hold during my life and my wives life, and after the death of my wife a rent of three pound to me for my life; in this case if my wife die, I shall have both the rents. But if there be any words of restraint or determination of the first rent, it may be otherwise. *Bro. Gr. 64.*

If one be seised of a garden plot in the parish of Sale, and grant it to B. for ten years, which being expired he doth grant his garden plot to C. for twenty one years, and C. doth build a house upon part of it, and leaveth the other part in a garden plot still, and after the twenty one years ended, the lessor doth grant to D. *totum illud pecum fundi sive garden plot nuper in tenura de B. & nunc de C. lying in the parish of Sale,* by this grant the house newly built, and the plot of garden doth pass.

Adjudge. M. 20 Jac. B. R. Burton versus Brown.

If one grant his Manor of Dale in Dale, which in truth doth extend into Dale and Sale; in this case no part of the Manor that doth lye in Sale shall pass. So if one grant all his Tenements in Dale; hereby none of the Tenements in Sale will pass. So if the Manor lie within the parishes of A. B. and C. and the grant is of the Manor of Dale, lying within the parishes of A. and B. by this grant no part of the Manor lying in C. will pass. But if one seised of the Manors of A and B. in the County of C. grant thus, *totum illud Manerium de A. & B. cum pertinen' in Com' C.* or *totum illud Manerium de A. cum B. in Com' C.* by these grants in case of a common person both the Manors will pass. *Bro. Grant 53. 88. Done 26. Co. 1. 46.*

If one grant all his land in Dale which he had of the gift of I. S. by this grant nothing will pass but that which he had of the gift of I. S. But if one grant all his Lands in Dale called Hodges which he had of the gift of I. S. by this grant all that which is called Hodges shall pass, albeit the grantor had it not of the gift of I. S. *Bro. Grant Plow.* If I grant all my Land in D. in the tenure of I. S. which I purchased of I. N. specified in a Devise to I. D. and I have some Land in D. which doth answer to all this, and other Land that doth not answer to it; in this case the first sort of Land shall passe. If I grant my Manor of F to I. S. and in truth I have two Manors of that name, South F. and North F. this must be made certain and good by Averment which was meant of the two. But if I grant ten Acres of Wood in Dale, where I have 100 Acres, this is made good and perfect by my Election which 10 Acres I will have, and so it is perfected. But if I recite where I am seised of the Manor of North F. and South F. and I grant one Manor of F. in this case the Grantee may choose which of them he will. *See more in Grant. Election.*

If one grant all his Lands in the occupation of I. S. by this grant doth pass not onely such Land as I. S. doth occupy by right, but also such Lands as he doth occupy by wrong, and not onely the Lands whereof he hath some estate, but also such Lands as whereof he hath the pasturage onely. *Dockraies case Pasch. 12. Jac.*

If one grant all his Lands in B. and elsewhere in the County of S. in the Tenure of I. S. by this grant nothing doth pass but that which is the Tenure of I. S. *2 Jac. Br.*

If one grant his Manor of S. *nec non omnes mariscos suos de S. ac omnia terra, tenementa &c. in S. & alibi dict' Manerio spectan'*; by this grant the marsh doth pass though it be no part of the Manor. *Adjudge Seignior We at worths case.*

If one grant all his demesne Lands of his Manor of Dale, &c. it seems by this the customary land parcell of the Manor held by copy doth pass. *Co. 1. 46.*

If one be seised of riches which did belong to an Abbey, part of which were gathered by the Almoner, and part not; and he grant *omnes & omnimodas decimas granorum &c. infra dominium pradiſt & praeſentis ejusdem, in diſt Comis. Agimus alia decimas, praſentia & commoditates &c. infra dominium pradiſt & diſt Monasterii & ſpectantes quae nuper per Eleemoſynam inſuſdem Monasterii collectae fuerunt*; by this grant shall passe all the tithes as well those that were collected by the Almoner, as those which were not, and those words *qua per Eleemoſynam &c.* shall refer only to the last, and not to both sentences. *Adjudge. Hil. 2. Jac. 2. B. R. Bakers*

If one grant all his lands in D., containing 10 acres, whereas in truth his lands there doe contain 20 acres; by this grant the whole 20 acres will passe. *Dier. 60.*

If one grant the Scite of an Abbie *Omnes terras praeſentis pasturas & ſubſcripti cum pertinent diſt Monasterii pertinent &c. viz.* such a thing and such a thing, &c. by this grant he grantee shall have all the lands belonging to the Monastery, and *viz.* shall relate to *ſubſcripti* only, and not to *omnia*. If one by deed grant all the lands that the King had passed unto him by letters patents dated 10 of May anno that deed annexed and the patent was dated 10 of July being proved that that was the patent the grant will be good, but if no patent had beene annexed, and no certaintie given but the reference to the Patent, this had beene naught. So if I grant to you by general words, the land which the King hath granted to me by his letters patents, the tenor whereof doth follow in these words, and there be some mistake in the Recital it may be good enough. If I grant my Tenement [or all my Tenements] in the parish of Saint Batolpys without Algate [where it is without Bishops Gate] in the Tenure of M. this grant is void, and though in the Tenure of M. had beene first placed, yet it had beene naught. But it seemes otherwise. *Co. 3. 10. 2. 33. Dyer. 60.* But if I grant my tenement, which I purchased of J. S. in dale when in truth it was J. D. not J. S. bought it of, it seemes this is not good, though I have but one Tenement, where. See more in Grant *Infra. Num. 4.* and in Testament, at *Num. 8.* and in Fine, at *Num. 1.* and in *Brownlow. 1. part. 3. 1. 2. part. 33. 1. 332. Dier. 77.*

The Exception is always taken most in favour of the lessor, lessor &c. and against the lessor. And yet it is a rule, That what will passe by words in a grant, will be excepted by the same words in an exception. And it is another rule, that when any thing is excepted, all things that are depending on it, and necessary for the obtaining of it, are excepted also: as if a lessor except the trees, he may bring his chimpars to view them if hee desire to sell them, and he or the Vendee may cut them and take them away. And by such an exception the Lessor will have the boughs, fruit, hierbms, and hawks, that breed in them &c. *Co. 10. 206. 34. H. 8.*

If a man be seised of a fishing from such a place to such a place, and hath a Mill upon the water, and hee grant *totam partem suam piscaria de D. quam diu terra sua se extendunt, salvo tamen flumine indelendini*, this exception doth not take away the fishing of the grantee in the mill pond, but it shall have relation only to the pool to repair the Mill. *2. S. 646. Fitz. Affis. 316.*

If a man seised of a Manor make a lease of it excepting all the saleable underwoods now growing, or which hereafter shall grow on the premises, which have been usually sold by the owners of the manor, with free entrie, egress, and regress, for the selling, making, and carrying away of the same at times convenient, in this case the soils is not excepted by reason of the subsequent words. *Hil. 16. Jac. B. R. per 2 Judges.*

If one be seised of a Manor and make a lease of it *cum pertinet una cum columbaris ac redditibus decimis garbarum finibus, heriot perquisitis Cur. & aliis omnibus praſentibus, Advocat. Ecclesia & Wreth* except, in this the exception doth begin an *Advocat. Ecclesia*, and doth except that which followeth, and no more. *Dier. 58.*

If one grant in fee excepting the trees, or any other thing, to the grantee without saying [and to his heires,] by this exception the thing excepted is severed only for the life of the grantor, and then it shall passe with the rest of the things granted. *Dier. 264.*

But if the thing be excepted indefinitely without saying for the life of the grantor &c.] nor how long; this shall be taken to be an exception during the estate. *Dyer* 264.

The *Habendum* as all other parts of a deed for the most part, shall be taken most strongly against the grantor and most in advantage of the grantee; yet so as withall it shall be construed as near the intent of the parties as may be; as in all the cases following doth appear.

In the *Habendum* or limitation of the estate, and how that shall be taken.

Fee simple. *Self* 16.

If land be given or granted to one *habendum* to have and to hold to him and his heirs so long as he pay 10l yearly to *I S* and his heirs, or so long as such a tree doth stand, or the like, this is a kind of fee-simple, but it is limited and qualified and determinable upon this contingent. And yet this may become a pure fee-simple, for if land be granted to one and his heirs until *I S* pay 100l and *I S* die before he pay it, in this case the estate is become a pure fee-simple. *Flow* 357.

If lands be given or granted to a man to have and to hold to him and his heirs, this is a fee-simple, pure, absolute and perpetual; and this is made by these words [his heirs] for it is a general rule that these words [his heirs] only make an estate in fee-simple in all feoffments and grants. But this rule hath many exceptions, for if feoffment of land be made to *I S* & *heridibus*, without the word [Sui] this is a fee-simple. *Co. super Litt* 8. 9. *Lit* 1. 27. *H. 8. 5*; *Perk. Self* 239. 240. 241. 239. *H. 8. 38*; *Flow* 28; *Brev. Estant* 4. 11. *H. 7. 12*; *Co. super Litt* 15.

And yet if the grant be to *I S* and *I D* & *heridibus* without this word [Sui] contra, for this is only an estate for their lives. And if lands be given to a Bishop, Parson or the like, To have and to hold to him and his successors, this is a fee-simple. And lands be given to a Mayor and Commonalty or other Corporation aggregate generally without the word Successors, or any other word, or if lands be given to such a Corporation for their lives, this is a fee-simple. But if lands be given to a Parson, or the like, To have and to hold to him, without saying how long, or to have and to hold to him for life; by this he hath no more but an estate for life. And if lands be given to the King generally without any other words; this is a fee-simple. So if one grant *do & velis de D*; it is said this is a fee-simple in the Parson of *D*. So also of a grant *de velis de D*; per *Thirus Inst*. So if a grant had bene to the Mother of such a house, it had been a fee-simple in the house. *Co. 6. 27*; *super Litt* 9. 15. *Ed* 4. 13. 9. *H. 7. 11*; *H. 8. 9*; *H. 4. 84*; *35*; *H. 6. 20*; *Co. super Litt*. *Aff. Pl* 12. *Phy* 1. 10. 14. *H. 4. 13*.

And in like manner it is in other cases; As if one saies that *B* hath enfeoffed him of white acre To have and to hold to him and his heirs, and then he saith further, that as fully as *B* hath given white acre to him and his heirs he doth grant the same to *C*. by this *C* the grantee hath the fee-simple of this acre. And if one grant 2 acres to *A* and *B* to have and to hold the one to *A* and his heirs, and the other to *B* in forma predile; by this *B* hath a fee-simple in this other acre, for an estate in fee-simple, fee-tail, or for life, may be made by such words of reference. Also if a rent be granted betwene Parteners for to make an equalitie of partition, and it be granted generally and without any words of heirs, yet this is a fee-simple. So where lands are given in *Frankalmorie*. And so also it is in the cases of a release of right, a fine, and a recovery. See more in *Bracton*. *Rep* 1. pars. 32. 369.

If one give or grant land to another, To have and to hold to him and his heirs makes, or to him and his heirs females, in both these cases there is a fee-simple made, but otherwise it is when these words are in a Will, for then it is but an estate in tail only. 27 *H. 8. 27*. *Lit. Self* 31. *Co. 11. 46*.

If one grant land to one, to have and to hold to him and his right heirs; by this he hath a fee-simple. And so it shall be taken if it be by Doe. So if one grant land to *I S* for life, the remainder to the heirs, or to the right heirs of *I S*, this is a fee-simple. So if one make a feoffment in fee to the use of himselfe for life, and after his death to the use of his heirs; this is a fee-simple. *H. 6. 5*; *Co. super Litt* 22. *Co. 1. 9. 66*.

If one grant land to *I S*. To have and to hold to him and the heirs of *I S*, this is a fee-simple, and all one with a grant to *I S* and his heirs.

If one grant land to another to have and to hold to him for 20 years, and that after the 20 years the grantee shall have it to him and his heirs by aol. rent, and give livery of seisin; by this the grantee shall have the fee-simple: 20 H. 6. 35: Co. super Lit. 217.

If one grant land to the Wife of I S to have and to hold to her for life, and after to I S in taile, and after to the right heirs of I S; by this I S hath a fee-simple. And if one grant land to A for life, the remainder to B for life, the remainder to the right heirs of A; by this A hath a fee-simple: Co. 2. 91. Dyer. 156. Co. super Lit. 22.

If land be granted to a man and his wife, to have and to hold to them and the heirs issuing of them, it seemes this is a fee-simple and not a fee-taile: Bro. Estates: 86.

If land bee granted to one and his heirs by the premisses of a deed to have and to hold to him for life; by this he hath a fee-simple: So if by the premisses of a deed land bee granted to one and the heirs of his body to have and to hold to him and his heirs; by this he hath an estate taile and a fee simple expectant. And so *via versa*. Brownlow. Rep. 1. part. 45. accord. 169. If by the premisses of the deed the grant be to him and his heirs to have and to hold to him and the heirs of his body; by this also he hath an estate taile and a fee-simple expectant: Co. 2. 21. 24 super Lit. 21. 21 H. 6. 7:

If lands be given or granted to a man to have and to hold to him and to the [or his] heirs of his body, or the [or his] heirs males of his body, or the [or his] heirs females of his body; by this the grantee hath an estate taile: So if lands be given to a man, to have and to hold to him and the heirs males, or to him and the heirs females of his body begotten; in both these cases it is an estate taile. Brownlow. rep. 1. part. 2. 1. 1. part. Terms of law, tit. taile. Lit. tis Fee to so, & in Co. super Lit. 26.

If lands be given to a man and his wife, to have and to hold to them and the heirs males, or to them and the heirs females of their two bodies begotten; by this they both have an estate taile. And if lands be given to them and the heirs males, or heirs females of the body of the husband begotten on the wife; by this he hath an estate taile and his wife an estate for life only. And if lands be given to A to have & to hold to him and his heirs on the body of B begotten; by this A hath an estate taile and B hath nothing. So if lands be given to a man and his wife, to have and to hold unto them and the heirs he shall beget on her body; by this they have an estate taile in them both. If lands be given to a man and his wife and the heirs of the body of the husband, by this the husband hath an estate in general taile, and the wife but an estate for life. If lands be given to him to have and to hold to him and his heirs he shall beget on the body of his wife; by this he hath an estate taile and she no estate at all. Lit. idem Co. 1. 140: Co. super Lit. 20. Co. 7. 41.

If one give his land to his daughter or Cousin in Frankmarriage, by this they have each of them an estate taile without any word of [heires, or heires of body] &c. Lit. Stat. 17.

If one give lands to B and his heirs, to have and to hold to B and his heirs, if B have heirs of his body and if he die without heirs of his body that it shall revert to the donor, by this B hath an estate taile. So if one give lands to B and his heirs if he have issue of his body; by this he hath an estate taile: So if lands be given to B to have and to hold to him and his heirs, provided that if he die without heire of his body that the land shall revert. So if lands be given to A & B *ut vultus & heredes eorum & alius heredes ipsius A sicut heredes de dictis A & B ex eunt obierunt sine herede de se &c.* by this they have an estate taile. And so in all such like cases where after a limitation of a fee-simple these or such like words are added, viz. that if he die without heirs of his body the land shall revert, for in all these cases the *habendum* is construed to be a limitation or declaration what heirs are meant before. Co. super Lit. 21. Co. 7. 41: 5 H. 5. c.

If lands be given to A and B (a young man and maid unmarried) to have and to hold to them and the heirs of their two bodies; by this each of them hath an estate taile; and if they marry their heirs may inherit it. Co. super Lit. 26: Plow. 135.

If lands be given to the son to have and to hold to him and his heirs of the body of his Father; by this the son hath a fee-simple. But if the words

Will.

bee to have and to hold to him and the heires of the body of the Father engendred; by this it is an estate taile in a deed as it is in a Will. And if the Father be dead the Law is so also, but it seems the son shall have by this only an estate for life except he be issue in taile to his father *per formam doni*. So if there be grandfather, father and son, and the father dieth, and lands be given to the son to have and to hold to him and the heires of the body of the grandfather; this is an estate taile in the son: but neither the father nor the grandfather have either of them any estate in these cases. If lands be given to *I S* and the heires of the body of his wife (being dead) begotten by this *I S* hath an estate taile. *Co. super Litt. 7: Co. 8. 87. Aff: Pl. 47. 5 Aff: 14: 12 H. 4. 1.*

Sel. 17.

If one grant lands to *I S*, to have and to hold to him and the heires of his body issuing, the remainder to *I D* and his heires *in forma predicta*; by this *I S* and *I D* after him have each of them an estate taile. *Co. super Litt. 385.*

If one grant lands to *A* to have and to hold to him for life the remainder to the first son of *A*, and the heires males of the body of that first son; by this the first son hath an estate in taile, and *A* his father but an estate for life only. But if lands be granted to *A* for life the remainder to the heires of the body of *A*, by this *A* hath an estate taile in him. And if lands be given to a man and his wife to have and to hold to them and one heire of their bodies lawfully begotten and to one heire of the body of that heire; by this there is an estate taile made, yet so as it shall last only during the lives of those two heires: *Co. 2, 91. super Litt. 12: 39. Aff: Plow: 20.*

If one grant lands to another to have and to hold to him and to his heires of t^e body of such a woman lawfully begotten; by this he shall have an estate taile, for begotten shall be intended by the donee on that woman. *Co. super Litt. 26:*

If there be husband and wife and they have issue a son and daughter, and lands are given to the wife to have and to hold to her and the heires of her late husband on her body begotten; by this the wife hath an estate for life and the son an estate in taile, and if he die without issue it shall goe to his daughter *per formam doni*. *Co. super Litt. 26.*

If lands be granted to the husband of *A* and wife of *B*, to have and to hold to them and the heires of their two bodies; by this they have each of them an estate in taile in them, for there is a possibility that one husband and wife may dye, and then the other husband and wife may intermarry. *Co. super Litt. 20.*

If there be father and son, and lands are given to the father to have and to hold to him and the heires of the body of his son; by this the son hath an estate taile, but the father as it seemes, but an estate for life. *12 H. 4. 3. Dyer 247.*

If lands be given to the mother for life the remainder to her son and the heires of the body of his father on her begotten (the father being dead) by this the son hath an estate taile. *Lit. Sect. 352.*

If lands be granted to *I S*, to have and to hold to him and the heires he shall happen to have of his wife; by this he hath but an estate taile and no fee simple, and his wife hath no estate at all. *12 H. 4.*

If lands be granted to *I S* and the heires that the said *I S* shall lawfully beget of of his first wife, and he hath no wife at the time of the grant, by this he hath an estate taile. *Co. super Litt. 20.*

If *A* have issue by *B* his wife *C* a son and *D* a daughter, and *A* die, and lands are granted to *B* to have and to hold to her and to the heires of *A* her late husband on her body begotten; in this case and by this deed *C* hath an estate taile and the woman hath only an estate for life, and if *C* die without issue, *D* his Sister shall have the land *per formam doni*. But if one grant lands to *A* late wife of *I S*, to have and to hold to the said *A* and the heires of *I S* on the body of the said *A* begotten; in this case the son and heire shall take no estate by the grant. And the same construction shall be upon the same words in his Will. *Co. super Litt. 26.*

Will.

If lands be granted to the husband and wife, to have and to hold to them and the heires of the body of the survivor of them; by this the survivor shall have an estate taile after the death of the other. *Co. super Litt. 26.*

If lands be granted to *I S* to have and to hold to him & *heredibus de carne sua*,
or

or *heredibus de se*, or *heredibus quos sibi consigerit*, in all these cases *I. S.* hath an estate taile and no more. *Co. super Litt.* 20.

If Lands be granted to Husband and Wife, to have and to hold to him and the Heirs of the body of the Husband, the remainder to the Husband and Wife and the Heirs of their two bodies begotten, this remainder is void, and therefore by this the Husband hath an estate in taile and the Wife a joint estate for life with her Husband and no more. *Co. super Litt.* 28.

If Lands be granted to *I. S.* and his Heirs of the body of *Jane a Noke* begotten; by this *I. S.* hath an estate taile and no more. *Co.* 1. 140.

If Lands be granted to *I. S.* & *heredibus de corpore procreatis*; by this the Heires that shall be begotten afterwards shall take. And if Lands be granted to *I. S.* & *heredibus de corpore procreandis*: by this the Heirs of his body before begotten shall take *per formam doni* as well as those that shall be begotten afterwards. *Co. super Litt.* 20.

Señ. 18.

If one grant to *I. S.* that if he and the Heirs of his body be not yearly paid 40 l. that he or they shall distraine in the Lands of the grantor; by this the Grantee hath an estate in taile in the Rent, as if he grant to *I. S.* that if he and his Heirs be not paid &c. that he or they shall, &c. he hath a Fee-simple in the Rent. *Co. super Litt.* 146.

If one give or grant Land to another to have and to hold to him, or to him and his assignes, and say not for what time; and the grantor make livery of seisin according to the Deed; by this the Grantee hath an estate for his own life. But no livery of seisin be made no estate at all but an estate at will doth pass by this Deed. And if he that doth grant the Land be but a Lessee for years of the Land and he make no livery of seisin upon the grant; by this his terme of years and that estate which he hath is granted. But if he make livery of seisin upon the grant then an estate for the life of the Grantee will pass, and it is a forfeiture of the estate of the Lessee for years of which he in reversion may take present advantage. And if one grant to another Common in his Land when he doth put in his own beasts, or estovers in his Manor when he cometh there, and say no more, by this it seems the Grantee hath an estate for life. *Brownl. 1 part.* 153. 175. *Litt. (señ.)* 283. 285. *Co.* 8. 85. 96. 2. 24. *Fines Law* 60. *Co. super Lit.* 9. *Dyer* 307. *Co.* 7. 23. 17 *Aff. pl.* 17.

For life.

Forfeiture.

If one grant Land to *I. S.* to have and to hold to him or his Heirs, in the disjunctive; this is but an estate for life and no more. So if one grant Lands to *I. S.* to have and to hold to him and his Heire, in the singular number; by this *I. S.* hath only an estate for life and no Fee-simple. *Co.* 5. 112. *super Lit.* 8.

If one bargain and sell Land to another for money, and limit no time and express no estate, by this the bargainee shall have only an estate for life. But otherwise it was before the Statute of Uses, for then it had been a Fee-simple. *Co.* 1. 87. 130 *Plow.* 5. 9.

If Lands be granted to *I. S.* for life, and after to the next Heir male of *I. S.* and the Heirs males of the body of such next Heir male; by this *I. S.* hath but an estate for life. But if it be to the next Heirs males of *I. S.* it is an intaile. *Co.* 1. 66.

If one grant Land to *I. S.* to have and to hold to him in Fee-simple, or in Fee-taile, without saying [to him and his Heirs, or to him and his Heirs males or the like] this is but an estate for life and no more. So if one grant Land to *I. S.* to have and to hold to him and his seed, or to him and his issues, generally without more words; by this is made only an estate for life. But in the construction of a Will the law is otherwise in most of these cases. 20 *H.* 6. 33. *Co. super Lit.* 8. 20.

Will.

If Lands be granted to two & *heredibus* without this word [*Suis*], by this they have an estate for their lives and no longer. 20 *H.* 6. 35.

If one grant Lands to *I. S.* to have and to hold to him and his Heirs for his own life, or for the life of *I. D.* by this *I. S.* hath an estate for life and no more. *Co.* 5. 112. 1. 140.

If one grant Lands to *A.* and *B.* *Habendum sibi & suis* omitting all other words, or to have and to hold to them and their assignes; by this they have an estate for life only. So if Lands be granted to any naturall person to have and to hold to him and his successors; by this he hath only an estate for his life. *Co.* 4. 29. *super Litt.* 1. 8.

If

If one grant his lands to *I. S.* to pay his debts to have and to hold to him generally without limiting any estate; in this case *I. S.* hath an estate for life only. *Co.* 8. 96.

If Lands be granted to *A.* and *B.* to have and to hold to them for their lives to the use of *C.* for his life; by this *C.* hath an estate for his life if *A.* and *B.* live so long. *Dier* 186.

If a Tenant in taile grant *totum statum suum*; by this the grantee hath an estate for the life of the grantor and no longer. And if a Lessee for life grant all his estate; hereby his estate for life doth pass, for this is as much as he can lawfully grant. *Witt.* sect. 613. *Co.* 1. 53. *super Litt.* 345. *Plow.* 562. 162.

If a man have a Son and a Daughter and die, and Lands be granted to the Daughter and the Heirs Females of the body of the Father; it seemes by this she hath only an estate for life. *Co. super Litt.* 24.

If one grant Land to another to have and to hold to her whiles she shall live sole, or during her widowhood, or so long as she shall behave her self well, or so long as she shall dwell in such a house, or so long as she pay 10 l. yearly, or so long as the coverture between her and her husband shall continue; or one grant lands to a man to have and to hold unto him untill he shall be promoted to a Benefice, or the like; in all these cases if livery of seisin be made according to the Deed, or if the grant be of such a thing whereof no livery is requisite; the Grantee hath an estate for his life and no more, and that determinable also. *Co. super Litt.* 42. 234. 235.

If one grant Lands to *I. S.* to have and to hold to him for life, and doth not say for whose life; this regularly shall be taken for the life of *I. S.* the Lessee, and not for the life of the Lessor. But if the Lessor himself have but an estate for life in the Lands granted, then the Lease shall be construed to be and endure during that life only by which the Lessor did hold to prevent a forfeiture. And if he that doth make the Lease be Tenant in taile of the Land, this shall be taken to be a Lease for the life of the Lessor. And if a Tenant for life of Land make a Lease for years of it and then grant his reversion by the name of a reversion to another, To have and to hold to him and his Heirs; by this he hath only an estate for life of the Grantor and no more. So if Tenant in taile of Land grant it to one for years, and after grant his reversion to another, To have and to hold to him and his Heirs, this shall be construed to be an estate for the life of the Tenant in taile and no longer, and the attornment of the Tenants in these cases will not alter the cases. And so it is in case of a Release also, as if Tenant in taile doth release to *B.* (being Lessee for years of the Land) all his right to the Land, this shall be taken to enure but for the life of the Tenant in taile and no longer, as if a man receive a servant, and say not how long; this shall be taken for a year. *Constructio legis non facit injuriam. Co. super Litt.* 183. 42. *Plow* 161 *F. N. B.* 168.

If one grant to *I. S.* that if he be not paid yearly for his life 40 s. that he shall distraise in the Land of the Grantor for it; by this *I. S.* hath an estate for life in the rent. And if a man by his Deed grant a rent of 10 l. issuing out of all his Land quarterly at the usual feasts, this is an estate for life of the Grantee. *Co. super Litt.* 147. *Co.* 8. 86.

If one grant Lands to *I. S.* and *I. D.* To have and to hold to them during their lives, omitting these words [and the longest liver of them] by this notwithstanding they shall hold it during the life of the longest liver of them. And if Lands be granted to *A.* to have and to hold to him during the lives of *B.* *C.* and *D.* without any more words; by this *A.* hath an estate during all their lives and during the life of the longest liver of them. *Co.* 5. 9. 12. 3. See *Brownlow's Rep.* f. 30. But if it be to one during the lives of *A.* and *B.* if one of them die the Lease is ended. 39. 180. 181. 2 part 392. *Goldsb.* 1. pl. 16. If a Lease be to two for their lives, and one of them die, the other shall hold by survivor. A Lease was made to the Father, during his Life and the Life of two of his sons, this was adjudged to continue after the death of the father. *Exdalla case* 31. *Eliz.* *Brownl.* 187. pl. 139. And if Lands be granted to *A.* To have and to hold to him during his life, and during the lives of *B.* and *C.* by this he hath a Lease for his own life and the lives of *B.* and *C.* and the longest liver of them. 38. *Eliz.* *B. R.* in the case of *Ros & Adwick*,
But

But if a Lease be made to *T. S.* of Land to have and to hold to him during the time that *A.* and *B.* shall be Justices of Peace, or during the time that *A.* and *B.* shall be of the Inner Temple, or the like; in these cases the failure of one doth determine the estate. And if a Lease be made to *B.* only to have and to hold to him and *C.* for their lives; by this *B.* hath an estate for his own life only and no more; and *C.* hath nothing at all. *Adjudged B. R. 3 Edw. Hobart & Westminster 1491.*

When no time is set down for the beginning of an estate, then it shall begin presently, otherwise it shall begin at the time expressed if it may stand with Law. If a Lease for years be made bearing date the 26 day of May, To have and to hold for 21 years from the date, or from the day of the date; in these cases the Lease shall begin on the 27 day of May. But if the words be To have and to hold from henceforth, or from the making hereof, in these cases the Lease shall begin on the day in which it is delivered. And if it be to begin 2 *die messuagii*, then it shall begin the next day after the delivery. And if it be To have and to hold for 21 years, without mentioning when it shall begin, it shall begin from the delivery if there be no former Lease in being, and if there be, then it shall begin from the time of the ending of that Lease. If the Deed have a date which is void or impossible, as the 30 of February, or 40 of March, and the terme be limited to begin from the date, then it shall begin from the delivery. So if a man by his Deed recite a Lease which is not, or which is void, or misrecite a Lease that is in effect in point material, and then say, To have and to hold from the end of the former Lease; this Lease shall begin in course of time at the time of the delivery of the Deed. *C. 1. 154. Plow. 198. Co. 2. 1. 1. Dier 286. 307.*

For years: when such a Lease shall begin and how long it shall continue.

Stat. 19.

If one make a Lease of Land to *A.* for 20 years, and then grant it to *B.* To have and to hold to him from the end of the first terme, &c. in this case the second Lease shall begin as soon as the first Lease by what means soever shall end. But if the words of the second Lease be To have and to hold to him from the end of the 20 years, in this case the second Lease shall not begin until the 20 years be expired. And if one make a Lease of white acre to *A.* for 10 years, and of black acre to *B.* for 20 years, and then reciting both the Leases doth make a Lease to *C.* to begin after the former Leases; this shall be taken respective, and shall begin for white acre after the end of the 10 years, and for black acre after the end of 20 years. And if one make a Lease to two for 60 years, provided that if the Lessee shall die within the term, that then presently after the decease of the last of them longest living the Lessor shall reenter, and one of them die, and after the Lessor doth make a Lease to another *Habendum, &c. cum post five per mortem suam vel per mortem unius* of the first surviving Lessee *acciderit vacare* for 40 years; in this case this second Lease shall begin after the death of the Lessee surviving, recently of the Lessor, or the effluxion of time of the first Lease which of them shall first happen, and the Lessee cannot at his election make it to begin at any other time. *C. 1. 154. Plow. 198. Co. 6. 36.*

If a man make a Lease for 30 years, and 4 years after make another Lease, to another man in these words. *Novimus, &c. me A. de B. prediis 30 Annis finis dedisse & concessisse B. de C. &c. Habendum a die consecrationis presentium terminis predictis finis usque finem*; *Annorum*: by this the second terme shall begin at the end of the 30 years. And if one make a Lease to *A.* for 20 years, and after make a Lease to *B.* to have and to hold to him from the end of the first terme for 20 years to be accounted from the date of the last Deed; in this case the second Lease shall begin at the end of the first Lease, and these words [to be accounted, &c.] shall be rejected *Dier 281. Cradock's case pasc. 7. 9. Co. B.*

If one make a Lease of Land to *A.* for 10 years, and after by indenture grant it to *B.* to have and to hold to him from Michaelmas next for 10 years, and after the first Lessee doth purchase the reversion by which his terme is drowned; in this case the second Lease shall begin presently when Michaelmas is come. *Dier. 112.*

If two Jointenants be, and one of them grants the Land to *T. S.* to have and to hold to him for 20 years, if the Lessor and his companion so long live; by this

the Lease shall continue no longer then they both live together, and when either of them is dead the Lease is determined. And if one grant his Land to J. S. to have and to hold to him, his Executors, &c. for the terme of 100 years if A. B. and C. live so long; and leave out the words [for either of them] in this case it is either of them die the Lease is determined. But if the words be To have and to hold for 100 years if A. B. or C. [omitting or either of them] shall live so long, &c. If a Lease be made of Land to the husband and wife to have and to hold to them for 21 years if the husband and wife or any child between them shall so long live; this is a good lease and shall continue for all their lives and for the life of the longest liver of them after the first word in the copulative.

If a man make a Lease for years to A. B. if they live so long; in this case if one of them dye, the Lease does not end. If a Lease be made to A. and B. his wife for 21 years if he and she or any child between them lawfully begotten shall so long live and after marriage she dwelleth with him, in this case the lease doth continue notwithstanding her death. *Provan. 1. part. 180. 2. part. 292. Mich. 13 Jac. 2.*

If one grant of Land for a Terme of years grant the same to another, To have and to hold to him, his Executors and administrators, or to him and his assigns, or to him, without any more words; for if a man that is possessed of a terme grant his Lease to another, and doth not say for what time; it seemes in these cases the whole terme is reserved, albeit no livery of seisin be made. And in the first case if livery of seisin be made, then it seems there doth pass an estate for the life of the Grantee, and therefore that this is a forfeiture of the estate of the Lessee for years whereof he is in the reversion may take advantage presently. And if a Lessee for years of Land grants a portion of the Land generally without any limitation; this shall be construed to enure for a part of the rent so long as the estate of the Grantor doth continue. But if he grants a rent by express words for the life of the Grantee, by this the Grantee shall have it for all the terme, if he live so long. *Dier 307. 69. Plow. 529. 529. 825. 423. 424. 67. 7. 23.*

If one grant Land to J. S. To have and to hold to him for life reserving the first seven years a rent, &c. if he will hold the Land over that he shall pay a rent in money and no livery of seisin is made, by this it seems in certayne it made a Lease for seven years until the condition be performed, and then also it seems it is a Lease for no longer time. And so perhaps it will be if livery of seisin be made. *Co. super Litt. 218.*

If one grant a rent of 5 l. per annum unto J. S. To have and to hold to him, &c. until he shall receive 20 l. in this case he shall have a Lease for four years of this rent. But if Lands be granted to J. S. To have and to hold, &c. until he shall receive 20 l. out of the profits of it, in this case if livery of seisin be made the Grantee hath an estate determinable upon the levying of the money, and if no livery be made he hath no estate at all but at will. *Co. super Litt. 431. Plow. 273.*

If one make a Lease for life and say, that if the Lessee within one year pay not 20 s. that he shall have but a term for 2 years; by this if he doth not pay the money he hath only a lease for 2 years, albeit livery of seisin be made upon it. *Co. super Litt. 218.*

If one make a Lease to J. S. To have and to hold to him, his Executors, &c. for 10 years if J. D. shall live so long, and J. D. is dead at the time when the lease is made; in this case J. S. hath an absolute lease for 10 years. *Co. 9. 63. 60.*

If one grant Land to J. S. To have and to hold to him, his Executors, &c. for 3 years and so from 3 years to 3 years during the life of J. S. or from 3 years to 3 years during the life of the lessee, by this it seemes J. S. hath a lease for 6 years and no more. And if one grant Land to J. S. To hold for 3 years and after the end of those 3 years for 3 other years, and after the end of those 3 years for 3 other years during the life of the lessor; by this it seems J. S. hath a lease for 9 years and no more. And yet if in this and such like cases where a lease is made from so many years to so many for the life of any person livery of seisin be made upon this deed *secundum formam charte*; this perhaps may be an estate for life. *Plow. 273. Co. super Litt. 45. Dier 24.*

For years
when such
a lease shall be
made how
long it shall
continue

2. R. 1. 2.

If a Lease be made to a widow for 40 years under this condition, that if she shall be so long sole and dwell in the house, and she lived sole and in the house all her life: it was agreed that the lease did continue after her death, *Gouldsb.* 179.

If Lands be granted To have and to hold from our Lady day *pro termino unius Anni, & sic de uno Anno in unum Annum quamdiu ambabus partibus placuerit*; by this the Grantee hath a Lease for 3 years only in certain, and afterwards a lease at will: And if lands be granted to have and to hold from the Nativity of Christ next *pro termino unius Anni, et si in fine dicti unius Anni amba partes placerent, quod eadem praesens dimissio foret renovata, tunc habend' promissa* to the lessee, &c. *ab & post dictum festum Nativitatis Domini usque terminum trium Annorum extunc prox' sequen'*; by this the Grantee hath a Lease in certain but for one year only; and if the parties agree again, a lease for 3 years. 14. H. 8. 10. Co. 6. 35. 19, 106.

If one make a lease to *I. S.* To have and to hold to him for years, and say not how many years; by this the lessee hath a lease for 2 years and no more: Co. 6: 35. 21 H. 7: 38.

If one grant his land to *I. S.* To have and to hold to him untill *I. D.* shall come to 21 years of age; in this case if *I. D.* die before that time, the lease is ended: Co. 3. 19.

If a man possessed of a terme of years of land doth grant the land to another and his Heirs, this by construction will amount to a good grant of his interest. Co. 1: 44. 7 H. 4. 42.

If lands be granted to husband and wife, and to *I. S.* To have and to hold to them and to the Heirs of the husband and *I. S.*; by this the wife hath only an estate for life in a moiety with her husband, and the husband and *I. S.* have the fee-simple in Jointenancy to them and their heirs. *Dyer* 263.

Limitation of estates to divers persons.

If lands be granted to two brothers, or two sisters, or to a brother or sister, or to a father and son or any others, To have and to hold to them and the heirs of their bodies begotten: by this they have joint estates for their lives, so that the survivor of them will have the whole for his life, and severall inheritances .i. estates in general taile by moieties in common one with another. And if lands be granted to two men and their wives and the heirs of their bodies begotten: in this case they have joint estates for life, and afterwards the one husband and wife shall have the one moiety, and the other the other moiety in common. And if lands be granted to a man and two women To have and to hold to them and the heirs of their bodies; by this they have each of them an estate taile in common with the other. Co. 8. 87. 10. 50. *super Litt.* 25: *Dier* 145.

If lands be granted to husband and wife To have and to hold to them and their heirs of their bodies issuing, or in any such like manner, by this the wife hath an estate taile as far forth as the husband. But if it be granted to them To have and to hold to them and the heirs of the body of the husband, or to the husband and wife and the heirs of the husband which he shall have by his wife, or in any such like manner: by this the wife hath only an estate for life, and the whole estate taile is in the husband. So *via versa*, if lands be granted to husband and wife, and the heirs of the wife upon her body begotten by the husband: by this he hath an estate for his life only, and his wife the whole estate taile. And if lands be granted to the husband To have and to hold to him and the heirs of his body on the body of his wife begotten, or to have and to hold to him and the heirs of his body begotten on the wife he shall first marry, or to have and to hold to him and his wife he shall first marry, and the heirs of their bodies begotten: in these cases the husbands have the whole estate, and the wives nothing at all. But otherwise it is it seems, when the estate is limited by way of use to a man and his wife that he shall afterwards marry, for by this it seems the wife shall take also. *Lit. sett.* 27. 28. 29. Co. *super Lit.* 26. *Dier* 340. Co. 1. 100.

Use.

If Lands be granted to *A* a married man, and to *S* a married wife and to the heirs of their bodies engendered: by this they have each of them an estate taile presently executed, and whiles the wife of the husband and the husband of the wife live they shall hold it for their lives, and if they happen to die, and these to intermarry and have issues, their issues shall have it according to the intaile: 15 H. 7. 10.

When the *Habendum* shall be said to be repugnant and void. And when not, but shall controul, divide or expound the premises.

If Lands be granted to *A* and *B* To have and to hold to *A* for life the remainder to *B* in Fee: by this *A* shall have the whole for his Life and *B* the Fee-simple afterwards. *Dier* 126. 56

As touching this matter these differences are to be taken. Between things that are granted and between the estates, When the things that are granted are such as lye in grant and take effect by the delivery of the Deed only without any ceremony, or take effect by the same ceremonie, and when not but another ceremony is required to the perfection of the grant and estate. *Co.* 2. 23. 8. 56. *Perk. fess.* 181. 14 *H.* 8. 14. *Co. super Litt.* 183.

And when there is an expresse estate made by the Deed in the Premises thereof, and when but an implied estate only, as for examples. If one grant Land, Rent common, or any such like thing to one and his Heirs by the Premises of the Deed To have and to hold to him for life, or To have and to hold to him and to his assignes, without more words; in this case the *Habendum* is repugnant and void, and by this the Grantee shall have an estate in Fee-simple if livery of seisin and attornment, as the case doth requite be duly made, for otherwise no estate at all but at will, will pass. So if a man grant a Rent, or any such like thing that lieth in grant to one and his Heirs, To have and to hold to him for years; this is a void *Habendum*, and the Grantee shall have the Fee-simple. But if a man grant Land to another and his Heirs. To have and to hold, to him for a certain number of years; in this case whether he may make livery of seisin or not it is a good *Habendum*; and by this the Grantee shall have an estate for so many years and no more. So if one grant Land, Rent, Common, or any such like thing to one in the Premises of the Deed without limitation of estate (which in judgement of Law is an implied estate for life) To have and to hold to him for a certain number of years, or at will; this *Habendum* is good and shall stand with the Premises and qualifie it; and by this the Grantee shall have but a Lease for years, or at will, as the *Habendum* is. And if one grant Land by the Premises of a Deed to one and his Heirs of his body To have and to hold to him and his Heirs; this *Habendum* shall stand, and this shall be taken an estate taile and a Fee-simple expectant. So *vice versa*, If Land be granted to one and his Heirs To have and to hold to him and his Heirs of his body, this shall be construed an estate taile and a Fee-simple expectant and so both shall stand together. *Co.* 8. 154. 21 *H.* 6. 7. *Co. super Litt.* 20. *Dier* 126. & *per curiam* in *Thurman's case*. *Pasc.* 16. *fac. B. R.* 21 *H.* 6. 7. If Lands be given to *B* and his Heirs To have and to hold to *B* and his Heirs, and if he die without Heirs of his body that it shall revert to the Donor, it seems this is a Fee-taile only and no Fee-simple expectant, *Voluntas donatoris in charta doni sui manifeste expressa observanda est.* *Co. super Litt.* 21.

If a Lease for years be made of Land, and then the Lessor by the premises of the Deed granteth the Land to another To have and to hold the reversion of the Land to him, &c. for life; this *Habendum* shall stand. So if by the Premises of the Deed the reversion be granted To have and to hold the Land it self, this is good and both shall stand together, but nothing is granted in either case, but the reversion *Co.* 10. 107. 108.

If the next Advowson of a Church be granted to three to have and to hold to them and either of them jointly and severally; this is joint, and the *Habendum* is void. And yet if one grant Land to two by the premises of the Deed To have and to hold to one of them for life, the remainder to the other for life, this is not repugnant, but shall stand together and make the estates severall and in remainder one after another. So if a Lease be made to two To have and to hold the one moiety to the one, and the other moiety to the other; by this they have severall estates, *Expressum facit semper cessare tacitum.* *Dier* 304. *Co.* 5. 19. *Co.* 2. 55. *super Litt.* 183. *Dier* 106. If a man have a Lease for years of Land, and he reciting this, by the Premises of the Deed doth grant all his estate in the Land, To have and to hold the Land or the term after his death, or for part of the time only; in this case the *Habendum* is void and the whole estate doth pass immediately by the premises. *Dier* 272. *Plow.* 520. If a Tenant for life surrender a moiety of his Land and the Lessor grant it all to a stranger To have and to hold the one moiety for life and the other moiety for 40 years, after the death of the tenant for life; this *Habendum* shall stand and enure according to the grant. *Dier.* 256. If

If a man seised of land in fee make a lease for life of it to one, and after grant the reversion of it to another to have and to hold the reversion and the tenements aforesaid *cum post mortem forisfacti &c. vacare acciderit*; in this case the *Habendum* and premisses may stand together: It is usuall in the *Habendum* of a deed to set down to what use the party to whom the deed is made shall have the thing granted. But touching this and the matters that doe concern uses see *Vse infra* at large. And see also more for the *Exposition of Deeds in Testaments Numb. 8. Grant Numb. 4. Leases cap. 14. Numb. 4.* And here note that parol-agreements & conveyances have the same construction for the most part made upon them as are made before upon deeds. And therefore if a man by word of mouth without any writing grant all his lands in dale to *I S* to have and to hold to him for life, but doth not say for whose life, this shall have the same construction as such a grant made in writing hath. *Curia pas: 7 Jac: Co. B.*

Note.

This is alwaies taken most in advantage of the feoffee, grantee, lessee, &c. and against the feoffor, grantor, lessor, &c.: and yet so as the rent be paid during the time. *Co. 5. 111. 10: 106. 8. 71. Co. super Litt. 47: 213, 214. Goldsb. 148.*

And therefore if the reservation be only to the feoffor, grantor, &c. and the deed doe not say also [to his heires, executors &c.] this reservation shall continue only for the life time of the grantor and shall determine with his death. And so also it is where the reservation is to the feoffor or his heires, in the disjunctive, for in this case the rent shall continue only during the life of the grantor. And yet if one make a lease for years rendring yearly during the said terme to the lessor or his heirs or executors; this is a good reservation during all the terme, by reason of these words [during the terme.] So if the feoffor, or lessor be seised in fee, and make a feoffment in fee, or lease for life or years, rendring rent to the feoffor or lessor or his executors or assignes; in this case the rent shall continue only for the life of the Lessor. *Plow. 171. 21 H. 7. 25. 27 H. 8. 19. Dier 45.*

In the reservation of Rent. And how that shall be taken. *Sett. 21.*

But if the reservation be to the Feoffor, or Lessor, his Heirs and assignes, in the copulative, or in the disjunctive to him or his Heirs, or to him and his successors (if it be the lease of a Corporation) during the terme; then all the assignes of the reversion shall enjoy it. And if the reservation be thus, yeelding and paying so much rent (without any more words,) this shall be taken for all the time of the estate and shall goe to him in reversion accordingly. And if the reservation be rendring so much rent during the said terme, and doth not say to whom; in this case it shall be construed to be to him that hath the reversion, and accordingly it shall be paid and shall continue during the term: *So held in the case of Bland M. 8. Car. B. R.*

But if *A* be seised of Land in Fee, and make a Lease for years of it rendring rent to *A* [without saying To his Heirs, &c.] during the said terme, this rent shall continue only during the life of *A* and no longer. And yet if *A* be possessed of a terme only, and make an under-lease or assignement with such a reservation: *Quere.*

If the reservation be thus, Yeelding and paying 20 s. during the said terme, omitting the word [yearly] this shall be taken to be not once only but yearly during the terme, and accordingly it must be paid. And if a Lease be made for years, rendring in every middle of the yeare, *quolibet medio Anni 20 l.* this shall be paid during the terme. *27 H. 8. 19. Pas. 21. Jac. Hudson & Brent B. R.*

If one by Deed indented grant Lands to *A*, To have and to hold to him for life, the remainder to *B*, and the Heirs of his body, and for default of such issue to remaine to *D*, in taile, or for life, yeelding therefore yearly, &c. in this case the reservation shall extend to all the estates. *Co. 10. 107.*

If a Lease be made the 10 day of *August*, rendring rent at our Lady day and Michaelmas; in this case albeit our Lady day be first named, yet the first payment shall be at Michaelmas next after the making of the Deed. *Dier 130. Co. 5. 111. super Litt. 217.*

If the reservation be at Michaelmas or within 20 daies after: in this case the 20 day shall be taken exclusive. But if the rent be to be paid at Michaelmas or by the space of 20 daies after, in this case the 20 day shall be taken inclusive: *Per Williams & Telverton Inst. Ch. Inst. contra 9 Jac. B. R.*

If a lease be made in *December*, from the Nativity of Christ next for one year with this addition, *Et si in fine dicti Anni amba partes agreeant quod eadem dimissio foret renovata tunc habenda & tenenda premissa dicto 1 S* (the lessee) *ab & post dictum festum tunc proximum sequens usque finem trium Annorum. Reddendo inde Annuatim durante dicto termino dicti 1 S. &c.* in this case the reservation shall relate to both the terms, and the rent shall be paid the first year although they do not agree to renew the lease. *Co. 10. 106.*

If two Jointenants by deed poll, or by word make a lease for life, reserving a rent to one of them, this shall goe to them both. So if one of them be tenant for life and the other in fee, and they joine in a lease for life, or gift in taile reserving a rent; the rent shall enure to them both. But if tenant for life and be in reversion joine in a lease for life, or gift in taile by deed reserving a rent, the rent shall enure to the tenant for life only during his life and after to him in reversion. *Co. super Litt. 214.*

If two tenants in common make a lease of their land rendring 20 s. rent; this shall be but one 20s and not two 20 s. So if the lease be rendring a Hawke or a Horse; by this they shall have but one Hawke, and one Horse, and not two Hawkes or two Horses, as it shall be in cases where they do joine in the grant of such things out of their land. *Plow. 171. 289. Co. 10. 106.*

If one make a gift in taile of two acres of land, the one at the common law, and the other in Burrow English rendring an ox to him and his heires, and the donee having two sons die, and the eldest son doth inherite the one acre, and the youngest son doth inherite the other; in this case the donor and his heires shall have but one ox &c. *Co. 10. 106.*

If one make a lease of land for years if the lessee live so long, and after the lessor by his deed indented doth grant the land to another to have and to hold the reversion to the grantee for his life *cum post mortem &c.* *unt ut si uter acciderit vacare reddenda inde Annuatim* to the grantor and his heires *cum reverso predicta acciderit 91. 4d. per Annum*; in this case this reservation of rent shall not begin before the reversion happen in possession. *Co. 10. 107. 108.*

In other respects.

If rent be reserved to be paid at two terms, and it is not said by equal portions; yet it shall be so taken and it must be so paid. *See more in Brownlow. 1 part. 19. 39. 63. 87. 105. 108. 2. part. 21. 1273.*

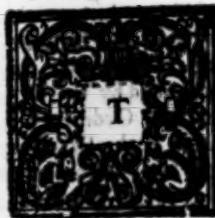
Devise.

If one be possessed of a terme of years of land, and grant it by deed to 1 S for his life, and after his death to 1 D; in this case the whole terme is granted to 1 S, and his executors, administrators and assignes shall have it and not 1 D. But if a terme were so devised by Will *contra*. And if one give or grant to another his horse, or his books for his life, and that after his death they shall remaine to another, the remainder is void, and the first shall have it for ever, for the gift or grant of such a thing for an houre is a gift of it for ever. If I grant you that if you pay me 20 pound at *Easter*, that then you shall have an Annuite of 40 pound to you and your heirs and you die before *Easter*, in this case the heire can never have it. *Goldsb. 64. Pliz.*

Remainder.

CHAP. LXIV.

Of an Action of Debt.



His word Debt is sometimes taken for a sum of money, or other thing which is owing or due from one man to another, whether by writing or otherwise; And sometimes it is taken for the mean it self to recover this thing, and then it is said to be an Action given, or a Writ lying where any sum of money or other thing is due to a man, upon, or by reason of a Judgement or Recovery in Law, Obligation, or other Especialty, Account, Loan or Contract to be paid at a certain day, at which day he payeth it not, then he to whom it is due shall have this writ to recover it. *New terms of the Law. F. N. B. 119. § Ed. 4. 1.* In this place it is taken sometimes in the one, and sometimes in the other signification and considered as the Debt of a Common person and as the Debt of the Lord Protector.

What it is.

Sec. 1.

The Action of Debt (wherever it lyeth) is sometimes grounded on matter of record, as either on an act of Parliament, or a Judgement, Statute, or Recognizance, or the like. And sometimes it is grounded on matter in fait: And that either in writing, as an Obligation, Bill, Covenant, or other especialty, or else without writing, as an Arbitrement, Escape, Receipt, Paroll-contract, or the like. This Action may be had and brought in any of the common Law Courts as the upper Bench, or Common pleas, or other Courts that have Jurisdiction. But if the Debt be under 40 s. the proper places to sue for it is in the County, or Hundred-Court, or a Court-Baron. And if the Debt be under 40 s. and owing by one that doth live within the City of London, or the liberties thereof, unto such a one also, and be not grounded on a reall contract, the party is bound by a speciall Law to sue for it in the Court of Requests for the City of London, for if he sue for such a petty debt in any other Court, he shall pay the Defendant Costs, and yet shall recover, no costs in his suit against the Defendant, *F. N. B. 119. 3. Jac. ch. 15.*

No Action of Debt or Trespas or other personall Action may be brought in the Common-pleas, where the Debt or Damages doth not amount to 40 s. or upwards. *Gloss. cap. 18. N. B. 61.* But by joyning two Debts together for divers contracts together in one writ, the force of this Statute is avoided, See *Crompt. Jur. 101.*

The party himself to whom the Debt is originally due, whilst he doth live, must bring the Action for it in his own name, and after his death his Executors or Administrators may and must have the Action where there is cause. And if the Executor be under age, the Administrator *durante minori aetate*. And if there be divers Executors who have taken upon them the Executorship, after the death of some or one of them, the survivor or survivors must have the Action: And when they are all dead, the Executor of the last survivor: And so when there is but one Executor, and he doth accept and die, the Executor of the Executor, and so *in infinitum* shall have the Action. And if an Executor die intestate, there must be an Administrator made *de bonis non administratis* of the first Testator, and he must have the Action; But the Ordinary or Administrator of the goods of an Executor may not have this Action for a Debt due to the first Testator, unless withall he have an Administration *de bonis non administratis* of the Testator which is usuall, *Dyer 24. 20. Ed. 4. 20. Co. 3. 9. Dyer 471. Brownl. 2 part. 207.*

2 By whom this Action may and must be brought, and who may bring it, and who not.
Sec. 2.
Executor.

An Heir may not nor must have this Action for a Debt due to his Ancestor, nay not albeit it be due upon an Especialty made to him and his Heirs, but the Executors must have the Debt and sue the Action, *F. N. B. 120.*

Heir.

The Executors or Administrators, not the successors of a Bishop, Parson, Vicar, Master of Hospitall, or the like, must bring this Action for the Debt due to the predecessor.

But

Executor.

But if a Debt be due to a Corporation aggregate, as Mayor and Commonalty, Dean and Chapter, or the like, in their politic capacity, there the Successor [not the Executor] must sue for it. If there be divers Executors, and one of them sell some of the goods (as he may if he will) in this case he alone may sue in his own name for this. If one grant to me a Rent in Fee, and if it be arrear, to forfeit 40 s. to me and my Heirs, *nomine pane*, and I die; my Heir, not my Executor must have the Action for the penalty paid, *Co. 4. 65. Old, N. B. 62. 34 Ed. 2. 9. F. 7. B. 120.*

Heir.

Against
whom it may
or must be
brought or
not.

Sec. 3.
Executor.

This Action may and must be brought against the party himself that doth originally owe the Debt, whilst he is living. And after his death it may and must be brought against his Executor if he make any, and the Executor made do take on him the Executorship; otherwise against the Administrator appointed by the Ordinary, or if he appoint none, against the Ordinary himself. And if the Ordinary die possessed of the goods against the Executor of the Ordinary. And if the Executor die after he hath accepted the administration, then the Action must be brought against the Executor of the Executor; and so *in infinitum* if any such Executor be made. But if none such be made, then against the Administrator *de bonis non administratis*. And if the Administrator of the first intestate die intestate, also it may be brought against the Administrator of that Administrator, being Administrator *de bonis non administratis*. But it doth not lie against the Executor of an Administrator for the Debt of the intestate, *F. N. B. 120. Dyer 271. 160. 174. 112. Co. 5. 9. Westm. 2 Cap. 19. Brownl. 2 part 97.*

Heir.

It lieth and may be had against an Heir upon an Especialty made by his Ancestor; if thereby he hath bound himself and his Heirs, otherwise not.

Husband and
Wife.

It lieth and must be brought against the Husband and Wife, for the Debt of the Wife, during the Coverture.

It lieth and may be had in some cases upon a contract against an Infant: For which see *Contract*.

Heir.

If one grant me a Rent-charge out of his Land, and the Rent is behind, and after the Grantor make a Feoffment of his Land to another, and then the Rent is behind again, and then the Feoffee makes a Feoffment of it to another, or makes a gift in tail, Lease for life, or years, or at will, or makes a gift in tail with the Remainder over in Fee, and then more Rent is behind. In these cases if I or my Executor sue for this Rent, I must bring my Action against every one of them for the Rent due in the time of his occupation of the Land only. So if the Land charged descend to the Heir of the Grantor, and from him to his Heir; in this case every Heir shall be charged for the Rent due to his time, *Qui sentit commodum sentire debet & onus Co. 7. 34. Stat. 32 H. 8. 37. Co. 4. 50.* If I make a Lease for years to A and B rendering Rent: and A assign his part of the term to C and B die; in this case I may have one Action of Debt against C and the Executors of B, and I am not bound to have severall Actions, *Curia Co. B. M. 4: Jac. Bayly & Burgesss de Ipswicks Case.* An Action of Debt lieth not against the Heir of a Conusor upon a Statute, nor against the Terre-Tenant, as it doth against the Conusor himself, *Co. 3. 15.*

Heir.

Executors.

It lieth not against the Executors or Administrators of a Lessee for years, for a Rent reserved on the Lease, where the Lessee in his life time, or his Executors or Administrators after his death, have assigned over their whole term, *Co. 3. 13.*

Where it shall
be laid in the
Debet, and
where in the
Detinet.

Sec. 4.
Debet & De-
tinet.

Where it may
be had for pa-
cell of a Debt,
and where
nor.

Sec. 5.

If a Purveyor, Taker or Clerk of the King, had contracted with me for any thing for the Kings house, in this case if he had been paid and allowed it from the King, I may sue him, otherwise I must have sued to the King for it, *Broo. Det. 62.*

Where this Action is brought for money due to a man in his own right, there he shall bring his Action in the *Debet*, i. the Writ shall run in this form; it shall have both these words *Debet & Detinet* contained in it. But where the Action is brought for Rent, Corn, Cattel or Hens, or the like, reserved on a Lease for years, or the Action is brought by or against Executors, there it shall be in the *Detinet* only i. it shall have this word only, and not *Debet* in the Writ. See for these matters *50. Ed. 3. 16. 11 H. 7. 5. 10 H. 7. 5. 19 H. 8. 8. Co. 5. 31. Brownl. 1 part 50. 56, 2 part 203. 204.*

If one bind himself to me in a single obligation, or by a verball Contract, to pay me money at severall daies, as quarterly or otherwise; or I make a Lease of personall

personall things, rendring Rent at severall daies; in these cases I may not bring this Action for any part of this Debt, untill all the daies be incurred, and then I may bring it for all together: And therefore if one bind himself so by bill to pay me xx l. a year during my life, in this case no Action may be brought for this untill I am Dead, and then my Executors may recover it all. So if I sell another a Horse to pay me five pounds a year, untill a 100 l. be paid, this Action will not lie untill all the money be due but (it seemes) I may have an Action of the Case upon every failer. But if one be bound to pay me money after this manner, by Recognisance, the Condition of an Obligation, a Covenant, or the reservation of Rent upon a Lease made of a reall thing; in all these cases I may have this Action upon every failer of payment, *F. N. B.* 130. 267. *Co.* 4. 94. & *super Litt.* 47. 292. *Dyer* 313.

Action of the Case.

If an Act of Parliament give a Penalty or Forfeiture to any person, and this Action to recover it, there this Writ lieth, and the party may have it accordingly. As a Parson may have this Action upon the Statute of 2 *Ed.* 6 against a Parochian for not setting out of his Tythes. So any man that is grieved by the false return of a Sheriff for a Knight of the Parliament, may have this Action and shall recover 100 l. upon the Statute of 8 *H.* 6. *cap.* 7. 1 *H.* 5. *cap.* 1. But where the Statute doth limit a time within which this Action must be brought, the Action cannot be had after that time, *Plow.* 78. 200. 113. 15. *Ed.* 4. 19. *Bro. Det.* 203. *Brownl.* 1. *part.* 70. 71. 83. 86. 99. 100. 123. 2 *part.* 9.

5 Where and in what case this Action or Writ lieth & is maintainable, and in what manner and where not *Set.* 6.

Upon an Act of Parliament. Upon a Judgment or other Record.

If I have a Judgement in any Court to recover any Debt, Damages or Costs in any Action, Reall or Personall, against another man; before Execution be done, or the money paid, I may have this Action of Debt for the things so recovered, or so much of it as is unpaid and not levied by Execution, and recover it by that means, and refuse to proceed or take my remedy on the Judgement. But then these three things must be in the case. *Co.* 5. 31. *Dyer* 21. 5. *H.* 7. 21. *F. N. B.* 122. 1 It must be a year after the Judgement be had, ere the Action be brought, 5 *Ed.* 4. 1. 20. *H.* 6. 11. 2 The Judgement must be of a thing certain; for if the demand be of a thing uncertain, as if one have a Judgement in an Action of Trespass, or any such like Action, before the damages be certain, no Action of Debt will lie for them, *Comper vers.* *Longworth.* *Hill.* 40. *Eliz.* *B. R.* 3 The Judgement must continue in force, for after it is actually reversed, no Action will lie upon it; but untill then, albeit there be manifest error in it, I may have this Action well enough. But if a Woman the Wife of a Copyholder, recover her Dower by custom of a Manor in the Lords Court of the Mannor and recover damages also; she may not have this Action of Debt to recover these damages, *Co.* 4. *inter le Copyhold Cases.* f. 30. 6. *Brownl.* 1 *part.* 72.

If a man enter into a Statute Merchant or Statute Staple, or Recognizance to me, after it is certified by *Mistimus*, I may have a Writ of Debt upon it, and recover the Debt by this means, and refuse to proceed upon the Statute or Recognizance by any other means: or I may sue Execution upon the Statute at my pleasure. But if I once sue Execution upon the Record, I cannot after have this Action of Debt, *Co.* 3. 15. *Dyer* 219. *F. N. B.* 222. *Dyer* 300. p. 34.

If I recover an Annuity in Fee against another, and after sue a *Scire facias* upon this Judgement, and thereupon have Judgement to recover it with damages; in this case I may have this Action of Debt to recover these arrearsages and damages, and wave my proceeding upon the Judgement. *F. N. B.* 122. *Litt. Bro. ject.* 25.

If in account before Auditors the Bayliff be found indebted to his Lord, the Lord may have this Action against him for this Debt, and wave his proceedings in the Account, and then it seems the Bailiff must not be committed to Prison, *Dyer* 21. 21 *H.* 6. 8.

If the Kings by their Patent had granted to me a sum of money out of the Custom of London, yearly for life or years, and hereupon I have a Writ of *Liberate* to the Customer to pay it, and this be delivered to him, and he have Assets at that time in his hands: if he refuse to pay it me, I may have this Action to recover it: So if I had had a Taile out of the Exchequer to the Kings Collector, to receive a Debt due to me from the King, and I shew it to him, and he hath Assets at that time in his hands, and yet doth not pay me, I may have this Action to recover it, *F. N. B.* 121. 27 *H.* 6. 9. *Bro. Taile de Exchequer* 3.

If

Upon a contract by specialty, either in writing or otherwise.

If one doe by Obligation, Bill, Covenant, or other Writing, undertake or bind himself to pay me money or deliver me Corn or the like by a day, and do not perform it accordingly, I may have this Action against him, his Heirs or Executors, as the case is. And if it be by Covenant, I may at my choise have this Action, or an Action of Covenant to recover the thing *F. N. B. 120. New Book of entries: 191. Plow. 439. Curia Hil: 7. 7a. Co. B.*

For a penalty.

If one grant a Rent to me and my Heirs in Fee, and grant moreover that if it be unpaid a certain time, that he will forfeit, and pay to me and my Heirs 40s. *Nomine pena*; in this case if he fail to pay the Rent at the day, I or my Heirs after my death, may have this Action to recover this penalty, *F. N. B. 120. Dyer 24.*

If a man by his Deed bind himself to do and perform divers things by severall Covenants, and by the same Deed binds himself in twenty pounds *Nomine pena* to performe the same Covenants; in this case if he break any one of them, I may have this Action for the 20 l. 22. *H. 6. 5.* If one borrow my Horse untill such a day, and do promise me to restore him that day, or else pay me ten Pounds for him; in this case if he do not restore the Horse, I may have this Action for the 10 l. *F. N. B. 121.* But if *A* Covenant that his Executor shall within a year or such a time after his death, pay 10 l. to *B*; in this case no Action of Debt will lie against the Executor, because it did not lie against *A* himself, but an Action of Covenant will lie. So if the Covenant be conditionall, as that if *E* do not pay to *B* 10 l, *A* will pay it: So if it be in the disjunctive to do such an Act, or pay 10 l: if it be not done, an Action of Covenant lieth, not of debt; but if both be to be done by the Covenantor (*viz.*) 10 l. if not 5 l. such a day, *Contra. See Penon Case. Co. Pasch: 33. Eliz. Anstons case. C. B.*

Executor.

Covenant.

For Rent.

If I being seised in Fee-simple, Fee-tayle, or for life, of land, or of any incorporeall inheritance, as Common Advowson, Fairs, Markets or the like, make a lease for years of this to another, rendring Rent, and the Rent be unpaid at the time of payment; in this case I during my life, and my Executors or Administrators after my death, may have this Action for these Arrearages against the Lessee, or if he be dead, against his Executors or Administrators: and so also may my Heir or Executor, as the case is, after my death, have this Action for the Rent to come.

Executor.

Heir.

And albeit the lease be on condition to re-enter for non-payment of Rent, and I do re-enter by force of the same condition, yet I may have this Action for the Arrearages due before; and albeit the lessee surrender his Estate to me, and I do accept it, yet I may have this Action for the Arrearages due before the surrender; and albeit the Lessee for years assign over his Estate to a stranger; yet I that am the lessor may have this Action for the rent to come against the lessee, while he doth live, or the Assignee, at my choice: but if after the Assignment I grant away the reversion, or die, or the Lessee die; in all these cases neither I nor the Grantee of this reversion shall have this Action: and yet if in this case the Assignment had been but of part of the land, or of all the land, but for a part of the time only; here the Grantee of the reversion may have this Action for the rent past or to come against the first lessee, and after his death against his Executors or Administrators: And if I grant the reversion to a stranger, and the lessee or Tenant at term, the Grantee of the reversion shall have this Action for the rent that shall grow due after the grant, *Co. 10. 127: 20. Ed. 4. 9. Co. super Litt. 47. F. N. B. 120. Co. 3. 23. 65: F. N. B. 121. 5. H. 6. 32.* A man makes a lease for years to *I. S.* and after grants away the reversion to *I. D.* and after *I. S.* assign over his whole interest, and after assignement rent is behind; in this case the Grantee of the reversion cannot bring Debt against *I. S.* *Goldsb. 182.*

And if I be possessed of a Term of years only, and make a lease for all or part of my time to another rendring rent, I may bring an Action of Debt for this Rent upon this Contract. So also if I make a Lease to another of my Land, to hold at will only rendring Rent; I may have this Action for the Rent, and in all these cases it is not material whether the Lease be in writing or no, unless it be in case of the demise of incorporeall things, as Commons, Advowsons or the like, which will not pass without Deed, *Litt. sect. 72.*

But

But if I have a Rent-service, Rent-charge, or Rent-seck in Fee-simple, Fee-tail, or for life; as if one make a Feoffment in Fee, Gift in Tail, or Lease for mine own or anothers life to me, rendring Rent; or one grant a Rent in Fee-simple, Fee-tail, or for life to me: In all these cases, so long as this Rent doth continue, and I have any other remedy for it, I may not have this Action to recover the Arrearages by the Common-Law, unless it be in some special cases; But if the Estate on which the Rent depended, or if the Rent it self be ended, or the Land out of which it doth issue be come into another hand, so that all remedy doth now fail; in these cases this Action will lie. See for this divers Examples afterwards, and the Statute of 32 H. 8. c. 37. which is, That the Executor or Administrator of him that hath Rent or Fee-farm, in Fee, in Tail, or for life, shall have this Action for this Rent against him that ought to pay it. So that now if one make a Lease for life rendring Rent, and the Rent is Arrear, and the Lessor dieth, the Executors may have this Action during the life of the Tenant for life, *Dyer* 13. p. 60. *Lit.* 203. *Co. super Lit.* 47. *Co.* 4. 50. 7. 20. *Co.* 7. 78. 79. So if a Rent be granted to a man for his life, *Habendum* after the death of his wife, and he enter into a Statute to me, who after have an Extent, and the Rent delivered to me by a *Liberate*; in this case I may not have this Action for the Rent against the Terre-tenant so long as the Extent doth continue, but afterwards I may, *Brownl.* 1. par. 103. So if there be Lord and Tenant, and the Lord demise his Manor or Seignior to me for years, and the Rent of the Tenants is behind; I, that am the Lessee of the Seignior, cannot have this Action for the Rent during the Lease, but afterwards I may. So if Lessee for life be of a Manor, and the Rents be Arrear, and the Tenant surrender his Estate, he shall have an Action of Debt for the Arrearages. So if the Tenant die, his Executors or Administrators shall have this Action, 9 H. 7. 17. *Co.* 7. 79. *F.N.B.* 121.

If a Feme be endowed of a Rent, or a Rent be granted for life, and the Tenant attorn to this Grant, and after the Rent is Arrear, and then the Tenant in Dower die, or Grantee die, or surrender his Estate; in these cases the Executors of the Tenant in Dower, or Grantee for life, may have this Action for the Arrearages incurred before the death or surrender, *Co.* 4. 49. 9 H. 7. 17. 34 H. 6. 20. If one have an Annuity or a Rent-charge for years, and it be behind during the Lease, and after it is ended; he may have this Action for it during the Lease, and after it is ended. *Per* three Justices, *Pasch.* 10. *Car.* at *Serjeants Inn.* If a Parson or Prebend, &c. have an Annuity, and the Annuity is behind, and the Parson or Prebend resign or die: In the first case he himself, and in the last case his Executors or Administrators shall have this Action for the Arrearages before. But as long as this Annuity, and the thing to which it belongs did continue, this Action will not lie for it, *Co.* 4. 48, 49. *F.N.B.* 120, 121.

If the son be Lord, and the father Tenant by a certain Rent, and the Rent is Arrear, and the Tenant die, and the Tenancie descend to the son, so that the Rent is extinct; yet it seems the son may have this Action for the Arrearages by the Statute, *Co.* 4. 49. *Quare.* If my father grant a Rent-charge out of his Land to me his son in Fee, and the Rent is Arrear, and my father dieth, and the Land doth descend to me, (whereby the Rent is extinct:) In this case, if my father did not make his Election in his life-time by Distress and Avowry for this Rent, I may have this Action of Debt for the Arrearages incurred in his life-time against the Executors of my father, *Co.* 4. 49. 45 *Ed.* 3. *tit. Executors*, 71.

If one grant a Rent-charge to me out of his Land for his life, provided that it shall not charge his person, and then he die, so that this Land cannot now be charged because the Estate is ended; in this case I may have this Action against the Executors or Administrators of this Grantor, notwithstanding the Condition, *Dyer* 227. *Co. super Lit.* 146. 39. If the Husband be seised of any Estate in any Rent or Farm in the right of his Wife, and he die, his Executors may have this Action for the Rent by the Statute of 32 H. 8. cap. 37.

If a Woman have a Rent for her life, and it is unpaid while she is sole, and after she is married, and then it is Arrear again; in this case the Husband may have this Action for all these Arrearages before and after marriage, after the death of his wife. *Co.* 4. 51. *F.N.B.* 12.

If I make a Lease to a Feme-covert for life, rendring Rent, and the Rent is Arrear, and she die; in this case I may have this Action against the husband for the Rent during the coverture, and after his death against his Executors. So if a man grant a Rent-charge to me for life out of his Land, and the Rent is Arrear, and the Grantor make a Feoffment of this Land to another, and after the Feoffee make a Feoffment to another, and there is Rent behind again in both their times, and then I die; in this case I in my life-time, and after my death my Executor may have this Action for these Arrearages: But we must sue every one severally for the Rent due in his time, *F.N.B. 101. 26 E. 3. 64. Co. 7. 39. Co. 4. 50. 11 H. 4. fol. ult. Vid supra.* But if Tenant in Tail make a Feoffment in Fee, and the Discontinuee charge the Land with a Rent in Fee, and after infeof the Issue in Tail within age, so that he is remitted; in this case no Action lieth against the Issue for this Rent. So in all cases where he that comes to the Land, comes not to it by, but above him that granted the Rent; *Co. 4. 30.*

If a Partition be made between me and another, and he promise or grant to me a certain sum of money yearly to make the Partition equal; in this case I may have this Action yearly to recover it, *F.N.B. 112.*

But if I have a Rent-service or Rent charge in Fee or for life, and the Rent is Arrear, and after I grant over the Rent to another, and the Tenant attorn, and then I die, in this case my Executors shall not recover this Rent by *Stat. 32 H. 8. Co. 4. 10.*

If a man seised of Land *jure uxoris*, make a Lease for years rendring Rent, and the wife die, and had never any issue by the husband, and the Lessee take the profits of the Land after the death of the wife; in this case so long as he take the profits, it seems the husband may have this Action and recover the Rent, *9 H. 6. 43.* See more, *Brownl. 1 par. 20. 34. 51. 55. Goldsb. 110. pl. 6.*

Upon Accounts.

If there be Reckonings and Accounts between another and me, or another hath received my money to Account, and upon the casting of our Accounts it doth appear he is indebted to me Ten pounds, I may have this Action for this debt. And it is sufficient in this Action to say *pro diversis mercimoniis*, without reciting particulars, *March, fol. 162. pl. 175. fol. 125. pl. 182.*

Upon a Loan.

If in the Account before Auditors it appear the Lord is indebted to the Bailiff, the Bailiff may have this Action to recover it against his Lord, *F.N.B. 121. Dyer 31. Mar. Rep. f. 101. pl. 175.* If I lend another money to be paid me again upon demand, or upon a day certain, and he do not pay me; I may have this Action for the money, but I may not sue for it before the day, *Co. Super Lit. 209.* If I lend another money, and after he mortgage Land to me for the security of it, upon condition to have the Land again upon repayment of the money, and at the day of payment he doth tender me the money, and I refuse it, and thereupon he doth re-enter upon his Land (as he may) in this case notwithstanding this refusal, I may recover the money, and have this Action for it upon the Loan. But if the Mortgage had been without any such Loan preceding for the payment of money, as a Gratuity, there by this refusal I am become restituere for this money, *Co. Super Lit. 209.*

Upon other Contracts.

If a man come into my house who am an Inholder and Taverner, and there call for meat or drink for himself or his horse; in this case I may have this Action for the money, *Co. 8. 147.* But if *J. S.* owe me money, and another come to me and intreat me to take him Debtor for this money, and promise to pay me at Michaelmas, I cannot have this Action upon this Contract, *9 H. 5. 14. 44 Ed. 3. 11.* If a man promise me Twenty pounds to marry his daughter, and I do marry her, I may have this Action for this Debt, *F.N.B. 120.* See *Brownl. 1 par. 20. 74. 34.* See *Contracts.*

If I buy twenty Quarters of Corn of another, or make a Lease of years rendring unto me a Quarter of Wheat weekly; in these and such like cases I may have this Action for this Debt. And in divers other cases where a Contract that is Executory is good, and there is a good Consideration for it, this Action will lie upon it, *F.N.B. 149. Dyer 22. 9 H. 7. 5.* See for this more in *Contract and Assumpsit.*

Upon a Retainer.

If another retain me to do any lawful work or service for him, and I do it accordingly, and he refuse to pay me for it, I may recover it by this Action. And if we do agree for a sum in certain, or the Law do set down the certain wages for that work;

as for a Serjeant his Fee for pleading, or an Attorney his Fee for prosecuting of a cause, or the like; in such cases I must bring the Action for that certain sum. But in other cases where our Agreement is not so certain, as where I put my Cloth to a Tailor to make a garment, or the like; in these cases I must bring my Action generally, and I shall recover as much as a Jury will give me, *F.N.B. 120. Old N.B. 622 F.N.B. 121. Co. 7. 10. 8. 147. 12 Ed. 4. 9.* A Barrester cannot have this Action for any other for his Fees for giving of Counsel, as a Serjeant or Attorney may; and therefore he is not bound to give Advice before he have his Fees. So was the opinion of Mr. Justice Bridgman: & *Curia in le Marches de Wales, 7 Car.* Also in *Trim. 2. Car. B.R.* That a Solicitor cannot have an Action for monies laid out upon any Suit, without an express Retainer to lay out monies for him in such a Suit, and an express Promise to pay such sums, *Brownl. 1 par. 73. 2 par. 99.*

If a Sheriff, Gaoler, or other Officer that hath a man in Execution at my Suit for Debt or Damages, do after suffer him wilfully or negligently to escape, and do not take him again before I commence my Action; in this case I may have this Action against him that did suffer this Escape, and thereby shall recover as much of him as the Debt or Damage was. So if the Suit were for Trespass, or for Debt upon a Deed, and the party deny his Deed, so that he is fined, and afterwards taken by a *Capias pro fine* within the year at the suit of the Keepers of the Liberty; if the parties that have taken him suffer him to escape, I may have this Action. But if the Arrest be on a mean Process, as *Latitat, Capias*, and the like; there this Action will not lie for the Debt of the Suit whereupon the Process came, but an Action of the Case will lie: And if it be after Execution, yet it doth not lie for this Escape against the Executors or Administrators of him that suffered it, *Plow. 35. Co. 3. 52. Dyer 278. F.N.B. 121. Dyer 27. 21 H. 7. 23. Brownl. 1 par. 84. 119.*

Upon an Escape.

Action of the Case.

If a Sheriff levy money upon a *Fieri facias* of another mans goods at my suit, I may bring this Action against him; or if he die, against his Executors for it. *March f. 13. pl. 33.*

See for Remedy against the Warden of the Fleet, if he take Bail of a Prisoner in by Judgment, or let him go at large. *Sac. 1 R. 2. 12.*

If one receive money of another to my use, for to deliver to me, or from me, to deliver to another, or to bestow for me, and he doth not dispose it accordingly; in all these cases I may have this Action for the money, or I may have a Writ of Account, *Dyer 21. 42 Ed. 3. 9. Bro. Condition 6. 38 H. 6. 9.* If the Lord levy Aid of his Tenants to make his Son Knight, or to marry his Daughter, and die before his Son or Daughter have received it; in this case the Son or Daughter may have this Action against the Executor of the Lord for it, and if he have not Assets, it lieth against his Heir, *Brownl. 1 part 58. 82.*

Upon a Receipt.

If a Fine or Amercement be imposed on a man in a Court Leet after any offence; or one do forfeit a sum of money by the breach of a By-law; in these cases and for this money, the Lord may have this Action of Debt, *Co. 8. 123.* But a Lord of a Manor cannot have this Action for a Relief or Escuage due to him, but if he die his Executors may have this Action, for they have no other remedy; and it is as a flower fallen from the stock; neither may the Lord have this Action for Aid to make his Son Knight, or marry his Daughter, nor for a sum of money upon a pretence of an unreasonable custom, as to have thirty pound of every one that shall break the pound within his Lordship, or the like, *Co. super Litt. 47. 83. 7 H. 6. 13. Littl. Broo. Sess. 176. 21 H. 7. 40.*

For a Fine or Amercement.

For a Relief.

If another and I do refer any differences between us to Arbitrement, and the Arbitrators Award the other to pay me ten pound, I may recover this money by this Action; But if we did enter into Obligation each to other, to stand to their Award, I cannot have this Action for the ten pound, and sue him upon the Obligation also, *F.N.B. 121. 33 H. 6. 2.* But for the further opening of this, we must know this, *Brownl. 1 part 55. 134.*

Upon an Award.

And as to this thing, these things are further to be known.

1. That Freemen of London, for Debts under forty shillings, have a special way to recover the same in the Court of Requests, *St. 3 Jac. 15.*

LII 2

2. There

2. There is also a special way to recover Debts against them that make fraudulent Conveyances of their Estate to deceive their Creditors, and come not in upon Summons, by *Stat. 2 R. 2: parli 2: 3.*

3. Remedy against the Prisoners in the Fleet, that to shift from others pretend debt to the King. See *Stat. 1 R. 2. 12.*

Self. 8.
What shall be
said a good
Plea or Bar to
this Action,
and what nor.

It is a good Plea to this Action grounded upon a Statute or Judgment, That the Plaintiff hath sued out and made Execution upon the Judgment or Statute. But regularly no matter in fact, as Payment or the like, is a good plea to this Action grounded on a Record, *Dyer 299. p. 34. 22 Ed. 4. 6. 6 H. 4. 6.*

If the Action be grounded on a Real Contract, as if it be for Rent on a Lease of years, it is a good Plea in bar to the Action to plead any of the matters following, viz.

1. That the Lessee was ejected out of the Land by a stranger that had tide paramount, that entred and kept him out.

2. That the Lessor entred upon all or part of the Land demised before the day of payment of the Rent, and doth keep out the Lessee always, so that he cannot take the profits; for if the Lessee re-enter, this is no Plea.

3. That the Lessor had nothing to do with the Land demised at the time of the making of the Lease; but if the Lease be by Deed indented, then this is no Plea.

4. That the Rent was paid at the day, and that there is nothing Arrear; and though the Lease be by Indenture, yet Payment is a good Plea.

5. Or that the Plaintiff hath distrained for it, and recovered the money by that means, and so levy by Distress.

6. But it is no good Plea to say, That the Houses demised were so ruinous, that the Lessee could not dwell in them, and that the Lessor by Covenant or Custom ought to repair them, *Dyer 299. p. 34. 22 Ed. 4. 6. 6 H. 4. 6. Dyer 83. Co. super Lit. f. 47. Dyer 212. p. 37. Ca. 3. 22. 10. 127. 37 H. 6. 10. Dyer 28. 27 H. 6. 10. Dyer 20. 6.*

If the Action be grounded on a Personal Contract in Writing, as upon an Obligation or other Especialty, if it be single, or with Condition to pay money at a day; it is a good Plea to say he paid or tendred, and the other refused the money at the day of payment: Or that he hath performed the Condition of the Obligation; or that the Plaintiff sued the same Obligation once before, supposing the Condition was broken, and was barred therein. But in case of a single Bill, Payment is no good plea, *Co. 5. 43. Dyer 256. 51. 1 H. 7. 14.* So neither for a single sum in a Bill penal, *1 H. 5. 7.* otherwise to the double sum in a penal Bill, for there payment of the single sum is a good Plea. And regularly no matter, unless it be in Writing, is a good Plea to an Action grounded on an Especialty; as that the money was paid after the day, and the Obligation delivered up, and the Plaintiff came by him actually again. So Arbitrement or Accord with satisfaction, is no Plea, *21 Ed. 4. 41. Lit. sect. 338. Co. 1. 113. Lit. Bro. sect. 106. 8 H. 7. 3. Co. 5. 43. Dyer 31. 1 H. 7. 17.*

If it be a Debt on a Contract without Especialty, in which Action wager of Law doth lie; it is a good Plea, That before this time the Plaintiff brought another Action for the same Debt, and the Defendant waged his Law and barred the Plaintiff therein: Or that the Plaintiff brought an Action of the Case for the same Debt before, and recovered the same therein; or that he oweth nothing, but hath paid the Plaintiff, *Co. 4. 94.* But in this case upon a Parol-Contract without Especialty, it is no good Bar to say, That there is a Decree in Chancery, that the Plaintiff shall release the Debt, and take no advantage of it: Or if it be for Goods sold, That the same were taken from the Buyer by one that had right before the day of payment, or that the Plaintiff agreed that the Defendant shall keep it for another Debt the Plaintiff did owe to him, or that a stranger hath made an Obligation to the Debtee for the same Debt, *Fitz. Bar 75. Co. 3. 12. 28 H. 6. 4.* And whether the Debt be grounded on an Especialty or not, generally a good Release of the Debt from the party to whom it is owing, his Executor or Administrator; or that the Defendant did give, and the Plaintiff accept something else in recompence thereof, it is a good Plea in Bar. But to say that the Plaintiff upon a *Justicies* had a Judgment for the same

same Debt in the County Court, it seems is no good Plea, unless Execution be done upon it. Or in an Action for Rent, or a Lease, to say, That he hath bestowed it in Reparations by the commandment of the Lessor, is no good Plea. Or to any Action of Debt, That he did grant the Debtee that he should levy it upon his Land, Co. 6. 49. o Ed. 4. 50. 34 H. 6. 17. Bro. Det. 29. Brownl. 1 par. 70, 71:

If the Debtor make the Debtee his Executor, and he accept it; or if the Debtor take the Debtee to husband or wife; or if two or more be bound in an Obligation to a Feme-sole, and she take one of them to husband; in all these cases the Debt is gone and discharged, Co. 8. 136. Pl. 364. 11 H. 7. 4. 21 H. 7. 29. Brownl. 1 p. 71. 76. 109.

If a Judgment be had on an Especialty, the Debt upon the Especialty is gone: And if a Debt be upon a Contract, or Arrearages of Account, and after the Debtee take an Obligation from the Debtor for the money; in this case the Debt upon the Contract is gone; (But if the Obligation be made by a stranger, *contra*.) For so long as the Judgment is in force, or the Obligation in being, the Creditor cannot sue upon the Obligation in the first case, or the Contract or Account in the last, F. N. B. 120. M. Dyer 21. Co. 6. 45. 28 H. 6. 4. See *Extinguishment, Release, Apportionment*. But if one promise to a woman, That if she will marry him, he will leave her worth an Hundred pounds at his death, if she overlive him: In this case their subsequent marriage will not determine this Debt, but that after his death she may recover it of his Executor, *Smith vers. Stafford, Pasch. 17 Jac. Co. B.*

If a Debt be due to me on an Obligation, and I take a Statute for this Debt from the Obligor; this doth not determine the Debt due by the Obligation, but I may sue upon either of them at my election; and if I sue upon the Obligation, it is no good Bar to plead the Statute, Co. 6. 45. Brownl. 1 par. 71, 72, &c. For Debt against a Hundred on a Robbery, see it in Chap. 3. So much for the Debt of a Common person.

Now as touching the Debts due to the Lord Protector, these things are to be known. 1. That his Debts arise commonly by Rents, Recognisances, Fines, Issues or Amerciaments, and as Issues upon Jurors, and Accompts of Officers. 2. These are all called in by, and brought in to the Exchequer; for they are sent from all other Courts, and certified in thither, and by authority thence called and fetch'd in. 3. This is done for the most part by the Sheriff and his Under-Officers. 4. It is done sometimes by Distress only, sometimes by Distress and Sale of Goods, sometimes by Seizure of Lands and Goods, and sometimes by Sale of Goods and Lands. 5. The Lord Protector hath a large remedy to recover his Debts, (See for this *Prerogative*.) 6. Yet the Sheriff and his Officers have many charges upon them in this. For, 1. They are not to levy any Debt of his upon Lands or Rents, so long as the Debtor hath Goods and Chattels to satisfy. 2. They are not to meddle with the Surety, so long as the Principal is sufficient. 3. They are not to sell the Distress taken for his Debt, within fifteen days. 4. If the party distrained can shew a Tally, and will give Security for his appearance in the Exchequer upon the next Accompt, they are to deliver the Distress. 5. They may not take any mans Cattel without good authority and Order from some Court. 6. Nor take such Distresses as are forbidden, nor abuse them after they are taken. See for this *Distress*. 7. The Sheriff having received any Debt, must upon demand of the Debtor, and without Fee, shew his Process for the levying of it, and give a Tally to the Debtor thereof. 8. He must answer that any of his Servants employed by him do receive. 9. He having received any Debt, must see that upon his next Accompt he do discharge the Debtor thereof. See for these things *Mag. Charta* 8. 18. *Westm.* 1. 19. *Articuli super chartas*, 12. *Stat.* 13 Eliz. 4. 14 Eliz. 7. 27 Eliz. 3. Co. 2 par. Inst. 18. And for Accompts and Publick Debts, *Ad 708. 1653. Ad 708. 1654.*

Self. 9.
Where and by
what means a
Debt shall be
discharged or
extinguished, where
not.

Debt of the
Lord Protector

The duty of
the Sheriff and
his Officers in
the Collection
hereof.

CHAP. LXV.

Of Disability.

Disability and
Nobility,
what.
The kinds.



Infant.
Woman-covert.
Idiot.

Disability (as we take it largely) is an incapacity, incapability, or impotencie of some persons for some causes to have and enjoy some benefit, or do some act, that another may have or do: As to give or convey Lands or Goods; to make a Will, and appoint an Executor; to have Land by descent, or to have and enjoy a Legacie, or any other Testamentary benefit; or to sue and bring Actions, or to have or enjoy dignities and honor. And this sometimes is absolute, as of an Infant, Monk, or other Religious person, or man attainted of Treason or Felony, who cannot by any means make any Conveyance or Gift of their Lands or Goods, but it will be avoidable. So the Heir of one attainted of Treason or Felony, is disabled to be Heir to his Ancestor. And sometimes this Disability is only *secundum quid*; as of a woman Covert, or man of Non-sane memory, who cannot convey or grant by Deed, nor be bound thereby: But if they do it by Fine or Recovery, (as they may) it is not avoidable. So the King cannot grant, nor take any thing but by matter of Record. A Bishop could not grant but for his life, without the Dean and Chapters Confirmation; nor the Parson or Vicar, without the Confirmation of the Patron and Ordinary, and the like. A man that hath one Benefice eight pounds in the Kings books, is incapable of another, unless he be first qualified according to the Statute.

And this is sometimes personal or temporal only: As when by Act of Parliament one is disabled to have his dignity, or some other thing for his life only; or where a Monk is disabled to have lands or goods; in this case it reacheth not to any other. And sometimes it is perpetual, and shall extend and reach to the prejudice of others: As where one is attainted of Treason or Felony, this is an absolute and perpetual disability to any of his posterity to claim any Hereditament in Fee-simple, either as Heir to him, or to any other Ancestor paramount him, because the blood is corrupt by the Attainder. See more of this in *Wills and Testaments*, who may make an Execution, or give his Goods, and who may take, except, and enjoy it. And some men are disabled in some particular things; as men that have no skill, to take upon them Offices they cannot execute: And no man is therefore capable of the Grant of a Judicial Office in Reversion, *Co. lib. Inst. fol. 13. 1 par.*

But Disability (as it is taken strictly and most properly) is an Exception taken against a Plaintiff by the Defendant in some Action. That the Plaintiff is not able to sue any Action against him, and for that he demandeth the Judgment of the Court whether he shall answer or no, and prayeth that the Writ may abate. And this Exception (for the most part) must be taken at the very first, before the Defendant have answered or delayed it by imparlance, or else it comes too late. And this Disability also is sometimes absolute, as of an Outlawed man that cannot sue by any means; or *secundum quid*, as of a woman Covert, who may sue, but it must be with her husband, for otherwise she is disabled to sue. See *Husband and Wife*, 16 H. 8. 1. 3 H. 6. 26. 44 Ed. 3. 17. 16 Ed. 4. 4.

Wife.

What are
causes to dis-
able a man to
sue, or not.

Person out-
lawed.

If a man be condemned in a *Præmunire*, outlawed, excommunicated, or professed in Religion in any Abbey, Priory, or Friery; he can bring no Action real or personal in his own right, or as for himself; neither can he sue in any other Court of Equity, (but as Executor to another he may) so long as he remains so. But after the impediment removed, (i.) Pardon in the *Præmunire* or Outlawry, or Reversal of the Outlawry, Absolution in the Excommunication, or Dearthment in case of Religious profession, he may bring any Action as before. See *Co. upon Lit. fol. 128, 129, 130.*

So a Villain in his own right could not sue his Lord; but as Executor to another he might have sued him, *Co. super Lit.* 21 H. 6 30. Executor.

So an Alienee cannot bring any real or mixt Action against any person; and an Alien-enemy cannot bring any Action real or personal at all: For which see *Alien* at large. *Co. super Lit.* fol. 129. Alien.

A man attainted of Treason or Felony cannot sue, *Co. super Lit. f.* Nor can a person that is a convict Recusant, sue while he is so. Person attains. Recusant convicted.

But there are divers Exceptions out of these general Rules: For every one of these in some Special cases may sue; and in some cases the Disability is but for the time they are so, but in some it is perpetual. In some cases the Writ doth abate, and the cause of Action is gone: As if he sue for Debt on a Specialty, and is outlawed, then it is the King's. In others the Writ doth not abate. See for this *Co. super Lit.* 129. But if a man be outlawed, and bring a Writ of Error to reverse that Outlawry, or any other Outlawry; these Outlawries in this case are no disability to him: So in an *Audita Querela* brought by a Defendant in Prison upon an Outlawry, that Outlawry is no disability to him to sue in this case; nor in a Writ of Error to reverse the Outlawry. It is no disability to the Mayor and Commonalty, that the Mayor is outlawed. An Outlawry in *Cheshire* or *Durham* is no disability. Ideots, Mad-men, and such as be deaf and dumb, be not disabled to sue: And when an Ideot doth sue or defend, he must do it in person; but an Infant or Minor shall sue by a Prochein-Amy, (i. e.) next Friend, and defend by Gardein, 29 Aff. 47. 7 H. 4. 39. *Co. super Lit. f.* 128.

Many are not disabled to purchase, that are disabled to hold; as Aliens, and men that have committed Felony or Treason: But after Attainder in the last case, and Office forfeited in the first, the King will have it from the Alien, the Lord from the Felon: And if he were attainted, yet he may purchase; but in that case the King will have it until he be pardoned, and after pardon he is capable: So of Corporations that purchase in Mortmain, 49 Aff. pl. 2. 49 Ed. 3. 11.

A Monster born within lawful matrimony, that hath not humane shape, cannot purchase, much less retain any thing: So neither can they that are civiliter mortui, as Monks, and the like. Monster.

An Hermaphrodite may purchase according to the sex which prevaieth: So may persons deformed having humane shape, Ideots, Mad-men, Lepers, Deaf, Dumb, and Blind men, Minors, and all other reasonable creatures, are able to purchase and retain Lands or Tenements. See more in *Grants*; and there also what persons are disabled to make Peoffments or Grants, *Co. lib. Inst.* 1 par. f. 42. Hermaphrodite.

See more *Capacity*, and *Stat. Articuli Cleri*, chap. 13. 25 Ed. 3. *Stat. 2 de nativitate ultra maris*. 42 Ed. 3. 10. 31 H. 8 6: 33 H. 8. 29. 5 & 6 Ed. 6. 13. *Fine*, Num. 6. 8. *Recovery*, Num. 5. *Grants*, Num. 2, 3. *Testaments*, Num. 4.

CHAP. LXVI.

Of Discontinuance of Lands.

1. Discontinuance, what.

The kind of it.

Sett. 1.

2. The fruit of it.

3. What shall be said a Discontinuance to take away and bar Entry, or not. By Tenant in Tail.

Sett. 2.

pa
to a
ranty.



Discontinuance is either of a Process, or of a Possession. Of a Process or Suit; where by some negligence or default, or the like, a Plaintiff hath lost his time in his Action, and for that cause his Suit is dismissed the Court, and put without day; and then the party hath no remedy, but to begin his Suit again. Or of a Possession; which may be either of Demesne, or of Copihold-lands, Tenements, Rents, Commons, Advowsons, &c. And that is, when the party that is present Owner of the Land doth grant some larger or greater Estate then he hath, and thereby doth divest the Inheritance or Estate which should or ought to have come to another: As when Tenant in Tail, for life or in fee, in the right of his wife, or Church, or house, do alien their Lands or Tenements they do so hold, for longer time then the Law doth enable them; this is called a Discontinuance. And in this last sense it is here taken; and it is properly where he in Reversion is so out, as he cannot enter. But it is taken for the displacing of a Reversion, where the Entry is not gone, *Lit. 140. Co. upon Lit. 325. Ney, ch. 27.*

The fruits and operations of this are divers and contrary: For sometimes by this the Entry of him that hath right is gone, and he is put to his Action: Sometimes an Entry and Action are given, and may be had presently after the Discontinuance: And sometimes the Entry and Action both are gone, and the party whose Estate is divested is perpetually estopped and debarred to require the same, as in the Examples subscribed may appear, *Co. 1. 84. Co. 10. 96.*

If a Tenant in tail make a Feoffment in fee, Gift in tail, or Lease for any other life then his own, (not warranted by the Statute of 32 H. 8. c. 28. *ut infra*) before or after he hath issue; this is a Discontinuance of the Estate-tail, and takes away Entry; and puts the Issue, if it be to go to him after the death of the Tenant in tail, to his Writ of *Formedon in Descender*; and if it be to go to him in Remainder, it puts him to his *Formedon in Remainder*; and if it be to revert, it puts him to his *Formedon in Reverter*. *Co. 1. 84. Plow. 137. Dyer 12. Lit. fol. 140. See Co. 3. 89.*

If there be Tenant for life, the Remainder in tail, and the Tenant for life levy a Fine to his own use, and after the Tenant for life and he in Remainder join in a Feoffment by Letter of Attorney; this is Discontinuance of the Estate-tail, and the Fee. *Dyer 324.*

If a Tenant in tail lease for years, and after make a Feoffment with Letter of Attorney, and the Attorney come to the house in the absence of the Lessee, and command the Servant of the Lessee to come forth of the house, and he doth so, and the Lessee doth after agree to it; this is a Discontinuance. *Dyer 363.*

If the Tenant in tail be disseised, and after release with Warranty to the Disseisee, this is a Discontinuance. So if one release or confirm to the Tenant for life, *Lit. 135. Co. 144. 3 H. 4. 9.*

If a Tenant in tail make a Lease for the life of the Lessee, and after grant the Reversion, and the Lessee attorn, and after the Lessee for life die during the life of the Tenant in tail, and then the Grantee of the Reversion enter; this is a Discontinuance. So in this case, if the Tenant for life after Attornment had aliened in Fee, and the Grantee of the Reversion had entred for a Forfeiture, *Lit. f. 134. 139.*

If a man be Tenant in tail of an Advowson in grosse, and another present by usurpation, and the six moneths do pass, and then the Usurper do grant the Advowson stranger in Fee, this is a Discontinuance *quodammodo*: For a Release with Warranty to the Grantee, will bar the Issue, 21 H. 7. 40.

If

If there be Tenant in tail, the Remainder in tail, the Remainder in fee, and the Tenant in tail make a Feoffment to him in Remainder in fee; this is a Discontinuance of the middle Remainder in tail, *Co. 1. Ghudleighs Case*.

If there be Tenant in tail, the Remainder in fee, and the Tenant in tail make a Lease for life, and after grant the Reversion in fee to another, and the Lessee attorn, and after the Grantee of the Reversion die without heir, and the Reversion escheat, and after the Tenant for life die, so that the Reversion is executed; this is a Discontinuance, *Co. 1.*

If a Tenant in tail endow his Mother, and she grant the Land to *A.* and *B.* for lives, and die, and after the Tenant in tail confirm their Estates with Warranty; it seems this is a Discontinuance, *3 H. 4. 9.*

If a Tenant in tail of a Rent or Advowson in gross grant it away in fee, and a Collateral Ancestor release with Warranty to the Grantee; this is a Discontinuance, *Finches leg. 193.*

If one that holdeth Lands in the right of his Wife, alien them for longer time than his own, and his Wives lives together; this is a Discontinuance, and by the Common-Law she was driven to her Writ of *Cui in vita*. But now she may enter after her Husbands death, by the Statute of *32 H. 8.*

By the Husband in right of his Wife.

If the Husband and Wife be Joint-purchasers, and he make a Feoffment with Livery of the Land; this is a Discontinuance, though the Wife do stand upon the Land and disagree to it, *21 Aff. p. 125.*

If any Spiritual persons, as Bishops, Deans and Chapters, Masters of Hospital, or the like, that have Lands in the right of their Churches or Houses in fee, alien such Lands for longer time than their own lives; this is a Discontinuance, and their Successors are put to their Action to recover the Land, *21 Ed. 4. 76. 4 H. 7. 24. 32 H. 8. Lit. 146. 145. 144.*

By a Spiritual person.

All Fines and Recoveries levied and suffered by the Tenant in tail to bar the Estate tail, are Discontinuances; in which a man shall have no remedy, unless it be in case where the Reversion is in the King. And for this see Fines and Recoveries, *Co. 10. 96.*

See 3.
4. What shall be said a Discontinuance that taketh away Entry and Action also, or not?

All Leases also for lives or years made by Tenant in tail, or in fee in the right of their Wives, or Churches, or Houses warranted by the Statute of *32 H. 8. c. 28.* are Discontinuances for the time, for the avoiding of which there is no remedy by Entry or Action. See Leases. But no Fine, Feoffment, or other Act by the Husband only of any Land being the Inheritance or Freehold of the Wife, shall be a Discontinuance, or prejudicial to the Wife, or such as have interest after her death, (Leases within the compass of *32 H. 3. c. 28.* excepted before mentioned in the Statute) within which Law a Common-Recovery is: See *Co. super Lit. 326. Stat. 32 H. 8. ch. 28.*

If Lands be given to Husband and Wife, and to the Heirs of their two bodies, and the Husband maketh a Feoffment in fee and dieth, the Wife is holpen and her issue by this Statute. So if a Woman Tenant in tail take a Husband, and the Husband make the Feoffment, and the Wife before entry die without issue, he in Reversion or Remainder may enter.

An Estate is in tail to the Husband, the Remainder in tail to the Wife, the Husband maketh a Feoffment; now in this case the Wife may enter. See more in *Co. upon Lit. 326. Woman's Law. f. 144.*

For the most part, such Conveyances as are without Livery of Seisin, and do contain no Warranty, shall not make any Discontinuance, *Brook 313.*

If a Tenant in tail make a Lease for life of the Lessee, and after grant the Reversion, and the Lessee for life attorn, and then the Tenant in tail die before the death of the Tenant for life, and after the Tenant for life die; this is no Discontinuance, but the Issue or he that hath right may enter upon the Grantee of the Reversion, *Co. super Lit. 173. Lit. fol. 139.*

5. What shall not be said a Discontinuance to take away and bar Entry.
By Tenant in tail.

If a Tenant in tail bargain and sell his Lands by Deed indented and inrolled; this is no Discontinuance. And if the Tenant in tail do after levy a Fine with Proclamation and Warranty to the Bargainee: yet this is no Discontinuance. And if after the Conusee in the Fine make a Feoffment in Fee, yet this is no Discontinuance, but he in Remainder or Reversion may enter, *Co. 10. 96. Co. 146. 48.*

If a Tenant in tail grant *totum Statum suum* to one, and the Grantee make a Feoffment in Fee, this is no Discontinuance, *Co. 10. 96.*

Sec. 4.

If a Tenant in tail grant any thing out of Land, as Common, Rent, or the like; this is no Discontinuance. So if a Tenant in tail of a Rent, Common, Advowson, or the like, grant it in Fee without Warranty, this is no Discontinuance; and if it be with Warranty, it is at the pleasure of the Issue, *Lit. fol. 138. Finches Ley. 193.*

If a Tenant in tail within age make a Feoffment in Fee, it seems this is no Discontinuance during his minority, because it is avoidable, *Lit. f. 149.*

If one make a Lease for life, the Remainder in tail, and he in Remainder grant his Remainder by Deed, and the Tenant for life attorn; this is no Discontinuance, *Lit. 138.*

If a Tenant in tail make a Release or Confirmation without Warranty, to a Disseisor, Lessee for life or years, or make another Conveyance which doth not pass the Land, this is no Discontinuance. *Lit. fol. 398. 3006. 309. Co. 3. 85. Pleu. 336. 13 H. 7. 10.*

If a Tenant in tail make a Feoffment to his Donor, and there be no Remainder between; this is no Discontinuance, *Dyer 13. Lit. f. 140.*

If a Feoffment be made by the first Tenant in tail, to him in the next Remainder in tail, this is no Discontinuance.

If a man have issue a son by one wife, and after have another wife, and have a son by her, and Lands are given to him and his second wife in tail, and after the wife die, and the husband is disseised, and he release with Warranty; this is no Discontinuance to the younger son, but he may enter notwithstanding, *Lit. f. 136.*

If a Tenant in tail make a Feoffment in fee upon Condition, and the Condition is broken; the Issue may enter notwithstanding this Discontinuance, *Lit. fol. 632. chap. 632.*

If a Lease be made for life, the Remainder in tail, and he in the Remainder in tail disseise the Tenant for life, and maketh a Feoffment in fee, and die without issue, and then the Tenant for life dieth; this is no Discontinuance to him in Reversion, *Lit. f. 146. See in Brownl. Rep. 1 par. 36.*

If a Tenant in tail grant all his Estate to another, and give Livery of Seisin, this is no Discontinuance. So if he grant *totum Statum suum* to one, that doth afterwards make a Feoffment in fee; this is no Discontinuance to take away the Entry of him in Remainder or Reversion, *Lit. f. 143. 137. Co. 146. 10. 97.*

Sec. 5.

If a Tenant in tail give the Land to one in tail, the Remainder in fee, and the Tenant in tail make a Lease for life, and after grant the Reversion to one in fee, and the Tenant for life attorn, and after the Grantee of the Reversion die without heir, and the Reversion come to the Lord as Escheat; if the Tenant for life die, and the Lord enter in the life of the Tenant in tail, and after the Tenant in tail die; this is no Discontinuance to the Issue in tail, *Lit. fol. 143.*

If a Tenant in tail have issue two Sons, and the elder disseise his Father, and make a Feoffment in fee without clause of Warranty, and die without issue, and then the Father die; this is no Discontinuance to the younger Son.

So if a Grandfather be Tenant in tail, and he be disseised by the Father, who makes a Feoffment and dies, and after the Grandfather dies; this is no Discontinuance, *Lit. f. 142:*

If

If Tenant in tail make a Lease for life, and the Tenant in tail have Issue and die, and the Reversion descend to his Issue, and after the Issue grant his Reversion in Fee, and the Tenant for life attorn and die, and the Grantee of the Reversion enter during the life of the Issue, after the Issue die, and hath Issue; this is no discontinuance, *Lit. fol. 142.*

If Tenant in tail make a Lease for his life and give Livery, or a Lease for years, and after release to the Lessee for life or years all his estate and right in the Land; this is no Discontinuance. So if he confirm to such a Lessee, *Lit. 138.*

If a Tenant in tail lease for years, and after grant the Reversion to one and his Heirs, and the Lessee for years attorn; this is no Discontinuance to him in Remainder or Reversion, or to the Issue, if any be. *Co. l. 144. Lit. f. 136.*

If a Tenant in tail devise his Land by Will, this is no discontinuance. See for this the Statute for Wills, *Co. 10. 96. 27 H. 8. 20. Dyer.*

If there be Tenant for life, the Remainder in tail, the Remainder in tail, and the Tenant for life and he in the first Remainder levy a Fine; this is no Discontinuance of the second Remainder. So if they two join in a Feoffment, *13 H. 7. 14. Co. l. 76.*

If there be a Tenant in tail, the Reversion or Remainder in the King, and the Tenant in tail make a Feoffment or suffer a Recovery, this is no Discontinuance. *Stat. 34 H. 8. c. 20.*

If the Husband alone levy a Fine, make a Feoffment, Release, or Confirmation with Warranty or any other Conveyances of the Land of his Wife, other then such as are warranted by the Statutes; this is no such Discontinuance, but that the Wife, or he that hath the next right after the Husbands death, may enter. *Stat. 32 H. 8. ch. 28. Co. sup. Lit. 326. See there the Exposition of this Statute. Lit. 136. Bro. 122: 15 Ed. 4. 5.* *Stat. 6. By the Husband in right of his Wife.*

If the Husband and Wife have Land in Fee or Fee-tail jointly, and the Husband alone convey it away; in this case the Wife, her Heirs, or he that hath the next right after the death of the Husband may enter, and this Discontinuance may not hinder, *per les Stat. 32 H. 8. 28. Co. 8. 72.*

If the Husband and Wife purchase Land in Fee and make a Lease, and after the Husband alone release to the Lessee and his heirs; this doth not make a Discontinuance. So for any other act of the Husband alone, or of him and her together by Deed, *Co. super Lit. 326. Bro. Release 81.* But by a Fine, and five years after the Husbands death, the Wife is barred. *By a Spiritual person.*

If a Parson or Vicar alien in Fee, this is no Discontinuance to the Successor, but he may enter. *Lit. 143.*

If a Spiritual person be disseised, and he release to the Disseisor with Warranty, this is no Discontinuance to the Successor.

If a Spiritual person grant a Reversion, Rent, or Common, or the like thing that lieth in Grant; this is no Discontinuance.

If a Dean alone had aliened the Land he hath in the right of him and his Chapter, this is no Discontinuance, *Lit. f. 145; 146.*

If any Woman that hath any Estate in tail, for life, or in dower, by the purchase-money or means of her deceased Husband or any of his Ancestors, made to her before or after her marriage, do after his death whiles she is sole, or with any other Husband after taken, alien such Land by Fine, Feoffment, Recovery, Release, or Confirmation with Warranty, and so discontinue the course intended; this is not good. And the Heir, or life to whom the next right is to come after the Woman, may enter presently to the Land, as for a Forfeiture, by the Statute of 11 H. 7: *chap. 20.* *6. What shall be said such a Discontinuance as to make a Forfeiture, or not.*

If there be Tenant for life, the Remainder for life, the Remainder in tail, and the two Tenants for life alien in Fee by Feoffment, or the second Tenant join in the Livery of Seisin; this is a Discontinuance causing a Forfeiture. See more in *Forfeiture, Co. l. 76. 77. Dyer 339.*

If there be Tenant for life, the Remainder in tail to the King, the Remainder in tail to another, and the Tenant for life makes a Feoffment in Fee; this is a Forfeiture, and to that purpose is a Discontinuance. But these acts are void only as to the Heir, &c. but are good against the parties and all others, *Co. l. 76. 3. 59.*

Forfeiture.

If there be Tenant for life, the Remainder in Tail, the Remainder in Fee, and the Tenant for life makes a Feoffment to him in Remainder in Fee; this is such a Discontinuance of the Estate-tail, as produceth a Forfeiture, *Co. 3. 59.*

Husband and Wife.

If two Joint-tenants in Fee of a Manor intermarry, and after levy a Fine of it to a stranger, which doth render it to them in tail, and they have issue three daughters; the husband die, the wife take a second husband, and they levy a Fine and take back an Estate in special tail, and the wife die without issue by the second husband: This first Estate-tail is within the Statute of 11 H. 7. for one moyetie, but not for the other. *Curia, Langhter vers. Humphry, Mich. 3. Elix. Co. B.* See more in *Ca. 3. 51.*

If a man seised in right of his wife, and his wife levy a Fine, and the Conuey grant and render to the husband and wife in special tail, the Remainder to the right heirs of the wife; they have issue, and the husband dieth; she taketh another husband, and they two levy a Fine, and die: This is not a Forfeiture within the Statute of 11 H. 7. *Co. sup. Lit. 365.*

For Discontinuance of Process, see Statutes, 11 H. 6. 6. 1 Ed. 6. 7.

CHAP. LXVII.

Of Disseisin, Abatement, Intrusion and Deforcement, Redisseisin.

Disseisin, what.
Disseisor,
Disseesee.

Affise.



Disseisin is, where a man entreth into the Lands or Tenements of another, and putteth him out where his Entry is not lawful; this is a Disseisin, and he that doth so is called a Disseisor, and he to whom it is done is called a Disseesee; and for his relief he may have an Affise: But by this Entry he getteth the Freehold, and may hold it against all men but him that hath right and his heirs, *Co. super Lit. 154.*

Abatement,
what.

Abatement into Lands or Tenements, is, where a man dieth seised of Lands or Tenements, and one that hath no right entreth into the same before the Heir maketh his Entry; this is called an Abatement, and he is called an Abator that doth so enter; and then is he lawful Owner against all men but the right Heir. *Terms of the Law.*

Intrusion or
Extrusion, what.

Intrusion is an unlawful Entry into Lands or Tenements by one that hath no right, whilst it is void of a Possessor, after an Estate for life or years is ended. *Terms of the Law.* It is sometimes taken for a Writ brought against an Intruder.

Deforcement,
what.
Deforceors.

Deforcement is the putting and holding out of a man from Land that hath right to it by descent or purchase, by the putting it by Intrusion, Abatement or Disseisin, *Co. super Lit. 277.* And he that so doth, is a Deforceor.

For these things, this only is to be known.

1. That if an Abator or Disseisor have quiet possession for five years next after the Disseisin, and so live and die in the possession, and the Land descend to his Heir, he hath gained the right of possession to the Land against him that hath right, till he recover it by a fit real Action at the Common-Law.

2. If he sue not this Action within threescore years after the Disseisin or Abatement, the right Owner hath lost his right by that negligence.

3. If it be a *Formedon* he is to bring, he must bring it within twenty years of his right to the Action accrued, if there be no impediment of Infancy; *Real* 16 ff, then within twenty years of the Impediment removed.

4. If one have divers Children, and the elder being a *Ballard* doth enter into the Land and enjoyeth it quietly during his life, and dieth thereof so seized, his Heirs shall hold the Land against all the lawful Children and their Issues, *See* *20 Jac. 1* *Str.* 10.

Rediffession, is a Writ lying where one is disseised and recovereth in an *Affise*, and after is disseised again by the same Disseisor; then he may have this Writ to the Sheriff, and if this be found against the Disseisor, he is to be sent to Gaol. *See* *100* *101* *102* *103* *104* *105* *106* *107* *108* *109* *110* *111* *112* *113* *114* *115* *116* *117* *118* *119* *120* *121* *122* *123* *124* *125* *126* *127* *128* *129* *130* *131* *132* *133* *134* *135* *136* *137* *138* *139* *140* *141* *142* *143* *144* *145* *146* *147* *148* *149* *150* *151* *152* *153* *154* *155* *156* *157* *158* *159* *160* *161* *162* *163* *164* *165* *166* *167* *168* *169* *170* *171* *172* *173* *174* *175* *176* *177* *178* *179* *180* *181* *182* *183* *184* *185* *186* *187* *188* *189* *190* *191* *192* *193* *194* *195* *196* *197* *198* *199* *200* *201* *202* *203* *204* *205* *206* *207* *208* *209* *210* *211* *212* *213* *214* *215* *216* *217* *218* *219* *220* *221* *222* *223* *224* *225* *226* *227* *228* *229* *230* *231* *232* *233* *234* *235* *236* *237* *238* *239* *240* *241* *242* *243* *244* *245* *246* *247* *248* *249* *250* *251* *252* *253* *254* *255* *256* *257* *258* *259* *260* *261* *262* *263* *264* *265* *266* *267* *268* *269* *270* *271* *272* *273* *274* *275* *276* *277* *278* *279* *280* *281* *282* *283* *284* *285* *286* *287* *288* *289* *290* *291* *292* *293* *294* *295* *296* *297* *298* *299* *300* *301* *302* *303* *304* *305* *306* *307* *308* *309* *310* *311* *312* *313* *314* *315* *316* *317* *318* *319* *320* *321* *322* *323* *324* *325* *326* *327* *328* *329* *330* *331* *332* *333* *334* *335* *336* *337* *338* *339* *340* *341* *342* *343* *344* *345* *346* *347* *348* *349* *350* *351* *352* *353* *354* *355* *356* *357* *358* *359* *360* *361* *362* *363* *364* *365* *366* *367* *368* *369* *370* *371* *372* *373* *374* *375* *376* *377* *378* *379* *380* *381* *382* *383* *384* *385* *386* *387* *388* *389* *390* *391* *392* *393* *394* *395* *396* *397* *398* *399* *400* *401* *402* *403* *404* *405* *406* *407* *408* *409* *410* *411* *412* *413* *414* *415* *416* *417* *418* *419* *420* *421* *422* *423* *424* *425* *426* *427* *428* *429* *430* *431* *432* *433* *434* *435* *436* *437* *438* *439* *440* *441* *442* *443* *444* *445* *446* *447* *448* *449* *450* *451* *452* *453* *454* *455* *456* *457* *458* *459* *460* *461* *462* *463* *464* *465* *466* *467* *468* *469* *470* *471* *472* *473* *474* *475* *476* *477* *478* *479* *480* *481* *482* *483* *484* *485* *486* *487* *488* *489* *490* *491* *492* *493* *494* *495* *496* *497* *498* *499* *500* *501* *502* *503* *504* *505* *506* *507* *508* *509* *510* *511* *512* *513* *514* *515* *516* *517* *518* *519* *520* *521* *522* *523* *524* *525* *526* *527* *528* *529* *530* *531* *532* *533* *534* *535* *536* *537* *538* *539* *540* *541* *542* *543* *544* *545* *546* *547* *548* *549* *550* *551* *552* *553* *554* *555* *556* *557* *558* *559* *560* *561* *562* *563* *564* *565* *566* *567* *568* *569* *570* *571* *572* *573* *574* *575* *576* *577* *578* *579* *580* *581* *582* *583* *584* *585* *586* *587* *588* *589* *590* *591* *592* *593* *594* *595* *596* *597* *598* *599* *600* *601* *602* *603* *604* *605* *606* *607* *608* *609* *610* *611* *612* *613* *614* *615* *616* *617* *618* *619* *620* *621* *622* *623* *624* *625* *626* *627* *628* *629* *630* *631* *632* *633* *634* *635* *636* *637* *638* *639* *640* *641* *642* *643* *644* *645* *646* *647* *648* *649* *650* *651* *652* *653* *654* *655* *656* *657* *658* *659* *660* *661* *662* *663* *664* *665* *666* *667* *668* *669* *670* *671* *672* *673* *674* *675* *676* *677* *678* *679* *680* *681* *682* *683* *684* *685* *686* *687* *688* *689* *690* *691* *692* *693* *694* *695* *696* *697* *698* *699* *700* *701* *702* *703* *704* *705* *706* *707* *708* *709* *710* *711* *712* *713* *714* *715* *716* *717* *718* *719* *720* *721* *722* *723* *724* *725* *726* *727* *728* *729* *730* *731* *732* *733* *734* *735* *736* *737* *738* *739* *740* *741* *742* *743* *744* *745* *746* *747* *748* *749* *750* *751* *752* *753* *754* *755* *756* *757* *758* *759* *760* *761* *762* *763* *764* *765* *766* *767* *768* *769* *770* *771* *772* *773* *774* *775* *776* *777* *778* *779* *780* *781* *782* *783* *784* *785* *786* *787* *788* *789* *790* *791* *792* *793* *794* *795* *796* *797* *798* *799* *800* *801* *802* *803* *804* *805* *806* *807* *808* *809* *810* *811* *812* *813* *814* *815* *816* *817* *818* *819* *820* *821* *822* *823* *824* *825* *826* *827* *828* *829* *830* *831* *832* *833* *834* *835* *836* *837* *838* *839* *840* *841* *842* *843* *844* *845* *846* *847* *848* *849* *850* *851* *852* *853* *854* *855* *856* *857* *858* *859* *860* *861* *862* *863* *864* *865* *866* *867* *868* *869* *870* *871* *872* *873* *874* *875* *876* *877* *878* *879* *880* *881* *882* *883* *884* *885* *886* *887* *888* *889* *890* *891* *892* *893* *894* *895* *896* *897* *898* *899* *900* *901* *902* *903* *904* *905* *906* *907* *908* *909* *910* *911* *912* *913* *914* *915* *916* *917* *918* *919* *920* *921* *922* *923* *924* *925* *926* *927* *928* *929* *930* *931* *932* *933* *934* *935* *936* *937* *938* *939* *940* *941* *942* *943* *944* *945* *946* *947* *948* *949* *950* *951* *952* *953* *954* *955* *956* *957* *958* *959* *960* *961* *962* *963* *964* *965* *966* *967* *968* *969* *970* *971* *972* *973* *974* *975* *976* *977* *978* *979* *980* *981* *982* *983* *984* *985* *986* *987* *988* *989* *990* *991* *992* *993* *994* *995* *996* *997* *998* *999* *1000*

CHAP. LXVIII.

Of a Distress.



Distress is either *finite*, which is where it is limited by Law, how oft it shall be made to bring the party to Trial, once, or twice: Or *infinite*, which is without limitation, which is until the party appear: Also it is the great Distress, which is of all the Goods and Chattels one hath in the County, which it seems is the infinite Distress: Or it is an ordinary Distress: *Old N.B. 43. 113. F.N.B. 126. Beke's*

1. Distress,
what it is.

ch. 6. 52. 2 H. 3. ch. 7. 9. 13. Old N.B. 71.

It is also said to be *Real*, i. when Land is distrained upon a *grand Cape*, or *petit Cape*. And sometimes (and most commonly) it is said to be *Personal*; and tharia where any moveable things are distrained: And of this kind of Distress is this following discourse.

A Distress then thus taken, is, where one doth take and distrain the Beasts, Cattel, or other things of another man in some ground or place, for Debt, Rent, or other duty behind, or for wrong or damage done. Which thing so taken, is by the Taker to be kept in Pound, until the party that distrained be satisfied his Debt, Rent, or Duty, or it be fetched forth by an Order of Law.

So that the end of this taking of the Distress, is, that by this means the party distrained may be enforced either to pay or perform the Debt, Rent or Duty, or else to answer the party distraining in a course of Law: For after the Distress is put in Pound, the Proprietor hath no means lawfully to come by it, but by agreement with the party, or by a *Replevin*, by which means the thing will come in question. (And in some special cases also, the things distrained may be sold for the payment of the Debt, and satisfaction of the party.)

Final cause of
it.

And after the Distress is in Pound, it is said then to be in *Custodia Legis*; so that now the Owner of it hath no absolute propriety in it: And therefore he cannot give, sell or forfeit it, neither can it be taken in Execution; but it must lie as a Pledge to be a means to help the party to his Debt or Duty, and cannot be took away to other purpose. And therefore if the party commit Felony after, or suffer Execution against him, the Goods shall not be forfeit nor took by the King, or upon the Execution, unless the King or Plaintiff will satisfy the Duty to the Distrainer, *Ca. sup. Lis. 196. Fines Law, 135.*

The nature of
it.

The power to distrain, is sometimes incident to the duty, and of common right; as to a Rent. Service, or an Amerciament in a Lect, sometimes is by Prescription, and sometimes by agreement of parties. *Sed quacunque via*, it is to the end, and in the nature aforesaid.

See. 1.

Note that all that is here said after, must be understood of the Distress of a common person; for the King hath a Prerogative above all other men. Which see in *Prerogative*.

For

3. What shall be said a lawful Distress, and lawfully taken, or not. In respect of the person distraining.

For this, these things are to be known.

1. If one seised of Land in Fee, demise it to one on Condition to pay to his Wife Three pounds Rent yearly, and if it be behind, that she shall distress for it; it seems by this Will she is enabled to distress, *Dyer* 34. 8.

2. If one make any Estate of Land in Fee, in Tail for life or years, rendering Rent; or grant, and reserve by the Deed, by apt words, a power to distress upon Non-payment; there he may distress by that power, *Bro. Distress* 70. 11 H. 6.

3. Where a man hath power to distress, he may appoint his Servant or Bailiff to do it, and he may do it by vertue thereof, *Co.* 48.

4. If there be Lord and Tenant by Fealty and Three pence rent, and the Lord die, and his Wife be endowed of the Thirds of the Seignior; here she may strain for one Penny, and the Heir for Two pence notwithstanding. So if a Rent be divided amongst Partners, each of them may distress for his part, *Bro.* 45.

5. If there be many Joint-tenants, and one only take the Beasts of a stranger Damage-fesant upon the ground, it seems good, *Bro. Charge* 39. 11 H. 6. 33.

6. Any Commoner may distress the Beasts of a stranger Damage-fesant upon the Common. See *Common*, *F.N.B.* 128. *Co.* 9. 112. 8. 78.

7. If a Lord that hath a great Common-Moor, enfeof another of part of it, and the Feoffee do not inclose it, but suffer his Beasts to come into the rest of the Moor, the Lord may distress them, *Dyer* 372.

8. He that hath but a Possession, and no Title, may justifie the taking of a Distress Damage-fesant, *Plow.* 431. 546.

9. But if one make a Lease for years rendering Rent, and the Term is expired, the Rent being behind, and the Lessor distress after for it, this Distress is unlawful: For regularly one may not distress for a Rent, after the Estate is ended upon which it is reserved; but he must have another remedy, 14 H. 4. 31. *Doff. & Sir.* lib. 1.

10. If one have three Daughters, and grant a Rent-charge in Fee to one of his Daughters, and after she die, and it descend to her Child, and after descend amongst the two Daughters and this Child, (as it must equally) she cannot distress for any part till partition, nor after partition but for a third part, 34 *Ass.* 15. 22 H. 6. 58.

11. None but known and sworn Bailiffs may distress for the King, *Westm.* 2. 36. See more for this, *Rent, Debt*, and *Westm.* 2. 37. *Brownl.* 1 par. 82. 187.

For answer to this, take these Cases.

See 2. In respect of the person distrained.

1. If a Rent be demised by Will out of Land to B. for the life of C. and the Devisor die, and after his Heir make a Lease of the Land to B. for life, the Remainder to C. in Fee, and the Rent is behind in the life of B. and he dieth: Now he may be distrained for this Rent and all the Arrearages, *Co.* 5. 118.

2. If one put his Beasts to Pasture for Twelve pence by the week with another man, and after he gives him notice that he will not tack there any longer; then may the Owner of the Ground distress them Damage-fesant: And he may be distrained in this case, though he be not a Tenant, and his Cattel were in lawfully at first, 43 *Ed.* 3. 21.

3. So where a Lessee holds in possession after his Estate ended, *Kelw.* 96.

4. A Commoner may be distrained by one of his Fellow-Commoners for Sur-charger, or the like, *Co.* 7. 23.

5. If one have the sixth part of a Ground in common with another, and grant a Rent-charge out of it, and after he and the other levy a Fine of the whole to a stranger: Now it seems the Grantee may distress the strangers Cattel for all the Rent before and after the Fine; and yet before the Fine levied, he could only have distrained the Beasts of the Grantor, and not of the other Tenant in Common, *M.* 18 *ac.* B.R.

6. If A. and B. be Tenants in Common, and A. lease his moyetie to C. for years rendering Rent, and C. lease it to B. and the Rent is behind; here A. may distress the Cattel of B. his fellow in Common, *Co.* 7. 23. *M.* 18 *ac.* B.R. *Sir H. Snelgar's* Case.

7. The Executor or Administrator of him which had Rent or Fee-farm for life, in Fee-simple or Fee-tail, may distrain the Tenant that should pay it. So may the Husband after the death of his Wife, his Executor or Administrator. So may he that hath Rent for anothers life, *Stat. 32 H. 8.*

None may distrain one that is out of his Fee and Jurisdiction, to come to his Court, *Marl. chap. 2.*

9. If one seised of Land in fee takes a wife, and after grant a Rent-charge in fee and die; the Grantor cannot distrain upon that Land the Wife hath in Dower, *F.N.B. 150. Bro. Distress 71.*

10. If the King be entitled to Lands by Office that be charged with a Rent, yet the thing cannot be distrained for the same, though the Rent is not lost, *Stat. 2 & 3 Ed. 6. ch. 8. 13 Ed. 4. 5.*

11. If one grant a Reversion rendering Rent, the Grantee cannot be distrained during the particular Estates, neither can the particular Tenant be charged with this Rent; but after the present Estate determined, the Grantee may distrain for all the Arrearages, *10 Ed. 4. 4.*

12. If one Joint-tenant make a Gift in tail of the Land rendering Rent, and the Rent be Arrear, he cannot distrain the Beasts of the other Joint-tenant for this Rent, *33 H. 6. 35.*

13. So if one Joint-tenant grant a Rent-charge out of the Land, the Cattel of his Companion cannot be distrained by the Grantee, *35 H. 6. 39.*

14. Tenant in Dower shall not be distrained for Debt due to the King by the Husband in his life-time, in the Lands which she holdeth in Dower, *Co. lib. Inst. 3 par. 51.*

15. None may distrain a Forreigner in any City, Town, Market, or Fair, for any Debt whereof he is not Debtor or Pledge; and if he do, he shall deliver the Distress under pain of grievous Amercement, *Westm. 2. 13.*

For answer to this, take these Cases.

1. One may distrain without clause of Distress for Rent-service, be it Money, Homage, Eleauge, Fealty, Bail of Court, Reliefs, Hofs, Rose, or the like, *Co. sup. Lit. 150.*

Self. 3.
In respect of
the cause of
the Distress.

2. If any Freeholder refuse to pay his Rent, the Lord may distrain. *Co. of Copholds.*

3. One may distrain for a Rent reserved on a Lease for life or years, or at will, so long as he have the Reversion in him. The Lessor or Donor may distrain of common right, without any clause of Distress in the Deed, *D. & S. f. 21.*

Rent.

4. One may distrain for an Amercement in a Hundred-Court, or Court-Baron, if one have a special Custom for it, *Nov. 31. F.N.B. 100.*

5. One may distrain for an Amercement or Fine in a Pleet, or the Penalty of a By-law, of common right, *11 H. 7. 151. Dyer 322. Co. 11. 44. 21 H. 7. 40. B.R. 183.*

6. One may distrain for Damage-ferant, where the Goods of another man be upon his ground cumbering the ground, or the Cattel of another man, without lawful authority or licence of the Owner of the ground, and there do feed, tread, or otherwise spoil the Corn, Grass, Wood, or other things; here the Owner of the ground may distrain them and put them in Pound as soon as ever they do come in; if he will, and that though the Owner do pursue them presently to fetch them out. And this is called a Distraint for Damage-ferant, *Termes ley 119. 7 H. 7. 1. Dyer 304. 399. Knt. 96. 23 H. 6. 37. Bro. 11.*

Damage-ferant,
what.

7. One may distrain for the Kings debt, or for Fifteenths in a Parliament, Issues to come into the Exchequer to account, and the like, and for Issues returned upon the heads of Jurors, *5 H. 7. 1. 16 Ed. 4. 10. F.N.B. 139.*

8. One may distrain upon an Attachment of a County-Court, Hundred-Court, Court-Baron, or the like.

9. If a Rent be appointed to one Copartner from the other upon partition, for the making of an Equality, he may distrain for it of common right, *33 H. 6. 33. 11 H. 4. 31.*

10. The Lord may distrain his Tenant for Aid for the marriage of his Daughter, *F.N.B. 82.*

11. If

11. If a Township be amerced, and they tax every man, and appoint one to levy; he may distrain for it. *D. & S. f. 74.*

12. One may distrain for Fees for Knights of the Parliament, where they be due. *11 H. 4. 2.*

13. If any Freeholder refuse to do corporal service, as Homage or Fealty, or to amend the High-ways, repair decayed Bridges, or the like tending to the profit of the publicke; or to discharge the office of a Carver, Butler, Brewer, or the like; or pale the Lords Parks, tile or thatch his houses, or the like, which by Tenure he oweth; the Lord may distrain. *Co. of Copihold 49. See Distress.*

14. No man may distrain within his Fee or elsewhere of his own head for revenge, or such like cause; but in case where Distress is given, and then by order of Law, *Marl. ch. 1. 2. 3.*

15. A man cannot distrain for Rent-sock: As if one lease for twenty years, and the Lessee lease over for ten years rendering Rent; and after grant away this Rent, this Rent cannot be distrained for. *See Rent-sock, 2 Ed. 4. 17.* Nor for any incertain service the Lord cannot distrain, unless it be in some special cases. *Lit. Co. upon it. 97.*

16. One may not distrain for an Amercement in a Court-Baron, without a custom or prescription for it. *Co. 3. 34.*

17. One may not distrain for Debt on an Obligation or Contract, nor for Account, nor Arrearages of Account, nor for Trespass, but as before. *See Stat. 3. Ed. 1. c. 23. D. & S. 15.*

18. The Lord cannot distrain for the Service in *Frankalmoigne* where it is incertain; but where it is certain, he may. *Lit. Frankalmoigne.*

So neither can the Lord distrain for any Services whatsoever that are incertain, and cannot be reduced to certainty. *Co. upon Lit. f. 96. 142.*

19. None may distrain any to come to his Court than is part of his Fee, nor upon whom he hath no jurisdiction. *Marl. ch. 1. 2. 3.*

20. None may procure any to distrain another to make him appear at the County-Court, or any other inferior Court, for purpose to vex him and put him to charge and trouble; in pain to fine to the King, and to pay the party grieved treble damages. *Westm. 2. 36.*

For answer to this question, these things are to be known.

1. A Lord may distrain any thing of his Tenants upon the place out of which the Rent is to come, as soon as ever it is there, and also the Beasts or Goods of any other mans after they have been levant and couchant, a some reasonable time; as if they be living Cattel, that they have fed and lien down. *D. & S. 15. Term. 17. 10 H. 7. 21. Dyer 317. 1. H. 7. 1.*

2. And if a stranger will put in his Beasts or Goods into the Tenants ground wilfully and trespass him, then the Lord may distrain it presently before it have been levant and couchant. *15 H. 7. 17. 1 H. 7. 1.* So it seems where the stranger is to pay the duty as Lord Mefne and Tenant, and the Mefnes goods come upon the Tenancie, *15 H. 7. 17.*

3. A man may distrain for Damage-fesant any mans goods, and it matters not who is Owner of them; nor by whom they are put on his ground, if they be doing him trespass. *1 H. 7. 1.*

4. So for Issues a man may distrain any mans Cattel upon his ground upon whom the Issues are returned; that is, if he take them in the nature of a Distress only to impound, &c. there he may take any mans Beasts levant and couchant. But if they be to be taken and sold for Issues lost upon a Warrant out of the Exchequer to levy them upon the Lands of him that lost them, the Sheriff cannot do so. *Goldsb. 149. pl. 50. 5 H. 7. 1.*

5. A hath a Close adjoining to the Close of B. A. leaseth his Close to C. for sixty years; C. leaseth it to D. for ten years, rendering Rent which is Arrear. D. being to make the Bounds between these Closes, suffers the Bounds to be ill, whereby the Cattel of B. come into the Close of D. Now in this case C. may distrain them, and B. may have his remedy against him. *Court in B. R.*

6. If

Self. 4.
In respect
of the ownership
of the thing
distrained.
Levant and
couchant.

Damage-fesant.

6. If any be fined in a Leet or Court-Baron, or amerced, and he have other Beasts in his ground, they may not be taken and distrained for this, as in the Case of Rent, 12 H.7. 15. 41 Ed.3. 26.

7. It seems that for Rent, one may not distrain the Cattle of a stranger, upon the ground, before they have been Levant and Couchant; but in case where the stranger doth wilfully put them into the ground of the Tenant: And that if they come in by Escape, they are not distrainable till they have been Levant and Couchant. Yet (me thinks) if they get in by default of the owner, as if the bound be his, and he let them lie open; in this case the Lord may distrain them as soon as ever they come in. See 22 Hen.6. 37. Broo. Distress 21. Dyer 317. Doff. & Stud. 15. 15 Hen.7. 17. 22 Ed.4. 49.

8. It seems to me also, That if a mans Beasts be in his own ground, and the Tenant that ought to make the Closure suffer it to lie open, so that my Cattle come in his ground; that these are not distrainable when they are Levant and Couchant: But there must be either a default or consent in the owner, that his Cattle shall be there, else they are not distrainable, Dyer 317. 15 H.7. 17.

9. Such things as the taking of them may be prejudicial to the Commonwealth, are not distrainable; as Cloth in a Tailors shop, in a Weavers or Fullers house, 10 H.7. 21.

10. The Goods of a stranger that are distrainable in their nature, yet may not be distrained, when they are in the custody of the owner; as if a man ride his Horse, or have him in his hand, in the place where the Distress may be taken, or one bring his Horse to the House to fetch things, and tie him while he is loading: In these cases these things are not distrainable, Adjudg Reads case, 39 Eliz. C.B.

For the clearing of this point, take these things:

1. One may distrain any thing Damage-tenant, Shocks of Corn, or any thing else forbidden, to be distrained in other cases, 22 Ed.4. 47. 15 H.7. 13. 21 H.7.39.

2. One may distrain for other causes, all manner of Cattle, Oxen, Sheep, &c. all manner of Householdstuff and movables, as Beds, Bedsteads, Peuter, Brass; also a Wain laden, and the Oxen, though laden with such things as otherwise are not distrainable; as a load of Corn in Shocks or Sheaves, and almost all Chattels personal are distrainable; a Fold of Sheep, &c. is distrainable, 20 Ed.4.3. 2 H.4.15. 21 H.7.9. Dyer 281. 22 Ed.4.51.

3. Also Windows, Doors, Mill-stones, and the like, when they are laid aside, and are parted from the Freehold, and no more to be used with it, are distrainable, 14 H.8. 25.

4. Such things as whereof the Sheriff cannot tell how to make Replevin, and deliver them in as good plight as they were in the taking, are not distrainable for Rent, as dead Victuals, Flesh, or the like, that will corrupt: So Sheaves and Shocks of Corn, are not distrainable; but for Damage-tenant, these may be distrained, Co. Inst. f. 41.

5. Such as cannot be distinguished from others of the same kinde, as Money or Corn out of a Bag or Box, Sheaves or Shocks of Corn which is not in a Cart or Wain, Tithes, or the like, are not distrainable, 11 H.7. 15. Kelw. 126. 2 H.4.15. 7 H.7. 11. 22 Ed.4. 47,51. 11 H.4. 40. 9 H.6.9. 13 Ed.4.6.

6. Such things as are fixed to a Freehold, and parcel of it, are not distrainable, as Doors, Hinges, Windows, Millstones used in a Mill, Furnaces, Fats fastned to the house; Pales, Stanks, Gates, Evidences, and the like, 14 H.8. 25. 21 H.7. 26.

7. Such necessary Tools and Instruments as are necessary to keep men in their Callings; and for their livelihood, as a Carpenters Ax, as a Smiths-Anvil, or the like, are not distrainable, 14 H.8. 25.

8. Such things as are for mens present necessity, as a Horse when a man is riding, or the like, are not distrainable, 6 R. 2. Broo. Distress 16.

9. Such things as tend to the Common good, as a Draught, or Plough laden, Mens Plough Cattel, or Flock of Sheep, if they have others enough in the place, where Distress is to be taken, at the very time when a man comes to distrain, are not to be distrained, no not for the King, Dyer 312. But for Damage-tenant, these

N n n

may

See. 4.
In respect of
the quality and
nature of the
Distress.

may be distrained, 51 H. 3. And in the other case the Distress must be there at the very time, for before or after is nothing in it. *F. N. B.* 174. 22 Ed. 1. *Distress* 61. *Co. lib.* 1 part 147. 2 part 133.

10. The Instruments of a mans profession, as the Books of Scholar, and the like, are not to be distrained.

11. Such things as are distrained already, and are in Pound as a Distress, cannot be distrained again, whiles they are in Pound, 22 Ed. 4. 11. *Bro. Distress* 75.

12. Such things as are for the Commonwealth, or tend thereunto; as a Millstone, when it is off from the Mill to be Pecked and Beaten. Things in a Common Hostery, or that are brought into a Fair or Market to be sold, are not distrainable. *Vide infra* & *supra*, 14 H. 8. 25.

13. Such things whereof no valuable property is in any body, as Dogs, Does, Bucks, Coneyes, and things that are *Fera natura*, are not distrainable, *Co. lib. Inst.* 1 part, 47.

14. Fetters upon a Horse Leg, may be distrained with the Horse, *March. f.* 91. pl. 149.

15. Nor (as it seems) Poultry, or Fish, Vessels, or Apparel, distrainable, nor Armor, nor Jewels, *Co. 2 part, Inst.* 133.

Stat. 6.
In respect of
the quantity
of the Distress.

The Distress must be reasonable somewhat proportionable to the cause and duty, for which it is taken, and yet if the cause be so as one cannot take a Distress of less value, and the thing be after a sort intire, as in the Distress of a Cart with his carriage, or with the Horses or Oxen annexed to them there (it seems) though there be a great deal of inequality, as if one take two Chariots of Corn for twenty shillings Rent, it may not be unreasonable, *Marlb. 1. 4: 22 Ed. 4. 15. 20 Ed. 4. 3. 41 Ed. 3. 26.* So (it seems) one may distrain a flock of Sheep for two shillings, because they are intire, 41 Ed. 3. 26. *Broo.*

One may take any Distress for quantity, if he distrain for Homage, Fealty, Expenses of Knights in Parliament, or the like; for in these cases, no Distress shall be said to be excessive, *Co. 4. 8. Distress* 89. 27 Aff. 51. 28 Aff. 50. But such Distresses as either are excessive for magnitude, as if one take two Sheep for two pence, or two Oxen for sixteen pence, or the like, or else for multitude; as when one distrains very often for one cause, these are unlawful Distresses, for which the distrainer shall be punished, *Excessus in re qualibet in jure reprobatur*. If the Lord distrain two or three Oxen for twelve pence, or the like small sum, and the owner Replieve, and the Lord avow for twelve pence; in this case he shall be fined upon his own shewing, or the party may have his action upon the Statute. But if he take a Horse or Ox for a penny, where no other Distress is to be had, it is not excessive; but if there were a Sheep or Pig to be taken, there it is excessive and punishable, *Co. 2 part. Inst.* 107. 51 H. 3. *Marlb. 4. Co. 11. 44. 4. 8. 11. 4. Marlb. 4. F. N. B. 174. 45 Ed. 3. 26.* But Horses traced shall be said to be but one Distress, *March. f.* 91. pl. 149.

In respect of
the time of
taking the
Distress.

For Damage-lesant a man may distrain in any part of the day or night; and for other causes, as Rent, Amercement, and the like, any part of the night or day, 35 H. 6. 10. *Co. super Littl.* 142. *Noy* 51. If one make a Lease, rendering Rent at Michaelmas, provided, That if it be behinde twenty days after he shall distrain; now it seems, by this he cannot distrain till the twenty days be past, 1 Just. Haughton, *Tem.* 14 Jac. *nullo contra dicente*. But the opinion of some is otherwise where Distress is incident, and the words are Affirmative, *Co. super Littl.* 204. That he may distrain at any time after the day, *Co. 9. 66.* But one cannot distrain for any cause but Damage-lesant by night, *Co. 9. En Mackallies Case, Super Littl.* 142. If a Distress be got out of Pound (it seems) the party may not distrain them again, unless he do it presently after they are gone out, 9 Ed. 4. 2. If one distrain for Rent before, or at the day it is due, it is unlawful, 21 H. 6. 4. *Brownl. 1 part.* 176. If one have distrained once, and in the Sute the Seigniori is in question, he cannot distrain again till this be decided, 7 H. 4. 4.

The Lessor cannot distrain for the Rent due the last day of the Term, and therefore the best way is to reserve the last half years Rent at Midsummer, and then he may distrain between that Feast, and the Feast of Michaelmas, *Co. Inst.* 1 part. 47.

Though

Though generally a man cannot distress for Rent out of his Fee and Seigniorie, (i.) The ground or place out of which it doth issue; and if he do, the party grieved may either have Trespass, sue upon the Statute, or by Indictment; yet if he be coming to distress, and the owner or another perceiving it, drive the Cattle or carry the thing out of the ground into another mans ground, or into another place: He that distressed them, may pursue them or it presently, and upon his fresh pursuit may take and distress them, or it, in any other place, *Plow.* 38: 33 H.6. 18. So (it seems) is the Law where one have distressed, and another drive them away; he may either take them again, or have a Writ of *Rescous* at his Election. And yet if the Cattle, of themselves, go out of the Tenancy without Inchaesment before the Lord can distress them; there he cannot distress them, though he have the view within his Fee, *Co.* 2 part. *Inst.* 131. *Dyer* 44. 25. 33 H.6. 53. 11 H.7. 5. 21 H.7. 40. *Co.* 9. 22. & *super Littl.* 160, 161. 3 H.6. 53.

Self. 7.
In respect of
the place of
taking.
Distress.

So if an Officer in a hufe Court take a Distress, or be coming to distress, and another seeing it, drive the Beasts out of the Hundred; (it seems) the Officer having them in his view upon fresh pursuit may take them out of the Hundred or Liberty, 3 H.6. 18. 33 H.6. 53.

For Issues a man may distress in his Land upon whom the Issues were put, though he have sold it away, or it be another mans Land, 5 H.7. *Brvo. Distress* 40.

For a Fine or an Amercement, or a Pain forfeited in a Leet, or any other such like Court, one may distress in any place within the Jurisdiction, and Precinct of that Court as well without as within the ground of him that is fined, amerced, or pained, 11 H.4. 89.

One may distress in a Common, as before is shewed.

If one grant a Rent out of a Manor, or Rent be otherwise issuing out of a Manor; *Rent.* one may distress upon the Demeans, 12 Aff. 4: 8.

If the Rent be issuing out of a House and Land, one may distress upon the Land, or in the House, either if the doors be open that he may get in; but he cannot open the doors, *Co.* 5. 91. 92. 38 H.6. 26.

If one grant a Rent of one ground, and grant withal by that Deed or another, that the Grantee shall distress for that Rent in any of his grounds in that Parish; in this case, though the Rent issue out of that ground onely, yet the Grantee may distress in any ground of his within the Parish, *Co.* 7. 23. 9 H.6. 9.

A Collector of Fifteenths may distress in any place within the Village, where the man doth dwell that is to be distressed, 16 Ed. 4. 16. 16 Ed. 4. 10.

For Herriot Service, the Lord cannot distress out of his Fee, no more then for a Rent: But he may seize a Herriot-Custom out of his Fee, *Goldsb.* 97. pl. 14.

If one be distressing a Distress to Pound, and the Beasts escape into another mans ground by the way that lieth overt (it seems) here he may follow them, and take them away to pound, 35 H.6. 10.

If one distress Beasts, and put them in the Pound, and after the owner take them out, the distrainer may take them in any place, and put them in Pound again, or have a *Parce fraids* at his Election, 34 H.6. 16. 7 Ed. 4. 5.

Parce Fraids.

If a Lease be made to be for ten years, rendering Rent, and after the Lessor doth grant the Reversion to C. for twenty years, and B. attorns, and the Rent is behinde, C. licences a stranger to put in his Cattle, yet he may distress them, for his Licence is void, having no possession: But if a Lessor drive the Cattle of the Lessee upon the Land, he cannot then afterwards distress them, 3 Chr. *Heydens* case.

For the most part one may not distress for any Rent, or other duty upon any place, but upon that out of which the Rent doth issue, *Marlb. cap. 3. cap. 15.* except it be by the Tenants own grant, 9 H.6. 9. But the King may distress out of the place, any where in the High-way, Common, Street, or elsewhere, *Marlb.* 19.

One may not distress for Damage-*sefunt* in any place, but in the place or ground where the damage is done, *F. N. B.* 904. *Plow.* 38. *Co.* 9. 22. though the party drive them out in his sight, *Co. super Littl.* 161. 9 H.6. 9. *Brownl.* 1 part. 87. 148, 149.

One may not take a Distress in the High-way or Common, Street, *Marlb.* 15.

9 H.6.9. Nor in the ancient Fees of the Church, unless it be for the King, *Art. Cler. 9.* And if he do so, the party grieved may have remedy by Action upon this Statute: But a Herriot Custom the Lord may seize in the High-way, for that is not a Distress but a Seizure. But otherwise it is of Herriot Service, for he cannot distrain for this there. *Co. 1 part. Inst. Sect. 69. 2 part. fol. 122.* But if the Lord coming to distrain, and see the Beasts within his Fee, and the Tenant before he can distrain, drive them into the Highway; in this case the Lord may take them in the Highway.

One may not distrain Goods in a Fair or Market; nor Horses in an Inn or Common Hostery, 7 H.7. 21. 21 Ed.4. 361. 22 Ed.4. 49. But if the Distress in driving, fall into any such place, the Distrainer may follow it thither, and take it thence; and so he may if it go into the House of the owner of the Distress, if he follow them presently, 22 Ed.4. 36. 9 Ed.4. 2.

One may not distrain in the ancient Fees or Lands of the Church; but of those that have been newly purchased, he may. *Articuli Cleri. cap. 9. 9 Ed.2.9.*

One may not distrain Cloth at a Weavers, Fullers, Taylors, Sheermans; a Horse at a Smiths being shoeing, 10 H.7. 21. 22 Ed.4. 49. *Co. lib. Inst. part. fol. 47.*

One may not distrain in a Sanctuary, *Co. 5. 92. 27 Ass. 35.*

If a Distress escape out of Pound, he cannot take it again, unless he take him presently, *Co. super Littl. 142.*

If a Rent be issuing out of Manor, it cannot be distrained for, upon the Tenants, that had their estates before the Creation of the Rent, 12 Ass. 40.

Rent.

One may not distrain men out of his Fee, to enforce them to come to his Court, upon whom he hath no Jurisdiction or Bailiwick, *Westm. 1. 16.*

A common person, though he be the Grantee of the King, cannot justify the taking of a Distress for a Rent or Seigniorie out of the Land whence the Rent doth issue, and in the Land holden of him, 9 H.6.9.

A Horse cannot be distrained whilst the owner or other is riding on him; nor an Ax while he is in a mans hand, cutting of Wood, or the like; nor Goods that are in custody of the Law, that are taken Damage-lesant: The Lord may not break the Gates or Hedges, to come in to distrain, *Co. lib. Inst. f. 47. 161. Brownl. 1 part. 31.*

If the Lord coming to distrain, and have not sight of the Cattle within his Fee, and the Tenant had driven them away purposely; or if after he had sight of them, the Cattle of themselves go out of his Fee; or if the Tenant after view, for any other cause, and that the Lord might not distrain them, do remove them; in all these cases the Distress by the Lord is not lawful, *Co. super Littl. 461.*

And in all these cases of Distress taken unlawfully for time, place, &c. an Action will lie for the party grieved, against the wrong doer; albeit the party distrained, do agree or sue Replevin, or the like: And if it be for Rent, and he pay the Rent; yet doth not purge the offence, *Co. 2 part. Inst. 133.*

Se8. 8.
4. How a Distress shall be used, when it is taken.

The party that doth distrain Goods or Cattles, may not sell them (but in some special cases hereafter set down) neither may he use them as his own; for in so doing, he shall make himself a Trespassor; nor may he esloyn them that they cannot be relieved, if he do, the owner may have Trespass for it. But he must put the Distress altogether in some one lawful Pound: (if one Pound will hold them) within the County and Hundred, where the Distress is taken, or else within some Pound overt within three miles of the place where the Distress is taken. And if the thing distrained be living and quick, and be put in any Pound overt within the same County, where the owner may possibly and lawfully come to it, without doing Trespass to any man; and there, if it be live Cattle, they be suffered to perish for want of mear; in this case the owner shall answer them, and the party may distrain again. But if he put them in a Pound close, where the owner cannot come to them, either because it is impossible, as if they be in a Fort, or unlawful, because they be in anothers ground; or if he drive them out of the County, or the Kings Writ come to deliver them, and he refuse to deliver them, or resisteth the Kings Writ; or if the Distress were for Damage-lesant, and before the impounding, the distrained person offer sufficient amends for the Trespass, and the other refuse; and after this the Cattle be suffered

to

to perish for want of meat; or if the Distress be of a thing that will corrupt, as an inanimate thing, and put in a Pound close; in all these cases, he that doth distrain, and not the owner must answer them.

If there be a clause in a Deed, that the party shall distrain and keep the Distress till he be satisfied; yet it seems he may not work the Distress; and if the words be, That he shall distrain without Gage or Pledg, yet it seems the Distress must be impounded, and may be replevied; *Co. 8. 146. 9. 146. Co. 2 part. Inst. 141. D. & St. 112. 22 Ed. 4. 47. 28 Ed. 6. 5. 30 Aff. 38. Marl. 4. Dyer 281. Broo. Distress 72. Plow. 6. 8. Keln. 71. 9 Ed. 4. 2. Co. lib. Inst. 1 part. f. 47. Westm. 1. 16, 17. Brownl. 1 part. 145.*

And if one distrain a Cow, yet he may not milk her, but let him put her in an overt place or Pound: And albeit he have the Cattle upon a Return Irreplevisable, yet he cannot work them, *M. 7 fac. Levis Case.*

And if the party distraining, do put an animate thing distrained into a Pound-close, he must feed it at his peril, and yet he shall have no satisfaction for it. And if the Distress be the Utensils of a House, or the like, which may take harm by Rest, or Weather, or be stolen away; in these cases he must put them in a House or other Pound-close, within three miles in the same County: For if he put them in a Pound overt, he must answer them if any hurt come to them, *Co. super Littl. 1 part. f. 47. Marl. 1, 2, 3, 4. Noy 53.*

One took a wilde Colt as an Estray, and because he could not keep him in Pound, otherwise he did cross-fetter him there, and for this the owner brought an Action of Trespas: But the Chief Baron directed the Jury to finde against the Plaintiff; and he held it lawful in this case, but not otherwise, at *Sarum Affize, 19 fac.*

If the party that distrained, put them in Pound out of the County, that the Sheriff cannot make a Replevin; in this case the party may have the Writ called *Withernam*; and if he put them in a Fort or Castle in the same County, that the Sheriff cannot Replevie them, then the Sheriff may take *Posse contrarius*, and demolish it, if he cannot otherwise do it, *Westm. 1. 17.*

If the Distrainer will of his own accord give the Cattle meat in a Pound overt, he cannot require it of the owner, nor keep the Beasts till he have it; but if the owner did promise to pay him for it, he may have an Action upon that promise, *21 Ed. 4. 53. Distress 53. 5 fac. Bagshaw Case. B. R.*

If one have Land in one County, of a Manor in another County; the Lord of the Manor there, if he distrain, may bring the Distress to the Pound in his own Manor, though it be in another County, notwithstanding the Statutes of *Marl. 3. 1 H. 6. 31. 21 Ed. 4. 119.*

If one distrain Beasts for the King, he must put the Distress in Pound; and if the owner doth give them meat himself, he shall pay nothing for the keeping of them, and they may not be sold within fifteen days after the taking; and if the party shew an Acquittance for Tail out of the Exchequer, or under the Sheriffs hands, and offer to put in Bail, to answer it in the Exchequer, upon the next Account day; then they must deliver the Beasts again, *21 Ed. 1.*

If one distrain for an Amercement or Fine in a Leet, he that distrained may sell the Distress, and pay himself with the money, *Co. 8. Grandboys case.*

If Beasts be unruly in the Pound, and will leap over the Distrainer (as it seems) in this case, it cannot binde them to the Pound, nor fetter them, *27 Aff. 64. Broo. Trespas 250.*

A Distress taken for the King, may not be sold within fifteen days; and upon showing a Tally, and giving Security to appear in the Exchequer upon the next Account, the Sheriff is to go no further; but to attach the party to be there that day. *De Distressione Scaccarii.*

It is a Writ lying where one, or his Servant, doth distrain for Rent-services, or Damage-tenant, Fifteenths, or for an Amercement, or the like, and being about to impound them, another taketh them from him, and will not suffer him to impound them; then he from whom this Distress is taken away, may have this Writ against him

Self. 9.
5. Rescom,
what.

him that taketh them away, and shall recover his damages, *Term. Leg.* 279. *F.N.B.* 101, 102. *Co. super Lint.* 160.

How this Writ
is to be
brought,

There is a *Rescous* of a person also, which is when a man attached or arrested, is rescued by himself or another; for which see *Rescous*, *F.N.B.* 102. and *Return* of the Sheriff: For in that case one may have this Writ also. If he break or be taken away from under a lawful Arrest: And this Writ sometimes must be brought in his name that doth distrain, sometimes in his name for whom the Distress is taken. See *F.N.B.* 101, 102.

Where this
Writ lieth, or
not.

If one distrain Beasts Damage-ferant, and drive them along the Highway, and going to Pound, they enter into the House of the owner, and he withholdeth them, and will not suffer the Distrainer to have them to Pound; then he may have this Action against him. For this is a *Rescous* in Law, *Co. super Lint.* fol. 161. 315.

If a Lord be coming to distrain, and the owner drive away the Cattle, and the Lord distrain them upon a present pursuit (as he may) and the party will not let the Lord have them, but drive them away; in this case the Lord may have this Writ, 44 *Ed. 3.* 20.

If a Lord distrain his Tenant without cause, and unjustly, and a *Rescous* be made upon him, it seems he may have this Writ of *Rescous*, *F.N.B.* 102. 40 *Ed. 3.* 32. But in another case, where it is not between Lord and Tenant, it will not lye.

If any be coming to distrain onely, and the owner drive out the Beasts before, or they go out themselves, so as he is not possessed of the Distress; in this case this Writ will not lie against the owner, or any other, *Co. super Lint.* fol. 160. And so also it seems it is in all cases where the Distress is unlawful in time or place, &c. See before *Adillegat Distress*, 2 *H. 4.* 15, 22. 44 *Ed. 3.* 20. *Co. super Lint.* fol. 160, 161.

6. Pound, what.

A Pound is a place of strength, wherein Cattle distrained, are put for the time, till they be relieved or redeemed. And this is either

The kinder.

Overt, which is such a place, as to which the owner may possibly and lawfully come to give his Cattle distrained, meat or drink: And this is either publick or common, as the Pounds in every Township, Lordship, or Village, or else private and particular; as any Court, Backside, Yard, or Ground where the Beasts may be without doing Trespasse; and whither the owner may come without trespassing any man to give them meat and drink.

Or else Close, which is such a place, as to which the owner of the Distress may not either lawfully or possibly come to give his Cattle meat and drink, as in another mans house or ground, or in a Court or House inclosed with high Walls, or closed. But *Co. lib. Just.* 1 part. fol. 47. makes the Pound overt to be the Pinfold, made for that purpose, or his own Close, or the Close of another by his consent; and the Pound-close is, when it is some part of the house of the owner, *New Term. Law* 154. 9 *Ed. 4.* 2. *Brow.* 246. 20 *H. 7.* 1. *Distress* 112. *Dyer* 288. 11 *H. 7.* 32. 5 *H. 7.* 9. *Nov* 55. 52, 53.

The owner may give his Beasts meat in the Pound, though taken for the Kings Debt, 51 *H. 3.* without giving any thing for their keeping.

7. *Affise de so-*
vent foits
Distress, what.

It is a Writ where one hath cause to distrain, and he doth it so often for the same cause; as that the Tenant is grieved thereby, and is not able to manure his Land; then the party shall have remedy by this Writ, for in this Suit he shall have Judgment to hold his Land free, *Abque multiplici Distractione*. But when the cause of taking is for Homage, Fealty, Suit of Court, or other like Corporal Services, though a man do so distrain, yet this Writ doth not lie, *Co. 4.* 8. 11. 44.

8. *Parco*
Fraido, what.

Parco Fraido is a Writ lying where a Distress is taken out of Pound, after he is impounded, either by the party distrained, or some other; then in this case the party

for whom the Distress was taken, may have this Writ against him that took it out, and shall recover his damages, and then he may also distrain the Cattle again, where-soever he finde them, or for this the party may be punished, as for a Pound breach in a Leet. See *Leet*, *F. N. B.* 100. 20 *H. 7.* 1. 34 *H. 6.* 18. *Co. Inst.* 1 part f. 4. 7. *Broo.* 402.

And this Action lieth, though the Cattle were impounded, unjustly, and without caute; as if one offer sufficient amends before impounding for the Trespass, and the party refuse it, and after the owner take the Beasts out of the Pound; this Writ lieth. Where it lieth, or not.

And if one that hath a Replevin, or other colour, take upon him to take out the Cattle; and in truth his Authority is not good, this Action lieth. So if a man that hath authority, break the Pound, before he demand the Beasts of the Keeper of the Pound, and he refuse or interrupt him in the taking of them, *D. & Sr.* 112.

And whether the Distress were taken Damage-fesant or for Rent, or Services, and whether they were taken out of a Common-Pound, or other private pound; so it be a lawful one, it is all one.

But if one distrain Cattle Damage-fesant, and put them in Pound, and the owner that had right there of Common, make fresh Suit, and finde the door unlocked, he may justifie the taking of them away in this Writ, *Co. Inst.* 1 part fol. 47.

See more of these things in *Prerogative*, *Return*, *Rent*, *Avowry*, *Trespass*. And see the Statutes for *Distresses*, 1 & 2 *Phil & Mar.* 12. *Articuli Cleri.* 9: *Westm.* 2. 37. 36. 1. 17: 16. *Marlb.* 15. 1, 2, 3, 4. And *De Districcione Staccarii*.

CHAP. LXIX.

Of Division of Places.



IN Division, the Law doth look upon Things and Places.

For the Division of Things, see *Appportionments*. And for Division of Places, it had one Division in Relation to the Spiritual Jurisdiction by Provinces, &c. and Diocesses, now gone, and Parishes; and another in Relation to the Civil Jurisdiction. For so it looks upon the whole Country, as divided into Counties, Hundreds, Cities, Towns, Parishes, or Villages, and Hamlets, and Burroughs.

See. 1.
Provinces.

The Provinces were the Circuits of the Jurisdictions of the Archbishops of *York* and *Canterbury*.

Province,
what.

The Diocesses of the other Bishops, the Circuit of their Jurisdiction.

Diocess, what.
Parish, what.

The Parish is a multitude of Neighbors, gathered together, and belonging to one Church, and under the charge of one Minister. And Parish Churches were those that were instituted for the Service of God, for the people dwelling within a certain compass of Ground near it: Of which were in *England*, in the time of *Henry* the Eighth, 4500 or near thereabouts.

A County is a certain Circuit, or part of the Country, into which the whole was divided for the better Government thereof; so as there is no part of the Country, but is in some County. And every County is governed by an Officer yearly chosen, called the Sheriff. And in *England* there are One and forty Counties, and in *Wales* Twelve Counties. And some Cities are Counties of themselves, or with a little addition of places near them, as *Glocester*; and some others of the Cities, as *Cambridge*, *Ely*, *Westminster*; and others are not so, but are within other Counties. *Co. upon Littl.* 109, 110.

Hundred, what. A Hundred is a certain circuit or part of a County, into which, the whole County for the better Government thereof, is divided: which at first were (as some say) an Hundred Towns; or (as others more probably affirm) because they were made up of Ten Tithings, which were a Hundred households of men, over which they had Jurisdiction, and over their Pledges, dwelling happily in two or three or more Parishes, Burroughs, or Towns, lying and adjoyning near together for the better Administration of Justices in their own distinct and proper Courts; and for the better Government of the whole Hundred, that they might not run out disorderly into one another's Hundreds, Laths, or Tithing, wherein they did not dwell; or so called, because every Hundred did finde the King a hundred able men for his Wars. *Sir Thomas Smiths Commonwealth. Terms of the Law.*

Ville or Village, what. A Village and a Tithing, it seems to me, were in the consideration of Law, one thing. By a Village is meant a little Neighborhood and company of Houses and Householdors compact together in one place.

Tithing, what. A Tithing did at first signifie the number or company of ten men, with their Families cast or knit together in a Society, all of them being bound to the King for the peaceable and good behavior each of other, whereof one was chief, and an Officer, called Tithingman, and in some places by other names.

Tithing-man. And of these Villages or Tithings, there are in many places many belonging to one Parish: There are more Towns in England then Parishes, for there is about Eight thousand eight hundred and three Towns, and but Four thousand five hundred Parishes.

Town, Burrough, City, what. And in Law, Towns, Cities, Burroughs, and Hamlets, seem to be included: And therefore some give one definition to a Tithing, and a Town, and a Burrough, and say, That they were heretofore taken for those companies of ten Families, which were one another's Pledg.

Every Burrough is a Town, but not every Town a Burrough: For a Burrough is an ancient Town holden of the King, or any other Lord, which sendeth Burgesses to the Parliament. And of these Burroughs, some be Incorporate, and some not; and some be Walled, and some not.

So every City is a Town or *Villa*, but every Town is not a City: For a City is defined to be a Burrough Incorporate, which hath or have had a Bishop, and though the Bishoprick be dissolved, yet the City remaineth; and with us, Town and City are commonly taken one for the other: There are seven and twenty Cities in England, and some of them are Counties, and some are not: And though Towns or Burroughs be decayed, so as no houses remain, yet they are called so still, and the Burrough doth send Burgesses to the Parliament. And some say it cannot properly be called a Town that had not a Church, the Celebration of Divine Service, Sacraments, and Burials, *Co. upon Littl. f. 109, 110, 113.*

Hamlet, what. A Hamlet is taken for a little Village, or that which was so and is now become, being depopulate, and but a Farm or entire Seat of one man: And of these Villages and Parishes are made up, for there may be many of them in one Parish, Town, or Village.

There are also in most Counties, some places that are not now known to be within any of those Divisions, *Fines Ley 84. 2 R. 3. 1. Co. upon Littl. the same, Co. 11. 26.*

There are some other Divisions by Wards, and otherwise used in some great Towns and Cities.

CHAP. LXX.

Of Drapery, Cloth, Cloathing, and Dogs.



The Law takes great care of the making of Cloth of all sorts.

Self. 1:
Cloth and
Clothiers.

And therefore provideth and ordereth,

First, Who shall make Cloth, and that all may not do it.

For this see 4, 5 *Phil. & Ma.* 5. 25. *H. 8.* 18. 1 *Eliz.* 14. 27 *Eliz.* 23. 18 *Eliz.* 45. 1 *R. 3.* 9. 4 *Jac.* 2.

Secondly, What Materials of Wool, Yarn, and Thrums, and other Stuff of all sorts, shall be put in the Cloth; and that no bad Stuff be intermingled in it: For this see 35 *Eliz.* 10. 31 *Ed.* 3. 8. 13 *R. 2.* 9. 28 *Ed.* 3. 2. 37 *H. 8.* 18.

Wool, Yarn, and
Thrums.

23 *H. 8.* 17. 6 *H. 8.* 9. 7 *Ed.* 4. 9. 8 *H.* 5. 2. 4 *Jac.* 2. 27 *Eliz.* 18. 43 *Eliz.* 12. 31 *Ed.* 3. 2. 3. 5. 6 *Ed.* 6. 7. 23 *Eliz.* 5. 33 *H.* 6. 16. 1 *Ed.* 6. 16. 3 *Ed.* 6. 7. 8 *H.* 6. 23. 2. 3 *Ph. & Ma.* 16.

Thirdly, That it be duly ordered and prepared in the making by Weavers, Spinners, Dyers, Dressers, &c. And that no unlawful devices by Gig-mills or Tensors be used in it: For this see 6 *H. 8.* 9. 3 *Ed.* 6. 2. 5 *Ed.* 6. 8. 22. 4, 5 *Ph. & Ma.* 5. 43 *H. 8.* 3. 5 *Ed.* 6. 6. 43 *Eliz.* 10. 39 *Eliz.* 20. 8 *Eliz.* 27. 14 *Eliz.* 12. 23 *Eliz.* 9. And that they be fit men to do it: See for this 2, 3 *Ph. & Ma.* 31. 4, 5 *Ph. & Ma.* 5. And that they be duly paid for their work by the Clothier: See for this 8 *Eliz.* 7. 14 *Eliz.* 12.

Gig-mills, Iron-
cards, Pickards.

Fourthly, That the Cloth have his due weight, length, breadth, and measure: See for this 6 *H. 8.* 9. 3 *Ed.* 6. 2. For the Cloth of Ray, 2 *Ed.* 3. 14. 47 *Ed.* 3. 31. 7 *H.* 4. 10. 13 *H.* 4. 4. For the white Straits in Devon and Cornwall, 27 *Eliz.* 18. 35 *Eliz.* 10. 4 *Jac.* 2. For the Lancashire Cotton, Fizes, and Rugs, 8 *Eliz.* 12. For the Washer-cloth in Yorkshire, 4 *Jac.* 2. For the Cloth made in Kent, Sussex, or Reding, 5 *Ed.* 6. 4. 5 *Ph. & Ma.* 5. 4 *Jac.* 4. For the Cloth made in Worcester and Coventry, and the long and short Worcesters made there, 5 *Ed.* 6. 5. 4, 5 *Ph. & Ma.* 5. 4 *Jac.* 2. For the Cloth called Cogware, Kendals, and Carptmeals, 4 *Jac.* 2. For the coloured Cloth, white Cloth, and short Cloth in Suffolk, Norfolk, and Essex, 5 *Ed.* 6. 6. 43 *Eliz.* 10. 4 *Jac.* 2. 4, 5 *Ph. & Ma.* 2. For the Northern Cloth beyond Trent, 39 *Eliz.* 20. 41 *Eliz.* 10. For all whites and reds in Gloucestershire, Wiltshire, and Somersetshire, 5, 6 *Ed.* 6. 4. 4, 5 *Ph. & Ma.* 2. 35 *Eliz.* 9. 4 *Jac.* 2. For all Plunkets, Azures, Blews, and Kerfies: See the last Statutes. For Broad-cloth and Narrow-cloth made in Tounson, Bridgewater, and Dunstons, 5 *Ed.* 6. 6. 43 *Eliz.* 10. 4 *Jac.* 2. For thick and thin Kerfies, 5 *Ed.* 6. 4 *Jac.* 2. For Welsh Linnen, and Welsh Fizes, 4, 5 *Ph. & Ma.* 5. 5 *Ed.* 6. 6. For the Northern Cloth and Dozens, 5 *Ed.* 6. 6. 43 *Eliz.* 10. For the Perinistone and Forest Whites, 5 *Ed.* 6. 6. 4 *Jac.* 2. For the Worsted cloth, 17 *R. 2.* 3. 7. 17 *Ed.* 4. 1. 15 *H. 8.* 4. 25 *H. 8.* 5. 14 *H. 8.* 3. For the Manchester and Cheshire Cottons, and Rugs or Fizes, 5 *Ed.* 6. 6. 4, 5 *Ph. & Ma.* 5. For the Measures and Weights of Cloth and Wool, 6 *H. 8.* 9. 3 *Ed.* 6. 2. 31 *Ed.* 3. 2. 8. 13 *R. 2.* 9. And those Clothes that are not of those Weights and Measures, &c. are not to be sold, 6 *H. 8.* 9. 3 *Ed.* 6. 2.

Worsted.

Fifthly, The Clothier must put his Mark and Seal upon his Cloth, and for this see the Statutes of 3 *Jac.* 1. 2. 39 *Eliz.* 20. 5 *Ed.* 6. 6. 27 *H. 8.* 12. 5 *H. 8.* 2. 25 *H. 8.* 18. 6 *H. 8.* 8. 7 *Jac.* 16.

Sixthly, There are Officers appointed to look to these things, and to view, and search the Cloth, as the Aulnegor, who is an Officer of the Lord Protector; that is, by himself or his Deputy, to look to the Assize of all the Woollen-cloth that is made: And he hath two Seals for that purpose appointed him. And for him and his Office, see the Statutes of 25 *Ed.* 3. 2. 27 *Ed.* 3. 4. 3 *Ed.* 6. 6. 8 *Eliz.* 12. 13 *R. 2.* 11.

Aulnegor,
what.

Overseers of
Cloth.
Searchers of
Cloth.

and *Brownl.* 2 part. 301. The Overseers of Cloth, and for them and their Office, 3 *Ed. 6. 2.* 39 *Eliz. 20.* 21 *fac. 18.* 35 *Eliz. 10.* And Searchers of Cloth, and for them and their Office, 5 *Ed. 6. 6.* 45 *Ph. & Ma. 5.* 4 *fac. 2.* 2, 3 *Ph. & Ma. 12.* 3 *Ed. 6. 2.* 35 *Eliz. 10.*

Seventhly, If there be fault in the Clothier, he is to be punished, and make amends for bad Clothe, 4 *Ed. 6. 6.* 45 *Ph. & Ma. 1.* 21 *fac. 18.* 4 *fac. 2.* 43 *Eliz. 10.* 35 *Eliz. 7. 9.* 5 *Ed. 6. 6.*

Weavers, Spin-
ners, &c.

Eighthly, The Weavers, Spinners, Carders, Dyers, Dressers, Rowers, Raisers, Shearers, and the rest, are to be careful of their part of the work, or be punished, 7 *fac. 7.* 4 *fac. 2.* 35 *Eliz. 10.* 6 *H. 8. 9.*

Ninthly, For Transportation and Importation of Cloth, 7 *Ed. 4. 3.* 5 *Ed. 6. 6.* 1 *R. 3. 8.* 3 *H. 7. 11.* 11 *Ed. 3. 3.* 4 *Ed. 4. 1.*

See more of these things in my Book of *Justice of Peace*, in the Chapter of Clothiers, and in *Wingate's Abridgment of the Statutes*.

of Dogs.

FOR Dogs, these special things are to be known.

1. If a man keep a Dog that doth use to kill Sheep or bite Cattle, and he hath notice given him hereof, and after this the Dog doth hurt to any man herein, the Master must answer for it. See for this *Action upon the Case*.

2. No Felony can be by stealing Hounds, Spaniels, Grey-hounds, or the like Dogs. But for a Blood-hound, or Mastiff, perhaps it may be otherwise. And for Dogs of Pleasure, the owner may bring an Action of Trespass for them, against him that shall take them away; for in these a man hath a property, and they are valuable to him. See *Trespass, Property*.

CHAP. LXXI.

Of Droit & Tort, or, Right and Wrong.

Self. 1.
Droit or Right,
what.

Tort or Wrong,
what.

The kinds of
it.
Droit of Entry,
of Action.



DROIT, called in Latine *Jus*, in English *Right*: This in a general signification doth signifie and include a Right, for the which a Writ of Right doth lie; but also any Title or Claim to Land, by force of a Condition, Mortmain, or the like; for the which, no Action but an Entry is given by the Law. And this seems to be opposed to *Tort*. Right is most properly where the estate is turned to a Right; but it doth sometimes include the estate in *Esse, Co. on Dist. ch. 8.*

Right is said to be of Entry, or of Action: For when a man is put out of his Land by Disseisin, Discontinuance, or Ejectment, and layeth claim to it, he hath sometimes a Right to an Action, the which he may have to recover it, and sometimes he may enter and take it. Sometimes he may do either; sometimes he hath an action, but cannot enter, sometimes may enter, but cannot have any Action, sometimes he is barred of Entry and Action both, and without remedy.

There is *Jus proprietatis*, a Right of Ownership, and a Right of Possession: As if a man be disseised of Land, the Disseisee hath the Right of Property, the Disseisor the Right of Possession: And if the Disseisee release to the Disseisor, he hath both.

There is a Right, first, of Recovering, secondly, of Entering, thirdly, of Having, fourthly, of Retaining, fifthly, of Receiving, sixthly, of possessing, *Co. 8. Altham's Case, Co. 2. 56.*

This Right also is Present, or Future, when the Right one hath, is to be had hereafter.

A Pretensed Right is where one is in Possession of Lands, and another who is out of Possession claimeth it.

Pretensed Right, what.

As concerning Right and Wrong, these general Rules are to be known.

General Rules concerning Right and Wrong.

1. Right doth sometimes sleep, but it never dies, trodden down it may be, but it can never be trodden out; so much favor it hath in Law, *Co. upon Littl. Sect. 478.*

2. When two are in possession by divers Titles, the Law doth judge the possession in him that hath the Right, in favor of Right, *Littl. Sect. 458.*

3. When due Rights do concur in one person, it is as good and effectual, and shall work, as if it were in divers persons, *Co. upon Littl. 278. &c.*

4. In Rights the most ancient shall be preferred, *Idem.*

5. Rights do help them that do watch, and not them that do sleep, *Plow. 372.*

6. Any man may be prejudiced in his Right by his delay, *Idem.*

7. The Law doth wrong to no man.

8. To him that doth agree to the thing, there can be no wrong.

9. Men are so to use their own Right, as thereby not to hurt another man.

10. None may have advantage, or take benefit by his own wrong, *13. H. 7. 1.*

11. No man shall be twice punished for any wrong.

In some cases to recover a mans Right to Land, he hath an Affize which is given to a man for his Land, where he is disseised of the Freehold, as being Tenant in Fee-simple, Tail, or for life; and so if he be Tenant by Elegit or Statute: And if a man be disseised, and then recover by this Writ, and after is disseised again by the same Disseisor; then he may have a Writ of Redisseisin. And if one recover by Affize of *Mort-damnsfer, &c.* and then be again disseised, he may have a Writ called a Postdisseisin.

Affize, what.

Redisseisin.

Postdisseisin.

The party put out of Land may also have remedy by a Writ of Right, which is a Writ of the highest nature of all others: And wherein if a man have Judgment, and no Claim be made within a year: and a day after; by this all persons are barred for ever, *F.N.B. 2.*

Writ of Right, what.

And this is either Open or Paten (that is) not inclosed within the Seal; or it is Close, (that is) inclosed within the Seal.

Patent or Open, or Close, what.

And in London by their Custom they have a Writ of Right, in this case much of this nature, *Co. super Littl. 158, 159. See Proces.*

Droit in London, what.

Eviction is, where one is cast out of something, whereof he had the possession and property. And this may be either lawful or unlawful; and lawful either by Act of Law, which doth no man wrong, or by the Act of the party: And this also may be either Peaceable or Forcible.

Eviction, what.

Forcible Entry into Lands, is a violent Actual Entry into Lands, Houses, &c. by any person weaponed, whether he offer violence or hear of hurt to any there, or furiously drive out any out of the possession thereof. And the Forcible Detainer is a Violent Act of resistance, by a strong hand of men, weaponed with harness or other action of fear in the same place or elsewhere, by which the lawful Entry of the Justice, or other is hindred. But as to this, see *Forcible Entry.*

Forcible Entry, or Forcible Detainer, what.

CHAP. LXXII.

Of Drunkennes, Dyers, and Dying.



Or Dyers and Dying, these things are to be known.

1. That no man is to Dye any Cloths, Kersies, or other things with Logwood, but the same is to be burned, 23 *Eliz.* 9. 39 *Eliz.* 11.

2. The Dyer must fix a Seal of Lead to his Cloth, 19 *Eliz.* 9.

3. No person that Dyeth Worsteeds, Stamins, or Sayes, is to Kalender them, 25 *H.8.* 5.

4. In what manner Woollen-cloth, and Wools shall be used in the Dying; and with what Stuff they shall be died, 25 *H.8.* 5.

Of Drunkennes and Alehouses.

SeE. 1.
Who must
take Licences.

AS to Drunkennes. Alehouses, and Alehouse-keepers, these things are to be known.

1. That none may keep any common Alehouse or common Victualling-house, or use commonly to sell Ale, Beer, Cider, or Perry, that is not licenced in open Sessions, or by two Justices of the Peace, *Quorum Unus*, 5, 6 *Ed. 6.* 25.

Taverns, In-
holders.

2. That Taverns keeping Victualling, Inn-keepers, and Victuallers, are within the Statutes, as well as Alehouse-keepers; so that if they offend by suffering Tipling, or selling less for a peny, or two pence, then the Statute appoints; they are to be punished as Alehouse-keepers are. And they are to be bound for keeping of good order, as well as Alehouse-keepers: And the Justices of Peace may require them to take Licences, and enter into Recognizance to keep good order, or else commit them as Alehouse-keepers. And all those Inns which were erected since 5 *Ed. 6.* and not Inns before, must have Licences, and be bound as well as others, *Crompt. Jur.* p. 77. *Dalt. 7. P. ch. f. 37. 1 Car. 4.*

Commitment.

Recognizances.

3. The Justices when they Licence Ale-selling to a man, must take Bond and Surety of him against the using of unlawful Games, and for the keeping of good order, which they must certifie at the next Quarter Sessions, *Subpoena* three pound six shillings eight pence.

4. When they commit any man three days for selling without Licence, they must ere they deliver him, take Bond with two Sureties, that he shall not offend again. And this Recognizance, Discharge, and Offence, they must certifie at the next Quarter Sessions: And this Certificate will be a sufficient Conviction in Law, to make him liable to the twenty shillings fine upon the 5 *Ed. 6.* 25.

5. If two Justices of the Peace, discharge an Alehouse-keeper of selling of Ale, and two others after, out of Sessions, allow him again, it seems the first two may commit him. So if he be Convicted of any of the Offences in the Statutes, by which he is disabled, and is, or is not suppressed for it: If he be licenced within three years after, the Licence is void, and he to be punished as one unlicensed. And he that is Convict for selling less than the Assize, for suffering Tipling, or that doth Tiple, or is Drunk, is disabled to sell again for three years; and being put down by two Justices, he cannot be licenced, but in open Sessions, *Dalt. 7. P. ch. 7. 1 Jac. 9. 4 Jac. 5. 21 Jac. 7.*

Femes Covert.

Good-behavior.

6. If a Woman that hath a Husband, sell against her Husbonds will, they may be both punished, in purse, and she, if the Justice think fit, may be imprisoned till she finde Sureties for the Good-behavior, and that she will not sell again, *Dalt. 7. P. chap. 7.*

7. He

7. He that is not licensed, may be punished by 3 Ed. 6. 25. or by the 3 Car. 3. But he cannot be punished upon both, that is, if he be committed and pay his twenty shillings, he cannot be sent to *Bridewel*. If he be sent thither, he is not to be committed to Gaol, and pay twenty shillings; and yet he that is unlicensed, may be punished for suffering Tipling, or breaking the Assize, as those that are licensed may be, *Dalt. 7. P. ch. 7.*

8. The Traveller and other necessarily accompanying him, and invited by him, during his necessary abode in the Alehouse, Handicraftmen, Workmen, and Laborers, that are there for an hour at dinner time; and such as do sojourn and lodge there, and such as are licensed by two Justices of the Peace, are not to be accounted Tiplers within the Statute: But all other men living in the same place, or elsewhere, except the stranger himself, are to be accounted Tiplers, *Dalt. 7. P. ch. 7. 1 Car. 4 Jac. 5. 1 Jac. 9.*

9. Brewers may not sell more Ale or Beer to unlicensed Alehouse-keepers, then what will serve for their own use, 4 Jac. 4.

10. Selling of Ale at Fairs, is not against the Statute of 3 Ed. 6. 25. 3 Car. 3.

11. All the Forfeiture of all these offences upon 4 Jac. 7. 3 Car. 3. 21 Jac. 9. are given to the poor of the place, where the Offence is done; and so is the one half upon the Statute of 4 Jac. 4. and must be delivered to the Church-wardens, who must account for it: But the twenty shillings on the Statute of 5, 6 Ed. 6. doth go to the Lord Protector.

12. It is held fit to hear the parties offending in these cases, before the Forfeitures be levied in, *Dalt. 7. P. ch. 7.*

13. If any Alehouse-keeper shall be lawfully convicted of any offence against any breach of 1 Jac. 9. 4 Jac. 5. He is for the space of three years next after the Conviction, to be utterly disabled to keep any such Alehouse, 7 Jac. 10.

14. A man convicted the third for his selling Ale or Beer of his own Brewing, and not compounding with the Commissioners of Excise, is to be punished as an unlicensed Alehouse-keeper, and to be for ever disabled to keep such a common House, *Att. 14 Aug. 1649.*

15. If a man be punished on the 5, 6 Ed. 6. that is committed and hath entred into Bond, and hath paid twenty shillings, he cannot be punished on 3 Car.

16. He that is drunk, is for the first offence to pay five shillings, or be put in the Stocks six hours; for the second offence, to be bound to the Good-behavior.

17. He that is Convict of Tipling, is to pay three shillings four pence, or be in the Stocks four hours.

18. The Innkeeper, &c. that suffers Tipling, is to pay ten shillings, or go to Gaol, till he pay it.

19. If he sell less then measure, he must pay twenty shillings, or go to Gaol, till he pay it.

See more of these things in my Book of *Justice of Peace.*

CHAP. LXXIII.

Of Election.

Here is an Election of Things and of Persons. That of things is Election, what. where one hath a liberty or free choice, to have or do one thing or another, as he pleaseth; and is by *Dyer* 281. thus defined, *Electio est interna, libera, & spontanea separatio unius rei ab alia sine compulsionē, consistens in animo & voluntate*: As if one be bound to pay a pound of Pepper, or a pound of Raisons, he may do which he will; and if one give me one of his Horses in his Stable, and say not which, I may take which I will, *Dyer* 281. 18. 21 H. 7. 29.

2. In what case
an Election is
given, or not.

If one for money make a Lease by the words Demise, Grant, Bargain, and Sell; the Lessee may take it, by way of Bargain and Sale, or Demise at Common Law at his pleasure, Co. 236. Dyer 39. see Deed.

So if a Husband and Wife be jointly seized of a Manor, out of which another hath a Rent-charge; and he do Release, give and grant this Rent to the Husband alone; he may use this as a Release, or a Grant, as will be most for his advantage at his own pleasure; See more of this Dyer 35. 11. 16. 302. Dyer 319. 109. Co. 71. 6236. 11. H. 6. 43. 44. Ed. 3. 31. 32. H. 6. 42. 10 Ed. 4. 3. Plow. 156. 433. Co. upon Deed 301. 302. see Grant.

Rent.

If one grant a Rent-charge, the Grantee may chuse either for to distrain for it, and so charge the Land, or so bring an Action, and so charge the person of the Grantor, or his Heirs, &c. and where this Election is given, and where not, see Co. 3. 29. 236. 448. 658. 724. Dyer 65. 140. 344. Litt. 48. see Rent.

Contract.

If one be to pay one of two things for Rent, or by a Contract, or Obligation, he that is to pay it, may pay which he will at his choice; 1 Rich. 3. 2. 9 Ed. 4. 36. Co. 2. 37. 399. 21 H. 7. 19. See Obligation and Contract, 7 Ed. 4. 26. 9 Ed. 4. 48. 50 H. 7. 31. 7 H. 6. 7.

If one give me one of his Horses, I may take which I will, and the Law gives me Election to make the gift good, Dyer 23. 21 H. 7. 19. Dyer 91.

Rent.

If one make a Lease for years rendering Rent, and the Lessee assign over his Term; the Lessor may sue the Lessee, or his Assignee for the Rent, at his pleasure, Co. 3. 23. 19 H. 7. 41. and Rent.

If a Tenant that held by Knights-service be dead, his Heir within age, the Lord may either seize the Wardship, or waive it, and demand his Services; so also it seems he may accept or refuse any of his Services at his pleasure, Dyer 285. 39. Co. 2. 68. see Services.

Action.

In some cases when one hath cause of Action, he may bring one Action or another at pleasure, Co. 2. 37. 61. 493. 5. 38. 6. 44. 9. 51. 72. Kelm. 61. 92. Dyer 20. 59. 51. 21 Hen. 7. 30, 37. Dyer 121. 140. 230. 344. 27 Hen. 8. see Action.

Dower.

In what cases a Woman may at her Election have Joyntor, or Dower, or both; and in what cases not, see Dower.

In what cases one may sue one or another at his pleasure, see Dyer 204. 107. 10 H. 7. 8. 22 H. 6. 40. and Action.

Lease.

In what cases by Acceptance, one hath Election to affirm or avoid a Lease, see Acceptance and Leases.

Executor.

And know that a man hath Election in divers other cases: As if one be a Legatee or Executor, to take as one or other. Cum multis aliis, Plow. 520.

But if a Lease be made to Commence after the death, Surrender, forfeiture of a former Lessee of the Land; this Lessee hath not any Election here, but his Lease shall begin, after the first of these Contingents when it hapneth, Co. 2. 36.

Deed.

If one sell Land to me by Bargain and Sale, and before Inrollment levy a Fine to me of the Land: Now I have not Election here to take by either, but I must take by the Fine, and the Inrollment afterwards will not relate to this purpose, Co. 4. 72.

Grant.

If one sell to me two Acres of a great Wood of one thousand Acres, and give me Livery of Seisin in part of the Wood; it seems this is void, and I have no Election given to me now to help it, because after the Livery it is too late, Dyer 281.

and will join.

If one grant to me and my Heirs a Rent-charge, but doth not say in his Grant *pro se & heredibus suis*, and he die: Now here I must charge the Land, and I have not any Election given me to charge the person, because the person of the Heirs is not chargeable, Co. 10. 128. Plow. 344. See more *Infans*, Contract.

3. Where Election is necessary, and in what time it ought to be made, or not.

If one be to have one of two things, by one title of Gift, Grant, or the like, and the Gift or Grant is so uncertain at the first, that nothing passeth till Election be made; and the Election doth precede the property or interest of the Feoffee or Grantee

Grantee (as in such cases it doth) there Election is very necessary; for till then no interest or property is in the Feoffee or Grantee, neither can he grant it over.

And it must be done also in this case, in the life time of the party, that is to chuse for his Heirs, Executors, or Administrators cannot chuse, Co. 2. 35, 36, 37.

And if the Election be not in his life time, the Gift or Grant will be void: As if one make a Feoffment to another of White-acre or Black-acre, or of a House and ten Acres of a great Wood of his of one thousand Acres, or one give one of his Horses: in all these cases, till Election be made nothing passeth, and after the death of the Vendee or Donee, no Election can be made, Dyer 281. Grant:

Where an Election is given to several persons, there Election is necessary, and nothing doth pass till Election be made: As if one Lease two Acres for life, the Remainder of one to J. S. and of the other to J. N. till one of them chuse, it seems nothing passeth; and therefore Election must be during life, Co. 2. 36.

But if one be to have one thing only, but by two several Titles, or in two several degrees or manners, and the estate passeth presently (as in that case it doth) there Election is not so necessary, because the thing is grantable before Election; and in this case Election may be made by the Heirs or Executors, after the death of the party: As in the cases of a Grant of a Rent-charge, and of a Lease made by the words, Demise, Grant, Bargain, and Sell, there the Grantee or Lessee, or his Executors or Administrators, may at any time make their Election, Co. 2. 35, 36.

Dyer 91. 70. If one grant me ten load of Wood, in his Wood, to take at my Election, and he or a stranger cut down Wood; now I may not take that cut down, but I must serve my self elsewhere in the Wood, Co. 5. 25. What thing is
elegant, or
not.

In all cases where an Election is given of two or more several things, he that is the first agent, and to do the first act, shall have the Election: As if one grant a Rent of Money or Robe, or a Lease be made, rendering a Rent or Robe, the Grantor or Lessee before the day of payment hath the Election; and may pay which he will. 14. What person
shall make the
Election, or
not.
Grant.

So if one promise, or enter into obligation, with condition to do one of two or more things, the party, obligor, or promising hath the Election: But if he fail payment of his Rent at the day or performance of his promise, then the other party may sue for one or the other, for then he hath the Election. But if the Grantee bring an Annuity for the Rent-charge, he must bring it for both, else he will lose his own Election, Co. 2. 37. 9 Ed. 4. 3. 13 Ed. 4. 4. 5 Ed. 4. 6. Kely 700. Co. 10. 118. Co. 9. 94. Dyer 18. 21 H. 7. 19.

If a Warrant come from a Justice to an Officer, to require him to bring a person before him, or some other Justice, the Officer, not the offender, shall chuse to which Justice he will go, Co. 5. 59. Officers

If one give to me one of his Horses in his Stable, I shall have the Election, and may take which I will: But if he say he will give me one of his Horses, in the words of the future-tense; there it seems, I cannot chuse, but he hath the Election, 21 H. 7. 19. Gift.

If one be bound in an Obligation, with a Condition, to pay fifteen pound at Easter next, or before at the request of the Obligee, it seems here the Obligee shall have the Election: But if the Bond be with Condition, that the Obligor shall pay fifteen pound before Easter, at the request of the Obligee, or at the said Feast of Easter, here it seems the Obligor shall have the Election, Dyer 108. Condition of
Obligation.

If the Condition of an Obligation be to deliver up the Obligations that be in his hand, or to seal to the Obligee such a Release as he shall devise, before Michaelmas next, the Obligor must do one of them at his peril; and the Obligor hath no Election in this case, but the Obligee may tender a Release, if he will. Goldsb. 141. pl. 55.

If one grant to another twenty Loads of Hazel, or twenty Loads of Maple, to be taken in his Wood of D; there the Grantee shall have the Election, 2 H. 7. 13. Co. super Litt. 146.

And

And when the thing granted, is of a thing Annual, and to have continuance, there the Election doth remain to the Grantor, when the Law doth give him the Election, as well after the day as before; as when one grants the Annuity of twenty shillings, or a Robe at *Easter*, but when it is to be performed *Unidâ vice* onely, *contra*: And therefore if one contract with me to pay me twenty shillings, or a Robe at *Easter*, if he fail, I may sue for either.

5. What Act shall amount to an Election, and be good and binding, or not. *Services: Dower.*

If an Election be given to divers persons, and one of them make a choice; this shall binde all the rest, though they agree not to it, *Co. 2. 36: Co. super Litt. 146.*

If two be Joyntenant of a Manor, and a Wardship happen, and one of them seize the Ward; this will binde the other, and he cannot after waive him, and demand his Services, *Co. 1. 23.*

If a Rent-charge be granted to a man and his heirs, and the wife of the Grantee brings a Writ of Dower against the Heir, and the Heir to prevent the wife of Dower, claims it to be an Annuity, and not a Rent-charge; this is no good Election, and therefore she shall recover her Dower; and after this Endowment, the Heir cannot have Annuity for the two parts, for he must have all as a Rent-charge, *Co. super Litt. 444.*

6. By what means an Election may be gone, or not.

If two things pass by one Gift or Grant, altogether uncertain at the first, and the Feoffee or Donee die before Election; this Election is gone, and the Grant void: As in the case of the Feoffment of one of two Acres, and of the Wood, and the gift of one of his horses, *Co. 2. 36, 37: Dyer 181.*

If one have an Election to pay one of two things at a day, and he do not pay it at the day, then his Election is gone to the other, as in the case above, *Kew. 18. Domesday case, Trin. 8 Jac. B.R.* And if after the Election given to the Grantee he brings a Writ of Annuities for one onely, and have Judgment for that one; his Election is gone, and he can never demand the other, *Co. 2. 36, 37.*

If one enfeoff another of two Acres, to have the one for life, and the other in tail, and before Election the Feoffee make a Feoffment of both: Now his Election is gone, and the Feoffor may enter upon which he will for Forfeiture, *Co. 2. 37.*

If one grant a Rent-charge, and after the Grantee distrain and avow for it in a Court of Record, or bring an Annuity, and have a Judgment in it; in these cases his Election is gone: So if the Grantee of the Rent, before Election, purchase the Land, or release all Annuities, it seems his Election is gone, *Dyer 344. 140.* But in cases where the Gift or Grant is of one thing, but by several Titles, or in a divers manner: As in the case of Lease that hath words of Bargain and Demise also, or of a Grant of a Rent; the alteration of the estate of him in Reversion, or the death of either of the parties will not determine the Election: And if in the first case the Lessee enter generally, and do not declare how he will take it; this is no Determination of his Election, *Co. 3. 37.*

If a Term be given to the Executor, and he enter generally, and do not declare how, whether as Legatory, or as Executor; this is no Determination of his Election, but he may afterwards make his Election well enough, *Co. 2. 37.*

Rent.

If a Lessee for years be of Land, determinable upon the death of J. S. and he grant a Rent-charge out of his Land, and before the Election of the Grantee how to take this Rent J. S. die; so that now the Land cannot be charged; yet the Grantee his Election is not so gone, but he may charge the Grantor in an Annuity, *Co. 2. 36.*

If one give to a man two Acres of Land, to have one in Tail, and the other in Fee, and he make a Feoffment of both; in this case the Election is not gone, to the Heir in Tail; for he may bring a Formedon for either, *Co. 2. 36.*

If an Issue in Tail make a voidable Lease and die, and the Guardian of his Heir avoid him (as he may) yet, this notwithstanding, the Election of the Heir at his full age remaineth, *Co. 7. 7.*

If one grant a Rent-charge in Fee, without the words *pro se & hereditariis suis*, and the Grantee bring a Writ of an Annuity against the Heir, and after discontinue his Suit, yet he hath the same Election he had, and may distrain the Land, *Dyer 344.*

If

If a Grantee be in the dis-junctive of two Annual things, and things of continuance; if the Election belong to the Grantor, and he fail of the day, his Election is not gone; otherwise it is of things that are to be performed, *unit & vice onely*. As if one grant by Copy, twenty Trees growing upon Black-acre, or White-acre to be cut down yearly by himself, and delivered to the Grantee such a day, and the Grantor fail at the day, yet his Election is not gone, *Co. of Copihold, 120.*

In most of all these cases before, when once a man hath made his Election, it is peremptory to him, and shall never after wave it, and chuse again; So also after a Judgment for Debt or Damages, where a man hath an Election what execution to take; if he have taken Execution by Elegit, it seems he cannot afterwards take any other remedy for recovery of his Debt or Damages upon the Judgment, *Dyer 329. 60.*

Where a Lord by Custom may seise a Herriot, the best Beast, and he chuseth one of the worst; he is bound by this, and he shall not chuse again. See more for this in *Contracts, 16 H. 7. 4.*

But where a man hath the Election of one Action of two, and he sue, and the other appear, and after is non-sure; this is no Determination of his Election, *Co. upon Littl. 146.*

For Election of Persons to any Office or place, these things are to be known.

1. Elections to Colledges, Churches, Hospitals, Schools, Halls, Benefices, Ecclesiastical Dignities, and Societies must be free.

2. So must the Admissions and Institutions be into such places, free.

3. None may by threats disturb free Elections.

4. If any take any thing, or a promise of any thing to give his voice for an Election, it makes the Election void, and another may be chosen.

5. If a man take any thing, or a promise of any thing for resigning a place, he that gives is hereby made incapable of the place:

6. If any take any thing, or any promise of any thing for a Presentation or Collation to a Benefice, by this he is made incapable of it, see *Simony.*

7. So it is of Corrupt Exchanges and Resignations, between Incumbents of their Benefices, if they be with cure of Souls, *31 Eliz. 6. Westm. 1. And Articuli Cleri, and Wingate, Abridgment of them: Fit: Election.*

7. Where an Election is peremptory, or not.

8. Election of persons.

CHAP. LXXIV.

Of an Infant and Engagement.



BY an Infant, commonly and properly in our Law, is meant one that is in his Nonage, under the age of one and twenty years, whether Male or Female, *Co. super Littl. 171.* But the word is sometimes taken more largely: And the Law hath a great respect to Infants, to protect them from wrong, and to preserve their estate; and therefore doth give them many Privileges, and Benefits above others; as in many cases.

First, Not to be sued, till they be of full age.

Secondly, Not to be bound by their Contract, or their other Acts, that may turn to their prejudice, but onely in some special cases; for which see in *Age.* And wrongs done to them, are more severely punished then to others.

1. An Infant, what. Nonage. Their Privileges.

Self. 1.

2. What acts
done by an
Infant shall
binde him, and
others, or not.

For the Answer of this Question, take these things.
1. If the King be an Infant, yet most Acts that he doth, as King, are good, and will binde him, and his Successors, *Co. 3. 27. Dyer 209.*

2. If an Infant be the head of a Corporation, all Acts that he doth in that capacity, will binde him and his Successors, as if he were of full age, *21 Ed. 4. 13. Co. 3. 27. Broo. 478.*

3. If a Parson, Prebend, or the like, had made any Lease of their Ecclesiastical Living, it seems it is good, and will binde them, as if they had been of age, *Broo. 478.*

4. If an Infant male after fourteen years of age, and a Female after twelve years of age, Contract for marriage, or make any Will or Demise of their Goods and Chattels, it is good; and will binde them, as if they had been of full age: But by the new Act, the age of a Man to consent, is sixteen, and of a Woman fourteen, *35 H. 6. 41.*

5. If he do any thing that by Law he is compellable to do, it is good and will binde him; as to Attorn to the Grantee of his Lord, or the like, *Co. 10. 43.*

6. If an Infant after fourteen years of age, being a Patron, do present to an Advowson the Church being void, or the like, it is good, and will binde him, *Perk. 15.*

Apprentice.

7. An Infant may in many cases binde himself an Apprentice, and in such cases, his Covenants in such an Indenture will binde him; *5 Eliz. 4. 21 Ed. 4. 6. 31 H. 6. 31. 9 H. 6. 8.*

8. All Acts done to an Infant, as Conveyances of Land, making of Obligations, or Statutes, or the like, the Infant may accept of it, and they are good to him, as if he were of full age, see *Grants*. If Land be conveyed to him, he may agree to it at his full age, or disagree and avoid it, and so may his Heirs before Agreement, *Co. lib. Inf. 3 part. fol. 2.* And therefore a Lease for years made to an Infant, rendering Rent, was adjudged good; and that an Action of Debt may lie against the Infant for the Rent, and yet this may be a prejudice. But if he do not enter and manure the Land, or take the profits, it is otherwise: For it is in his Election to make the Lease good, or not; For if he before the Rent day refuse, and wave the Land, he shall not be charged with the Rent; but if the Rent be of greater value then the Land, and he shew it in pleading, he may perhaps avoid the Lease, *Br. lib. 1 part. 130.*

Election.

Executor.

9. If an Infant be Executor, and do any thing according to the duty of an Executor, as sue for, receive, or pay debts, and upon Receipt of a debt to make a Release for it; all such Acts are good, and will binde him, or others, as if he were of full age, *Co. 3. 27. Perk. Sess. 14. Broo. Executor 115. See Executor.*

10. If an Infant Contract for necessary Food, Physick, or Apparel, or Schooling, or the Nursing of his Lawful child; such a Contract will binde him, as if he were of full age, *Co. 9. 87. 13 Ed. 4. 2. Perk. 4.* And a single Bill given for such money is good; but if the writing be with penalty, it is void, *Co. super Littl. 172. M. 39. 40 Eliz. Agreed:* And what is necessary, or not, shall be tried by the Judges, not by a Jury, *Goldsb. 168. pl. 99.*

11. If a Feoffment be made to an Infant, and he make a Letter of Attorney to take Livery, this seems to be a good Warrant, *Perk. 48. Sess. 14. 21 H. 6. 31.*

12. If an Infant sell a Horse, or the like for money, and deliver him with his own hands, and after sue for, and receive the money; this should seem to make the Contract good, *18 Ed. 4. 21 H. 7. 39. 26 H. 8. 2.* But that this oppugns a Rule of Law: *Qua male sunt inchoata, &c. Ergo quare.* For no Acceptance will make a void Contract good.

13. If an Infant levy a Fine, he may declare uses upon the Fine, and it will binde so long as the Fine is in force, *Co. 2. 58.*

14. If an Infant be Lord of a Mannor, and grant Copihold estates, according to the Custom, it is good, and will binde him, *Co. 6. 3. 8. 44.*

15. An Infant may not submit to an Award, nor shall it binde him as another man; nor will any Bond or Assumpfit of his to stand to an Award, binde him, *March. 4. 112. pl. 189.* He may present to an Advowson, *Co. super Littl. f. 172.*

16. But

16. But all such Gifts and Grants, Deeds, and Acts, as are done by an Infant, during his minority, as are or may be to the prejudice and hurt of the Infant, are void, or at least voidable: And amongst these Acts, most commonly those things that pass from him without Delivery of them by his own hands, are void; and those that pass by the Delivery of his own hands, are voidable, *Co. Super Littl. fol. 171. Perk. Sess. 12. F. N. B. 102. Brownl. 1 part. 110. 21 H. 6. 31.*

17. All Contracts made by him, though he be within a day of his age, and the bargain be never so much to his benefit, except it be for necessary Apparel as before, are void, and will not binde him; and in these cases a man shall have no remedy in a Court of Conscience, *per Curiam, Plow. 364. Co. 9. 37. 10 H. 6. 14. 11 H. 6. 39. 18 Ed. 4. 1. 21 H. 6. 31. 26 H. 8. 2. 21 H. 7. 39.*

18. If an Infant devise Land by Will, it is void, *Co. 6. 23. Dyer 143.*

19. If an Infant be Executor and Release Debts he hath not received, or do any other act contrary to the duty of an Executor, and prejudicial to himself, as pay Legacies before Debts, all such Acts are void, *Co. 5. 27.*

20. If an Infant grant an Advowson, or Rent, or Common, by Deed, it is void; and if the Grantee present, or distrain, or take the Common, the Infant hath the same advantages, as if no such act had ever been made, *26 H. 8. 2. F. N. B. 102. Perk. Sess. 13. And yet an Infant may present to a Church for fear of Lapse, Dyer 104.*

21. All Bills, Bonds, Covenants, and the like, entred into by an Infant, may be avoided in pleading to any Action upon them, that he was within age, *Co. 5. 19. 21 H. 6. 31.*

22. If an Infant sell a Horse, or any other such like thing for money, or else, and the Vendee take it of himself; in this case the Infant may have an Action of Trespass for the taking: But if the Infant delivered the thing with his own hands, the Vendee is excused from any Action of Trespass; yet the Contract is voidable at least: And therefore the Infant may take his Horse again, and cannot sue for the money, but may sue for his Horse, if it be kept from him. If an Infant buy a Horse, and give Earnest, and the seller break with him, he may sue him, because of his Earnest, which onely is recoverable in damages, and may be sued for by Action of Accompt, *Hobb. Rep. 96. 14 H. 8. 29. 21 H. 7. 39. 21 H. 6. 3.*

23. If an Infant make a Feoffment in Fee with a Warrant to give Livery of Seisin to a stranger, and he do it accordingly, this is void, and the Feoffee when he doth enter a Disseisor, and so the Infant may sue him, or enter upon him: But if the Infant had given Livery of Seisin, with his own hands, then had the estate been onely voidable; and the Feoffee not to be charged, as a Disseisor or a Trespassor, *Co. 5. 119. 4. 125. 3. 422. Dyer 109. 36. 26 H. 8. 2. Littl. 400.*

24. If an Infant make an Exchange or a Partition, it seems this is voidable onely, for he may affirm it at his full age, *F. N. B. 62. 18 Ed. 4. 2. 12 H. 4. 11.*

25. So if an Infant make a Lease for years, rendering Rent, it seems this is voidable, onely because the Infant at his full age, may accept the Rent and make it good; which if the Lease were void, it seems he might not do; but if it be without any render of Rent, it seems to be void, *9 H. 7. 24. 18 Ed. 4. 2. Plow. 545. Co. 3. 69.* It is said that it hath been adjudged, That an Infant shall not be charged for Wares that he doth buy for his Trade, *14 H. 8. 19.*

26. If an Infant levy a Fine, suffer a Recovery, enter into a Statute, or Recognizance, or Inrol any Deed, he may during his minority, avoid them; the first and second by a Writ of Error, the third and fourth by an *Audita Querela*, and the last by Entry or Action: But after the Infant is of full age, these Acts are not to be avoided, *17 Ass. 17. F. N. B. 104. Co. 10. 43. Keln. 19. Co. 1. 76. Co. 2. 57. Perk. 19.*

27. If an Infant sue or be sued in any Court by Attorney, and Judgment be given for, or against him, it is Error; and for this the Judgment may be avoided, *Co. 9. 76.*

28. If an Infant Tenant in Tail make a Lease for years, within the Statute of 33 H. 8. Yet it is not good, though the Statute be general, *M. 7 fac. B. R.*

29. An Infant is not bound by a Partition that is not equal, made by Agreement, or in *Chancery*; but if it were made by Writ, he were, *Co. Super Lint. fol. 171.* See *Crompt. Jur. f. 37.* But a Release may be by Decree in *Chancery*, in some cases against an Infant, when no other remedy can be had. See *Conscience.*

30. If the Guardian of an Infant suffer a Decree in *Chancery* against him, by consent, it shall not binde him; by all the Judges at *Reading, Term.* But a Decree involuntary upon the merits of the cause, shall binde him. Out of all which, it appeareth that all Deeds, Gifts, Grants, &c. made by an Infant, which take not effect by Delivery of the Infant, be absolutely void. But matters in Fact or writing, which take effect by hand and Delivery, are onely voidable by the Infant, or by them which have the Infants estate. And yet Acts that are apparently of necessity or profit to the Infant, or which can be no disprofit to him, as for Meat, Drink, necessary Apparel, and Schooling, the Obligation or Covenant of an Infant, is good, *Dyer 104.*

See more in *Agreement, Acceptance, Ability, Capacity, Testaments, Numb. 4. Fine, Numb. 5, 7, 8. Grant, Numb. 1, 3. Recovery, Numb. 3.*

Sec. 3.
3. What persons shall take advantage of a voidable Act done by an Infant, and when.

Privies in Blood inheritable, as Heir General, Heir Special, or as Heirs General and Special, shall have advantage of Infancy, *Co. 8. Whittinghams case, fol. 42.* As if an Infant, Tenant in Fee-simple, make a Feoffment and die; his Heir may enter or bring an Action.

So if Lands be given to one, and the Heirs-Males of his Body, and the Donee within age make a Feoffment in Fee; his Son as Heir General and Special, may enter or have Action. So also may the Heir Special, as in the case before, *Co. Super Lint. 337. Co. 8. 42.*

If the Donee have Issue two Sons, and the Elder hath Issue a Daughter; and the Donee die, and the Elder Son within age, make a Feoffment, and die without Issue, the younger Son being now Special Heir *per formam doni*, may avoid the Feoffment of his Brother.

So if Lands be given to a Man, and the Heirs-Females of his Body, and the Donee having issue, a Son and a Daughter, makes a Feoffment within age, and die, the Daughter may enter or bring Action; so the Heir in *Burrough-Englis.* For in these last cases, the Heir General cannot enter; for there is no right that doth descend to him.

So if a Tenant in Tail, within age, make a Feoffment in Fee, and is attainted of Felony; in this case the Issue may enter, and avoid the Feoffment. See more in *Privies.*

If the Husband being an Infant, make a Feoffment of his Wives Lands, and die, the Son and Heir may avoid it after his Mothers death, but before he cannot; but she may avoid it, during her life, *Co. 8. 42.*

Also Privies in estate in some special cases, may take advantage of Infancy; as if two Joint-tenants within age, make a Feoffment in Fee, and one die; the Survivor may enter or bring an Action for the whole, *Co. 4. 41.*

But Privies in Estate generally, shall not take advantage of the Infancy of another: As if a Donee in Tail, within age, make a Feoffment in Fee, and die without issue, the Donor can neither enter, or bring an Action.

So if two Joint-tenants are in Fee within age, and the one make a Feoffment in Fee of his Movery, and die, the Survivor cannot enter nor bring Action for his Companions part, but the Heir of the Joint-tenants that is dead, may, *Co. 8. 43.*

If a Tenant in Tail, being an Infant, make a Feoffment in Fee, and die without issue; neither the Donor, nor Collateral Heir of the Infant can enter or bring Action, *Co. 3. 43.*

If an Infant be Tenant for anothers life, and make a Feoffment in Fee, and he for whose life he hold it, dies; in this case the Infant, or his Heir, shall never enter, or bring Action, but he in Reversion or Remainder shall, *Co. 8. 43.*

Privies in Law, as Lord by *Exchange, &c.* shall never have any benefit by any such avoidable Act of an Infant: As if a Feoffment be made, and Livery given by the hands

lands of an Infant, and after he die without an Heir, or commit Felony, or the like : Now in these cases the Feoffment is an avoidable by any body, Co. 8. 44.

For Answer to this, take these Cases.

1. If an Infant after he is of the age of fourteen years or before, if he be of discretion (whereof the Justices must judge) commit Felony : He must suffer as another man, *Malitia supplebit aetatem*, Co. 4. 127. *Plow. 19.*

2. If an Infant do any personal wrong, as Assault or Battery, or the like, it seems he shall be punished, as another man : And so is the experience of our time, *per Tylerton, Just. Pasch. 9 Jac. Co. 8. 44.*

3. If an Infant be a Gaoler, and suffer an escape, he shall be punished as another man, Co. 8. 44. *Byo. Courtine 68.*

4. If the Estate of the Infant be upon Condition to be performed by the Infant ; and the Condition is broken, during his minority, the Land is lost and the Infant is perpetually barred : As if a Feoffment or Lease be made to the Infant, or to his Ancestor (whose Heir he is) upon Condition of Re-entry for non-payment of Rent, or the like ; and the Rent is not paid, or the Condition broken, the Land is lost, Co. 8. 44. *31 Aff. pl. 36. 36 H. 6. 28.*

5. So also in some cases the Infant shall be barred, and bound by a Condition in Law, if it be such a Condition, as is founded upon skill and confidence : As if Infants have an Office of Parkership, or Stewardship (unto which the Law hath annexed this Condition, that they do discharge the duty of that Office) and they neglect their charge, or any way misdemean themselves. So if an Infant have Liberties or Franchises, and do any way abuse or misuse, or disuse them ; in these cases, for such causes as another man may forfeit such Offices or Franchises, an Infant may forfeit : See *Forfeiture*. The same Law is of a Woman Covert, *Co. super Littl. 233, 234.*

6. If an Infant do actually Disseise another man of Land, he shall be punished as a Disseisor, *Perk. Sect. 47.*

7. If an Infant do commit Waste or Lease, in payment of his services, and the Lord or Reversioner recover the Land in an Action of Waste, or a Cessavit (as he may) this shall binde the Infant for ever. And so in all cases where a Statute doth give a Recovery upon a Condition in Law : But if such an Infant at the time of his Ancestors death, hath cause to enter into Land, and a Discent is cast, during his Infancy ; this will not bar him. And yet a dying seisor of the King, and a Discent will bar an Infant, Co. 8. 44. *Co. super Littl. f. 245. 380. 246.*

8. But when the Condition in Law is of that nature, as it is without any confidence or skill, and it be broken, it will not bar the Infant : As if the Infant be Tenant for life, in Dower, or by courtesie, and he make a Feoffment in Fee, and the Lessor, or he in Reversion, enter for a Forfeiture, as he may ; yet this will not bar the Infant, but he may after re-enter, Co. 8. 44. *Co. super Littl. fol. 234.*

9. So if an Infant alien in Mortmain, and the Lord enter ; yet the Right of the Infant is not barred, but he may enter again upon the Lord. So in all cases where a Statute doth give an Entry, but no Action for Recovery upon a Condition in Law. Co. 8. 44.

10. If an Infant make a Feoffment in Fee, and after his full age the Feoffee die seised, and the Land Disceid ; this doth bar him of his Entry, *Plow. 364. Perk. Sect. 409. 408.*

But if the dying seised were during the minority of the Infant ; it will not bar him of his Entry, *Plow. 364.*

11. If an Infant make default as another man in a real Action, it seems he shall not lose his Land as another man shall in such an Action. So if he be non-suited in any Action, he shall not be amerced as another man shall, *Co. super Littl. f. 173. 31 H. 6. 40. Dyne 338.*

12. An Infant shall not be barred by Non-claim in five years upon a Fine, and yet

4. Where an Infant shall be punished for his fault or neglect, or not.

Sect. 4.

Woman Covert;

Discent.

Fine.

yet if the five years begin in the time of the Ancestor, there he shall be barred, *Co. super Littl.* 380.

13. An Infant shall not be barred or hurt by time in cases of Wreck, Waif, Estray, or sale in a Market Over, as another man of full age shall be, *Co. super Litt.* 380. *Plow.* 364. *Co.* 5. 108. *Dyer* 153. 164.

14. If an Usurpation be made upon an Infant, to whom an Advowson is descended by Presentment, the Infant is not barred as another man, but he at his full age may have a *Quare Impedit*: And yet if he present not to a Church in six weeks, there will be a *Lapse*, *Co. super Littl.* 246.

15. If Tenant for life alien with Warranty, his Heir within age, and after die, his Heir within age; in this case the not-Entry of the Heir will not hurt him, nor the Warranty bar him. But if after the Alienation, he become of full age, before the death of the Tenant for life, there he will be barred. And in case where a Warranty doth descend upon an Infant or Feme-Covert, and their Entry is not lawful; in this case they will be barred, *Co. super Littl.* 380.

See §. 5.

16. If one make a Feoffment to another, rendering Rent: And it is agreed, That if the Rent be not paid, he shall pay double the Rent, and the Land come to an Infant, and he fail; it is said he shall not be charged. But *quere*, for in case of a Condition, he shall forfeit as another man. See the Cases before, *Co. super Littl.* f. 47. 6. 50.

Account.

17. An Infant before he is one and twenty years old, cannot be charged in an Account; and therefore till then, he cannot be a Bailiff or a Receiver, *Co. super Littl.* f. 172.

18. If an Infant have Title to enter for Mortmain, and he enter not within the year; this will not prejudice him.

What acts he may be compelled to do, or not.

An Infant-Tenant may be compelled to Attorn to the Grantee of the Seignior, or of the Reversion, *Co. super Littl.* 315.

And if one make a Lease, rendering Rent to him, and he occupy the Land, he must pay the Rent, 21 *H. 6.* 31.

But an Infant cannot be compelled to serve in a Jury, *Littl.* 259.

And by Statute Laws, how bound.

What Statutes shall binde him, or not. See *Plow.* 364. 236. 359-376. 372: *Co.* 8. 44. 100. 31. 91. *Dyer* 104. 133. *Littl.* 246.

But this is a Rule, That an Infant is bound by all Statute Laws, if they be not by name excepted.

§. Where an Infant may sue or be sued, and how.

An Infant Regularly may both sue, and be sued in all Personal Actions; and so also in all Real Actions, but where the Sute must stay for Nonage: For which see *Age.* 718. 2001.

Prochein Amy, what.

But the Infant may not sue or be sued, as another man; and therefore in most cases where the Infant will sue, he must sue by his *prochein Amy*, (i.) his next friend, which is said to be one that appeareth in any Court for an Infant which sueth any Action, and is allowed by the Court to aid the Infant in the pursuit of his Sute; and he is sometimes called a *Gardein*.

Gardein, what.

And if an Infant be sued in any Action, he cannot appear and defend it by Attorney, but it must be by a Guardian, which is one allowed by the Court to make defence for the Infant in that Sute. And this is commonly one of the Officers of the Court.

Guardian in Chivalry or Socage.

And yet it seems, that an Infant in some special Cases may sue by Attorney; as where he is (a) Executor, or (b) Administrator, or in Waste against his Guardian in Chivalry, for making Waste in his Land, or an Accompt against his Guardian in Socage, after the Infant is fourteen years old; (c) or in this case he may also, if he will sue by his Guardian, *F. N. B.* 27. *Littl.* 123. *Co.* 4. 53. 124. 71. 8. 58. 9. 30. 21 *Ed.* 4. 78. *Dyer* 104. 162. 312. *Westm.* 2. ch. 15. 1. 47. (a) *Mich.* 7 *fac.* *Co. B.* (b) *Trin.* 38 *Eliz.* Adjdg. (c) Allowed by the Judges. *Hil.* 6 *fac.* *B. R.*

Attorney.

Also if an Infant be sued upon his Contract for necessary Apparel, or for an Assault

Assault or Battery, or the like, there he may sue by his Attorney, as other men do, Co. 9. 87. F. N. B. 118. Ca. 8. 44. 58. Dyer 239. 27 H. 8. 11. Co. 4. 124. Brownl. Rep. 1 part. 151.

If a dumb man bring an Action, he must sue by *Prochein Amy*, 10 Ed. 3. 53. See *Age*.

This is a Writ lying where an Infant, within age, alieneth his Land, which he hath in Fee-simple, Fee-Tail, or for life; in this case, when he cometh of full age, he (or if he die, his Heir, when he comes of full age) may have this Writ to recover the Land again. *Dum suit infra etatem, what.*

Or in this case, the Infant may enter upon the Land, before he is of full age, or after he is of age, if there be no Discent to hinder him: And when he doth enter, he is said to be remitted, and put in, as of his first estate. *Discent. Remitter.*

And where this Writ will lie, may be gathered by what hath been said before, F. N. B. 27.

This is where a Woman is with childe, at the time of her Husbands death, with such a childe. That if he had been born, had been Heir to some of the Husbands Land. *Infant in the Mothers Womb, called En ventre sa mere.*

And this is sometimes privily and unknown, and then she is said to be *Priviment Enfant*: And sometimes it is open and visible, when she doth notoriously appear so. *Priviment Enfant, what. Posthumus.*

This Infant is called a *Posthumus* or *Postnatus*; and is one that the Law doth much favor and regard, as appeareth by that which doth follow in the next Question.

For Answer to this, take these Cases.

1. In all Cases where the Daughter or Female-heir, or other person, Heir, cometh into Land by Discent, or in the nature of a Discent; there the Son, or more immediate Heir that shall be born after, shall out her, and have the Land. And therefore if one seised of Land in Fee, and have but one Daughter, but his Wife is with childe of a Son, and he die, and the Daughter enter, and after the Son is born; in this case he may out the Daughter, and have the Land, and the Daughter can by no means prevent him of it. So where the Wife doth discontinue the Land, she hath by her Husband, and so make a Forfeiture of it within 11 H. 7. 20. And she have at that time a Daughter, and is with childe of a Son by her deceased Husband, and the Daughter enter, the Son shall after out her. So if a Gift be in Tail to a Man and his Heirs-males of his Body, and the Donee die without issue having a Brother, that is next Heir *per formam Doni*, but the Wife of the Donee is Privily with childe of a Son, and the Brother enter; in this case, the Issue after he is born, shall have the Land, and put out his Uncle. So if a Tenant in Tail having issue two Sons, and the elder die in the life time of the Father, leaving his Wife with childe of a Son, and then the Tenant in Tail suffer a Recovery to the use of himself for life, and after his death to a stranger for twenty years, and after of the Heirs-males of the body of the Tenant in Tail and after the Tenant in Tail die, and then the youngest Son enter, and after the Son of the eldest Brother is born; in this case he shall have the Land, and out his Uncle. So if a Son purchase Land, and die without Issue, and the Uncle, and after a Daughter is born, she shall have the Land from him. So if there be Son and Daughter, and the Son purchase Land, and die without Issue, it shall go to the Daughter. But if there be a Son born, after he shall have the Land, and if he have another Daughter, she shall be Copartner with her sister. And if a Daughter have a Seignior by Discent; and a Tenancy Elcheat, and after a Son is born; in this case he shall have the Tenancy, and out her of it, Co. 3. 61. 9 H. 7. 25. Co. 1. *Shelbys case. Broo. Age 51. Plow. 375. Co super Littl. 11.*

Self. 6.
6. Where an Heir born after, shall put out another Heir born before, or not.

2. But in all cases where the Daughter and Female-Heir, or other Heir cometh into the Land by Purchase, or in the nature of a Purchase, or the like, there the Son or other, more immediate or next Heir that shall be born after him, shall not out him. As if Lands be given to one for life, the Remainder to the right Heirs of J. S. and J. S. hath a Daughter, his Wife with childe of a Son, and the Remainder fall before the Son is born; in this case the Daughter shall have the Land for ever, and never

Condition.

never be put out by the Son. So if one by a Ravishment forfeit his Land within the Statute of 6 R. 2. And a Daughter is the next Heir in being, but there is a Son in *Utero matris*, and the Daughter enter, the Son shall never out her. So in like manner, if an estate be made on Condition, that if the Feoffor or his Heirs pay twenty pound, that they shall have the Land again, and the Daughter pay the money, and after a Son is born, he shall never have the Land, *Qui sentit onus sentire debet & commodum*: But if the Condition were to be performed on the part of the Feoffee, or it were broken in the life time of the Ancestor; in these cases it seems the Son may enter afterwards, and put out the Daughter. If one by Will devise to J. S. and his Heirs, and the Devisee had then a Daughter, when the Devisor died, his Wife being privily with childe of a Son, and the Devisee dieth, and the Heir be doth enter; in this case the Son that is after born, shall not out her, but the daughter shall have the Land; *Co. 3. 61. 9 H. 7. 24. 5 Ed. 4. 6. Co. 1. 95, 99. See Purchas.*

As to this point, these things are to be known:

7. How the wrongs done to Infants, shall be punished, &c. only.

1. To lie with an Infant-Maid, though with her consent; this abuse of her is Felony, see *Crown*.

2. By force or fraud to steal, or cause to be stolen, or taken away any person under the age of one and twenty years, with intent to marry the same person: For this a man shall forfeit his whole estate; the one half to the childe, the other half to the Commonwealth, and he is to be imprisoned and kept to hard labor in some House or Correction or other publick Working-house, during life. And all that are aiding and abetting herein, are to be imprisoned and kept at hard labor for seven years.

3. If any Marriage be so made by force or fraud, it shall be void.

4. If any Guardian or Overseer shall betray his trust, touching any childe, by seducing, selling, or otherwise wilfully putting such childe into the hands or power of any person who shall marry her, without his or her free consent; he shall forfeit double the portion, which of right did belong to such childe; the one half to the childe, the other half to the Commonwealth: The new *Act* of 24 August, 1653.

5. If any take or convey away any Maid, under sixteen years of age, out of the custody of her Parents Guardians or Overseers, against their wills, they are to be imprisoned two years without Bail or Mainprize, 4, 5 *Pb. & Ma. 8.*

6. If any take and marry any such yong woman against the will of them that have the Government of her, they are to be imprisoned five years without Bail or Mainprize, 4, 5 *Pb. & Ma. 8.*

7. Where an Infant shall have his age, you shall finde in *Age*.

8. Where an Infant shall be in Ward or not, you shall finde in *Guardian*.

See more in *Women Agreement*, and other Titles for Matters concerning *Infants*.

Engagement.

THe Laws touching the *Engagements*, are all now gone, and useles. See *Ordinance*, Jan. 19. 1653.

CHAP. LXXV.

Of *Emberitance* or *Inheritance*:

Inheritance or *Inheritance* is an Estate in perpetuity descendible to a man and his heirs.

Emberitance or
Inheritance,
what.
The kinds,

And some do make three sorts of Estates of *Inheritance* or *Inheritances*, which may be called Estates in Fee.

The first is Fee-simple absolute; and this is, where he hath Land to him and his heirs indefinitely without any limitation whatsoever of his Estate: This is an absolute Estate in perpetuity, and this is most properly and aptly called Fee-simple.

Another kind of *Inheritance* or Fee-simple is, where one hath an Estate to him and his heirs so long as *J. S.* hath heirs of his body, or so long as he shall pay twenty shillings a year to the Grantor, or to *J. S.* or so long as *Pauls Church* shall stand: This is an *Inheritance*, but it is limited and determinable; for if *J. S.* fail of heirs of his body, the Rent be not paid, or *Pauls Church* fall or be taken away, this *Inheritance* is gone.

Another kind of *Inheritance* is, where a Donee in tail is attainted of Treason, so that he forfeits his Estate to the Lord Protector: He hath a Fee, but it shall be only for so long as the Tenant in tail hath issue of his body. So if Tenant in tail by Indenture of Bargain and Sale inrolled, bargain and sell the Land to another and his heirs; this is a Fee-simple, but this is a base Fee, for this *Inheritance* is but during the life of the Tenant in tail: And in both these cases there is a Fee-simple under a Fee-simple; for the absolute and supreme Fee-simple is in the Donor. And yet this base Fee is such a Fee as shall descend, as the Lord Protector or Bargainee may grant over to another: And so long as these Estates last, they shall be Assises in the Heir in Debt, or to render in value upon the Warranty of the Father, and the Wife shall be endowed out of it, *Plow. 557. Co. 10. 96.* See more of this in *Estates, Chap.*

Discent, what.

Discent signifieth in our Common-Law, an order or means whereby Lands or Tenements are derived unto any man from his Ancestors. And this is sometimes Lineal, as when the descent is conveyed in the whole line of the same blood, as Grandfather, Father and Son, and so downward, *Old N. B. 201. Lit. 1.* And sometimes it is Collateral; which is, when it is out in another branch above of the whole blood, as Grandfathers brother, Fathers brother, and so downwards. And by this means the Property of Land is gotten and transferred from one to another. And for the guiding of these Descents, there be three general Rules:

1. The eldest Male shall first inherit; and if it come to Females, then they being all in equal degree of nearness, shall inherit all together.

Sec. 1.

2. That no Brother or Sister of the half blood shall inherit to Brother or Sister, but to the Parents.

3. Land purchased by the party himself dead, is to go to the Heirs on the Fathers side; and if he have none, then of the Mothers side: But of Lands descended it is otherwise. *Co. upon Lit. 1. 13. 237. 238. 164. D. & S. 17.*

For answer to this, these things are to be known. That the Law of *Inheritance* preferreth the first Child; amongst the Children, the Male before the Female; and amongst Males, the first-born. If there be no Children, then the Brother; if no Brother, then Sisters; if neither Brother nor Sisters, then Uncles; and for lack of Uncles, Aunts; if none of them, then Cousins in the neereft degree of Consanguinity. So that if a man die seised of Lands or Tenements in Fee-simple, and do not dispose them after his death, and appointeth that they shall descend in this manner as followeth.

3: To what
persons Land
shall descend
after the death
of the Ance-
stor.

Escheat.

1. If there be any lineal Heir, it shall descend to him: And for want of such, if there be any collateral Heir, it shall descend to him: And for want of either, it shall escheat to the Lord. *Lex regis semper prefertur transversali.* *Noy* 26, 27. *D. & S.* 17.

Parceners.

2. If there be any sons, it shall go to the sons before the daughters: And if there be many sons, it shall go to the eldest before any of the younger; for the Rule is, *Detur digniori.* And if there be no sons, it shall go to all the daughters, who then are called Parceners. If a man have neither son nor daughter, then it shall go to the next Cousins Males lineal of the whole blood, (if any be;) and for want of Males to the Females. And if there be no lineal Cousins, then it shall go to the next Cousin Male collateral of the whole blood; and for want of Male to the Female, (*Numb.* 17. v. 3, 6, 7, 8.) But by special Customs in some places, Lands shall go to all the sons or next Heirs males; and in some places to the youngest son. See *Gavelkind, & Burton-Engliff.*

Custom.

Sec. 2.

3. If Lands come to one by the Fathers side, and he die without issue, it shall go to the next Heir of the Fathers side, and not of the Mothers side. So *contra*, if it comes by the Mothers side, it shall go to the next Heir of her side, and not of the Fathers side. *N.B.* 10. *Plow.* 132. 12 *Ed.* 4. 14.

Demy-junk, or Half-blood.

4. If one purchase Land in fee, and die without issue, those of the blood of his Fathers side shall inherit, if there be any; and for want of Heirs on the Fathers side, it shall go to the Heirs of his Mothers side. But if the Land come to the Son by descent, it shall never go to the Heirs of the Mothers side: For if there want Heirs of the Fathers side to take it, it shall escheat to the Lord; and so on the other side, if it come by descent from the Mother. *Lit.* c. 4. 12 *Ed.* 4. 14. 39 *Ed.* 3. 30. 1 *Ed.* 4. 14. *Co.* 3. 14.

Escheat.

5. If there be Grandfather, Father and Son, and the Father die before the Grandfather, and after the Grandfather die seised; the Land shall go to the son or daughter of the Father, if he have any, and not to any of the other children of the Father or Grandfather: And this Heir is called *Heir jure representationis*, because he doth represent his Fathers person. But if in this case the Father die without any Child, it shall go to the next eldest Brother; or for want of a Brother, to the Sisters of the Father, *Br.* 303.

6. One hath issue two sons, *A.* and *B.* and dieth: *B.* hath two sons, *C.* and *D.* and dieth: *C.* the eldest son hath issue, and dieth: *A.* purchaseth Lands in Fee-simple, and dieth without issue; in this case the issue of *C.* shall inherit it, *Co.* lib. *Inst.* 1 par. f. 30.

7. If a son purchase Land and die, and have no other Heir but his fathers brother, he shall have it: But if after his father have any son or daughter born, that son or daughter shall have it, *Co.* upon *Lit.* 10. 12.

8. If a man seised of Land as Heir of the part of his Mother, make a Feoffment and take back an Estate to him and his Heirs; this is a new Purchase, and if he die without issue, the Heir of the part of the Father shall first inherit it, *Co.* lib. *Inst.* 1 par. f. 12.

9. If there be three Brothers, and the middle purchase Land and die without child, the Land shall go to the eldest Brother, and not to the youngest: So if the youngest die, it shall go to the eldest, and not to the second, *Litt.* 5. *Stamf.* lib. 3: chap. 523.

Sec. 3.

Escheat.

10. If a man be seised of Lands, and have two Daughters, and one is attainted of Felony, and the Father die, both Daughters living; the one moyetie shall descend to one, and the other shall escheat, *Co.* super *Lit.* 163.

11. If there be two Sons or Daughters by two women, and the elder purchase Land and die without issue, or his issue die without issue; in this case the Land shall go to his or her Uncle, or the Kinsman of the entire blood, and not to the other Brother or Sister, but shall rather escheat to the Lord; for none can have Lands in Fee-simple as Heir to another, unless he be Heir of the whole blood. But in this case if the eldest Son die before he enter or is actually seised of the Land, there the Brother by the other woman shall be Heir, *Lit.* c. 6. 37 *Ass.* 15. *Dyer* 291. *Litt.* s. 4.

12. If a man have issue only a Daughter, and die and leave his wife with child of a Son, and after the Son is born: Now in this case the Land shall go to the Son after his birth, but till then it is to go to the Daughter, *Park. c. 521. 9 H. 6. 23.*

13. If a woman Covert an Inheretrix of Land die seised, and have issue by her husband, and the issue die without any issue; now one of the next of kin to the Mother shall have this Land, and not any of the other Children of the Father. So if the Land came by the husband, and he have issue by his wife and die, and after she have issues by another husband, and the issue of the first husband die without issue: In this case some of his next Kin shall have the Land, not any of the other Children of the woman by other husbands, *Lit. c. 4.*

14. If there be two Brothers, and one of them hath one Son only, and no Daughter, and the Son doth die seised of Land in Fee: Now this Land shall go to the Uncle, and not to the Father; because it is a Principle of Law, That Land cannot lineally ascend. But if the Uncle after he is actually seised of it die without issue, then it may go to the Father as Heir to his Brother: But if he had not been actually seised, then it could not have gone to his Brother, *Co. 3. 39. Litt. ch. 3. Co. 3. 14.*

15. If there be a Son and Daughter by one woman, and a Son by another, and the eldest Son purchase Land and die seised of it; his whole Sister, and not his half Brother shall have it: So also shall she have the Land that came to the eldest Son by descent from their Father, if her Brother be actually seised of it by an Entry himself, or by another, a Lessee for years, or a Gardein, (as he may) if the Land were leased, and the Lessee enjoy it, or the Gardein enter.

16. But if their Father die seised, and the elder Brother die also before he be actually seised of the Land; in this case the Land shall go to the younger Brother, and not to the Sister: For it is *Possessio fratris, qua facit sororem esse heredem*. As if Land, Common, Rent, Advowson, or the like descend, and the elder Brother die before Entry, Claim, receiving the Rent, or Presentment to the Advowson; in these cases it shall go to the younger Brother, as Heir to his Father, *Co. 3. 43.* See the *Writings of a Lawyer, f. 10, 11. & F.N.B. 36.*

17. If there be two Sons by divers women, and the elder is seised in Fee and die without issue, and the Land go to the Uncle, (as it must *supra*) and after the Uncle die seised of it without issue; here the younger Brother may have the Land as Heir to the Uncle, though he might not have it as Heir to the Brother. But then the Uncle must be seised of it; for he must make himself Heir to him that was last seised of it, and that was his Half-Brother, to whom he cannot be Heir, *Co. 3. 42, 43.*

18. If a man have issue three Daughters by one woman, and one by another woman, and die seised of Land; the Land shall go to all the four Daughters equally, *20 Aff. 2627.* And yet if two of the Sisters by the one woman die without issue, the third Sister by that mother shall have all the Land of those two Sisters, and the Sister by the other mother shall have no part of it, *20 Aff. 271.*

19. If a man hath one only Child, and he doth purchase Land and die, and the Land go to the Uncle, (as it must) and after he hath another Child; in this case the Land shall go to the Child that is after born, *D. & S. 211.*

20. If there be a Grandmother of the Fathers part, Mother and Son, and the Grandmother hath a Brother, and the Mother another, and the Son purchase Land and die without issue; it shall go to the Great Uncle, and not to the Uncle, *Don. 314.*

21. Land purchased (as appears in some cases before) may go to the Heirs of the part both of the Father and Mother of the Purchaser, unless it be once attached in the Heir of the part of the Father; for then the Heir of the part of the Mother shall never have it, because they are not of blood to him that was last seised. But Land descended go only to the Heir of that part from whence it doth descend: As if from the Father who did purchase it, then it may go to the part of the Heirs of the Mother of the same Father, but not to the Heirs of the part of the Sons Mother; for though they be of blood to the Son that was last seised, yet they are not

of blood to the Father which was the first Purchasor, 49 *Ed. 3. 1. 1. Finch's lty.* 119.

22. In the Collateral Discent of any one that doth purchase Lands, and die without issue; the Heirs of the part of the Father, and that are of blood of the Ancestors males, and in the lineal Ascent by the Father, shall be preferred in the Discent, before the Heirs that are of the blood of the Females in the lineal Ascent by the Father in the same degree: As the Brother of the Grandfather or Great-Grandfather of the part of the Father, and his Issues (be they male or female) shall be preferred before the Brother of the Grandmother or Great-Grandmother of the part of the Father and his Issues. But if one purchase Lands and die without Issue, having no Heir of the part of the Father, the Land shall descend to the next Heir of the part of the Mother; yet so, as to the Heirs of the race of the Males first: As if the Father of the Father of the Mother of the Purchasor have one Brother, and the Mother of the Father of the Mother of the Purchasor hath another; the Brother of the Grandfather, and not of the Grandmother of the Mother shall have it, *Plow. 444.*

23. If one have issue two Daughters, and die, each Daughter shall have alike; But if the eldest have issue three Daughters, the youngest one; the Daughter of the youngest shall have as much as the three of the eldest. And if the eldest have issue divers Sons, and the youngest divers Daughters; the eldest Son of the eldest, and the Daughters of the youngest shall have all alike; the eldest Son shall have a moyetie, and the Daughters of the youngest the other moyetie, *Co. super Lit.* 164.

24. But if there be Father and Son, and the Son be attainted of Treason or Felony in the Fathers life, and overlive his Father; the Land shall not come to the Son, nor any of his Issues: But if the Son had died before the Father, it should have gone to the other Issues of the Father. (See *Corruption of Blood.*) For if the Son die before the Father having Issue, neither the second Son, nor the Issue of the first Son shall inherit it, but it shall escheat, 27 *Aff. 11. Co. 3. 41. 4. 124.*

25. If a man be attainted of Treason or Felony, his blood is so corrupt, that Land can neither descend to him from any Ancestor, neither can any have Land from him that shall make himself Heir to him immediately, *Co. lib. Inst. f. 8. par. 1.* And the Kings Pardon will not help this.

Sec. 5.

26. If a Purchasor of Land have issue a Son, and die, and the Son enter and die without issue, and without Heir of the part of the Father; the Heir of the part of the Mother of such issue shall never inherit, but the Heir of the part of the Mother of the Father may inherit it, *Plow 446.*

27. If a Purchasor die without issue, and there be a Brother of the Grandmother of the part of the Father, and another Brother of the Great-Grandmother of the part of the Father; the Brother of the Great-Grandmother shall not have it, but the Brother of the Grandmother shall be Heir, *Plow. 449.*

28. A Monster that hath not the shape of Mankind, shall not be Heir nor inherit any Land: But if he have some deformity only, as four or six fingers, or crooked parts; this will not hinder.

29. A Bastard also shall not be Heir to another.

30. Nor shall an Alien born out of the Kings liegeance, inherit from his Father. See *Crompt. Jur. f. 53. 6. Co. lib. Inst. 1 par. f. 7, 8.*

4. What Discent shall take away Entry, or not.

The Law doth much regard Discents, and every Discent seems to add some strength to the Title. And therefore if one have right to enter into Lands which another enjoyeth, and he doth not enter, but suffer him to die seised of it, and the Land to descend; in this case his right of Entry is gone, and he hath no remedy but to bring his Action to recover his right. And this holdeth in most cases, and almost in all where these particulars are in the case.

1. A dying seised by the Ancestor of an Estate in Fee-simple or Fee-tail, and not for life only.

2. A dying seised of the Possession and Frank-tenement also, and not a Reversion or a Remainder only.

3. Where he that died seised, and he that hath right of Entry, do claim by several Titles, and not by the same.

4. Where

4. Where he that hath the right of Entry is of full age *infra quatuor maria*, of sane memory, out of the Prison, and sole, and not a Woman covert.

5. Where the Disfeisor or Abator must have the quiet possession of the Land five years before the Discent, without any Entry or continual Claim made by him that hath the title or right of Entry.

6. There must be a Discent, and not a Succession only: As where a Corporation disseise, and there be twenty Successions, this will not bar him that hath right of his Entry. For the illustration whereof, see the Cases and Examples following. *Lit. l. 1. c. 6, D. & S. 24. Lit. c. 387, 388. Finch 46. Lit. 397, 398, 401, 412. St. 32 H. 8. 33. Co. 11. 33. Dyer 219. Lit. 413, 448.*

1. If one be seised of Land in Fee, and disseised by another, and he die, and the Land descend to his Heir, and he enter; in this case the Entry of the Disseisee is gone, and he is put to his Writ of *Entry sur disseison* for his remedy: But this Disseison and Discent must be in time of Peace; for if it be in time of War, *contra. Lit. 383, 47.*

2. If one be disseised, and the Disfeisor give the same Land to another in tail, and the Tenant in tail hath Issue and die seised of that Estate, and the Issue enter; in this case the Entry of the Disseisee is gone, and he is put to his Action if he will have remedy, *Lit. c. 38.*

If a Feoffee in fee, or Donee in tail be upon Condition, and he is disseised, and the Disfeisor die seised; the Feoffee or Donee hath lost his Entry, and is put to his Action, *Lit. 392.*

3. If a woman Disfeisor marry a husband and have issue, and after the wife die seised, and after the husband die, and then the Heir enter; it seems the Disfeisor is barred of Entry, *9 H. 7. 37 H. 6.* And if a woman sole be disseised, and after take a husband, and the Disfeisor die seised during the Coverture, the Entry of the Wife is gone, and she is put to her Writ, *Lit. 404.*

4. If an Infant disseise another, and alien the Land, and the Alienee die seised, his Heir within age; the Disseisee is barred of his Entry. But if the Disfeisor within age enter upon the Heir, (as he may) then may the Disseisee enter upon the Infant, because the Discent is defeated, *Lit. 407, 408.* If one disseise another, and make a Feoffment upon Condition, and the Feoffee die seised; then the Entry of the Disseisee is gone: But if the Disfeisor enter for the Condition broken, then he may enter upon him, *Lit. 409.*

5. If one disseise a man, and put out his Lessee for years at once, and die seised; the Disseisee cannot enter, but is put to his Action; but the Lessee for years may enter. But if it were a Disfeisor of a Tenant for life, *contra. Lit. 411.*

6. If a Daughter be disseised, and after there is a dying seised, and then the Son is born; this Discent will bar him of his Entry, *Bro. 450.*

7. If a Disfeisor make a Lease for years, and after die seised; this will bar the Disseisee of his Entry, *Bro. 453.* If an Infant make a Feoffment, and after his full age the Feoffee die seised; or a Feoffee for life alien, and the Alienee die seised; or a Devise be of Land on Condition, and the Heir of the Devisor enter, and die seised: In these cases the Entry is gone, and they are put to their Action, *21 H. 6. 71. Lit. 98. 9 H. 6. 25.* If one bargain and sell his Land and the Bargainee enter, and after the Bargainor enter upon him and die seised; the Entry of the Bargainee is gone, *Dan. & Carlson, M. Jac. B. R.*

8. If an Abator or Intruder, or one that hath but title of Entry, or that may have an Action, die seised; this Discent taketh away Entry, *Lit. Discents. Plow. 47.* See more of this in *Co. upon Lit. 238.*

9. The dying seised of the Inheritance and Freehold together, whereby the Land descends unto his Heir, taketh away the Entry of every one that may have an Action, *Lit. Discents.*

10. The whole time from the Disseisin to the Discent cast, is considerable: For if the person be not privileged at all times, the Discent binds: As if a Woman covert be disseised, and the Husband die, and she take a new Husband, and then the Discent is cast; or a man *infra mara* is disseised, and he return into England, and then go over, and then a Discent is cast; this Discent doth bind, because of the interim, *9 H. 7. 24. Dyer 143.*

St. B. 6.

St. B. 7.

11. If one wrongfully enter upon anothers Possession, and put the right Owner of the Freehold and Inheritance from it, he doth thereby get the Freehold and Inheritance by Disseisin, and he may hold against all men but the disseised. And if such Disseisor or Abator having quiet possession five years after Disseisin or Abatement, die in possession, and the Land descend to his Heir; hereby they have gained the right to the possession of the Land against him that hath right, until he recover it by a fit Real Action: And if it be not sued for within sixty years after the Disseisin or Abatement committed, the right Owner doth lose his right for ever.

12. But if the Ancestor do not die seised in Fee or Fee-tail, but of a Term of life only, this will not take away Entry, *Lit. c. 387. Finches ley, f. 120.* And if one be seised of a Reversion or Remainder only, and die so seised, and it descend to his Heir, this will not bar him that hath right of his Entry, *Lit. c. 388.*

13. If there be Lord and Tenant, and the Tenant be disseised, and he alien in Fee, and the Alienee die without Heir, and the Lord enter as in the Bfcheat; here the Disseisor is not barred of his Entry, but may enter upon the Lord, for here is no Discent to the Heir, *Finches ley, f. 120.*

14. If one be seised of Land in Fee or in Fee-tail upon Condition, and the Condition be broken, and the Feoffee or Donee die seised; yet this doth not take away the Entry of the Feoffor or Donor, but he may enter upon the Heir. So if the Feoffee or Donee on Condition be disseised, and before or after the Condition broken the Disseisee die seised; yet the Entry of the Feoffor or Donor is not gone, but he may enter upon him, *Lit. 391. 22 H. 6. 11.*

15. If a Disseisor die seised, and after his Heir endow the Wife of the Disseisor of a third part, and she enter into it; now the Disseisee after the Endowment is not barred of his Entry into this third part, but may enter upon the Wife, *Lit. 393.* If a Disseisor infeoff his Father, and he die seised, and the Land descend upon him, the Disseisee may enter upon him notwithstanding this Discent, *Lit. 395.*

Sett. 8. 16. If any of the younger Sons enter by Abatement after the Fathers death, and have issue and die seised, or his issue die seised; this will not bar the eldest Son of his Entry: So if one Daughter enter upon all the Land descended, and die seised of it. But if after the eldest Son have entred, or all the Daughters have entred, one of the younger Sons, or one of the Daughters disseise the other and die seised, *contra. Lit. 397. 22 H. 6. 306.*

17. If an Infant have cause of Entry, and the Discent happen while he is within age, this will not bar him of his Entry. So if the right of Entry happen to a Woman, so long whiles she is so, and the dying seised be before she is sole, her Entry is not lost. So if the cause of Entry and Discent happen whiles a man is *de non sane memoria*, yet the Heir of such man so disseised may enter. So if the Disseisee be in Prison or out of the Realm at the time of the Disseison and dying seised, their Entry is preserved for them, *Lit. 402, 403, 405. 21 H. 6. 17. Lit. 437.*

18. If a Disseisor enter into Religion, whereby his Land comes to his Heir; this will not bar the Disseisee of his Entry upon his Heir, *Lit. 410.*

19. If a Tenant for life be, the Remainder to the right Heirs of J. S.; and the Tenant for life die, and a Discent is cast, and after J. S. die, and after the Tenant for life die; in this case the Entry of the Heir of J. S. is not gone, but he may enter, for his Remainder was in *custodia legis*, *Co. 1. 134.*

20. If one intrude upon the King, and after the King grant away the Land, and before Entry or Seisure by the Patentee, the Intruder doth die seised; this will not bar the Entry of the Patentee, *Dyer 266.*

21. If the Alienee in Mortmain die seised, yet the Lord or his Heir may enter upon the Heir of the Alienee, *21 H. 6. 17. 33 Aff. p. 11.*

22. The dying seised of a Disseisor by strength and without title, taketh not the Entry of him and his Heirs, which at the time of the Discent had good title of Entry, (unless the Disseisor had peaceable possession by five years next after the Disseison). See the *Womans Lawyer*, fol. 133. *Stat. 32 H. 8. chap. 33.* See *Enfans*: 22 H. 6. 17. 33 Aff. p. 11. 22 H. 6. 17. 33 Aff. p. 11. If

If one have divers children, and the eldest being a Bastard, he doth enter after his fathers death, and quietly hold the Land all his life-time, and hath issue and death seized, and the issue enter; in this case the Entry and Action both of the lawful Heir is gone, and he is without remedy. But if the right Heir had ever made his Entry or Claim upon the Bastard, *Donbrd. Lit. c. 401. 409. 360. 36 Aff. 2:*

See. 9.
5. What Discent doth take away Entry and Action also.

If one have issue a daughter Bastard, and another daughter *Mulier*; and both of them do enter together and make partition, and the Bastard die seized of her part, and her Heir enter; the *Mulier* shall never have any remedy for that part, *27 Ed. 3. 34.*

An Heir is he that succeedeth by right of blood in any mans Lands or Tenements in Fee: For nothing passeth *jure hereditario*, but only Fee; and one may be *Heres sanguinis*, and yet not *Heres hereditarius*, being disinherited. And this Heir is either General Heir, or Heir at Common-Law. And this (by our Law) is the eldest Son; and for want of Sons, all the Daughters: And in some places, and by some Customs, all the Sons are the Heir, as in *Gavelkind* Land; and in some places the youngest Son, as in *Burrow-English* Land. Or else he is Special Heir, which is he that is Heir only by some Conveyance (as we say) *per formam doni*, and not Heir at the Common-Law; as when Lands are given to *J. S.* and the Heirs females of his body, and so by any other special limitation. An Heir is also, as a Discent is, Lineal and Collateral: (See it in Discent.) And no man can be said to be Heir to another, whilst his Ancestor is living; for so long he is only Heir apparent, *Co. 1. 66: super Lit. 8. 10. 376.*

6. Heir, what.

The kinds.

For answer to this, take these things. That every Heir having Fee-simple Land, be it by Common-Law, or by Custom of *Gavelkind* or *Burrow-English*, is chargeable as far as the value thereof with the binding Acts of the Ancestor; *Qui sentit commodum, sentire debet & onus*. For the opening whereof, take these Cases.

7. Where the Heir shall be charged for his Ancestor; or not; and how.

1. If a man bind himself and his Heirs by any Obligation, Bill, Covenant, Annuity, or other Especialty, to pay money, or do any other thing, and his Heirs have any Land in Fee-simple descended to him from the same Ancestor, and the Action be brought before he sell away the same Land *bona fide*; in this case the Heir (be he Lineal or Collateral Heir) will be charged for so much as is so descended to him, and he may be sued upon that Especialty. And where there be many to make one Heir, as Daughters, or Sons, they may and must be all sued; and if one alone of them be charged, he shall have remedy against the rest by *Audita Querela*. Or the Creditor may in this case for bear to sue the Heir, and sue the Executor; for the Law gives him his choice to sue which he will.

Upon an Especialty.

Audita Querela: Election.

But to make an Heir chargeable in this case, there must be these three things

1. The Heirs must be bound by name in the Especialty, as, *I bind me and my Heirs*. And yet if a man do but bind himself to pay money, or do a thing, and do not name an Executor, at, *I bind me, my Executors, &c.* his Executors be bound as he is. But otherwise it is of Heirs: And therefore it is, that if one by any Writing bind himself, his Executors and Assigns, and do not name his Heir, the Heir shall not be charged, though he have never so much Land by Discent. So if one grant an Annuity to one and his Heirs, and do not say, [*For me and my Heirs*] or [*I bind me and my Heirs to pay it*] or the like. So if I by Deed bind my Heirs only to do a thing, and do not bind me and my Heirs; in this case it seems the Heir shall not be charged: Yet by a Warranty in Law, the Heir may be charged without being named.
2. The second thing needful to make an Heir chargeable to the Deed of his Ancestor, is, that he must have Assets in Fee-simple descended to him from the same Ancestor. And therefore although he have never so much Land come to him by Gift in Tail, or of any other Estate then Fee-simple, or Fee-simple Land; if it come by Conveyance of the Father, and not by Discent, it will not make the Heir chargeable.
3. The Land descended to the Heir, must continue in the hands of the Heir till the Action be brought: For if he after his Ancestors death sell away the Land descended to him before the Action brought on the Especialty, he shall not be charged; for he is chargeable only in respect of the Land. And yet if an Heir shall fraudulently and

See. 10.
Executors.

of

of purpose to avoid the force of a Suit, convey away the Land descended; this will not help him, but he may be chargeable notwithstanding: 4. When he is chargeable, he may not be charged for more then the value of the Land descended to him, except it be by his own false Plea in the Suit; for so he may make himself chargeable further. See for all these things, *D. & S.* 170. 173. *F.N.B.* 120. *Co.* 3112. 6. 47. upon *Lit.* 102. 183. *Dyer* 204. 114. 149. 373. 344. 111. 239. *Plow.* 457. *Fitz.* *Grant* 85. 21 *H.7.4.* 30 *Ed.4.10.*

2. Thus an Heir may be charged upon the Bond, Bill, or Covenant of his Ancestor, or by an Annuity granted, or Warranty made by the Ancestor, *Plow.* 457. *Co.* upon *Lit.* 102. 376.

3. If a Judgment be had against me for Debt or Damages, and I leave Land to descend to my Heir in Fee-simple, the one half of these Lands will be liable to Execution in his hands by the Writ of *Elegit*. See *Elegit*.

Elegit.

4. All the Lands that come to the Heir as Fee-simple Land, and Fee-tail Land, from his Ancestor, will be liable to pay the Debts due from the Ancestor to the Lord Protector, albeit the Heir be not named, and albeit there be no Specialty, and albeit it come by Conveyance, and not by Discent, *Plow.* 439. 33 *H.8.39.*

5. An Heir shall not be charged with an Annuity by a Prescription only without Record, or Writing; as that he and his Ancestors time out of mind have paid: For this will not charge the Heir, 10 *Ed.4.10.* *Bro. Prescr.* 11.

For this, take these Cases.

8. What lands and estates of the Heirs shall be subject to this Charge, or not.

1. None but Lands descended in Fee-simple shall be subject to the Charge of the Ancestor, and put in execution. And therefore in the Suit against the Heir, the Judgment is only against the Lands descended, and not any other Lands, nor Body or Goods of the Heir, except it be by his false Plea. And upon the Lands he hath in possession, Execution is to be made presently, that the Plaintiff shall recover and hold the Land till he be satisfied the Debt. And for the Land in Reversion, that he shall have Execution of it when it doth happen to be in possession. And where Lands descend to divers Heirs, as on the part of the Father, and on the part of the Mother, in *Gavelkind*, or the like, they must all of them be equally charged. *Dyer* 393. *Kelw.* 61. *Co.* upon *Lit.* 102. 376.

2. The Heir is not chargeable in respect of any Frank-tenement descendible. And therefore if Lands be granted to *J.S.* and his heirs during the life of *J.S.* or Tenant for life doth grant his Estate to another during his own life, and he bind him and his Heirs to pay Debt, or do any other thing, and this Land descend to the Heir; this will not be chargeable. So neither will entailed Land be subject to such a Charge, *Co.* 10. 98.

For this, take these Cases.

9. What Pleas the Heir must plead, and how.

1. The Heir that is sued upon such a Deed of the Ancestor, must take heed to his Plea: And his safe way is, to confess the truth, and shew what Land it is that is descended to him in Fee-simple; and then he cannot be charged further in his other Land, Body or Goods. But if he plead, That nothing came to him by discent, and it be found against him, or Judgment go against him by *Nihil dicit*, Confession, Non-suit, or the like, or upon a *Non est factum* pleaded to the Deed of the Ancestor; in all these cases the Plaintiff after Judgment given may have Execution against the Body, Goods, or other Lands of the Heir, *Plow.* 440. *Co.* 5. 36. 8. 53. *Dyer* 85. 62. 344. 149.

2. If a Judgment be given against the Heir by *Nihil dicit*, Confession, or the like, and after a *Scire facias* is sued to have Execution; the Heir cannot now plead he had nothing by Discent, *Dyer* 344.

3. If a Debt be paid by the Executor, or released to him, and after the Heir is sued for this Debt; the Heir may plead this in Bar of the Action, *Co.* 10. 93.

StB. 11.

4. If the Plaintiff be Executor to the Debtee, and hath enough of the Goods and Chattels of the Ancestor to pay himself; he may plead this in bar to the Action, *Fitz. Bar.* 188.

Escheat

Escheat is, where a Tenant of Fee-simple Land is dead, and there is no Heir capable of the Land, then it shall escheat to the Lord. And as to this, take these things. *Escheat, what?*

1. When the Heirs be all dead, so that there is no Heir general or special: Or when the blood of the Ancestor is corrupt, as where the Ancestor is attainted for Felony or Treason, so that now no body can be Heir to him; in these cases the Lord may enter and take the Land by *Escheat*. Or if a Bastard die without issue of his body, and leave Land to descend, in which case he can have no Heir; the Lord shall have the Land by *Escheat*. (*See Bastard.*) And if the Tenant or Bastard in these cases be disseised and die, the Lord may enter. But if the Disseisor die, or alien the Land to another *bona fide* before Entry, the Lord may not enter. *Bastard.*

2. In cases of Treason, the Lord *Proteſtor* is to have the Land by *Escheat*; but in cases of Felony and other *Escheats*, the Lord of whom the Land is held shall have it.

3. Conditions, Uses, Rights of Entry and Action, regularly cannot *escheat*.

4. By this *Escheat* the Property of the Land is altered, and given to the Lord of the Land, who may enter or have an *Escheat*. For all these things, see 29 *Aff. pl. 61. Co. 8. 42. Lit. 2. 22 Aff. pl. 49. 6 H. 7. 9. Co. 3. 1. upon Lit. 268. 312. 314. 13: See Forfeiture.*

For answer hereunto, take these things.

1. Pigeons in a Dove-house, Fishes in a Pond, Conies in a Warren, Deer in a Park, where the Ancestor had the Inheritance, or but for life in the Pond, Warren, Park or Dove-house, will not go to the Executor, but to the Heir, or other that hath the Land wherein these things are. *11. What things shall come to the Heir from the Ancestor, or not, but to the Executor or some other, Executor.*

2. Rents reserved on Leases made of the Lands descending, shall go to the Heir, not to the Executor.

3. If the Ancestor recover Land and Damages in an Action, or a Deed and Damages, and die before Execution; in this case the Heir shall have Execution for the Land or Deed, and the Executor for the Damages.

4. Heir-looms do signifie in some Countries all Implements of Household, as Tables, Presses, Cupboards, Bedsteads, Wainscotes, and such like, which by the Custom of that Country have belonged to a House certain descents; and these by that Custom are not to be inventoried, nor shall go to the Executor, but to the Heir with the House, *Co. upon Lit. 183. Goldsb. 129. pl. 24.* *12. Heir-looms what.*

But see for a more full answer to this question in *Testament, sect. 25. and Chattels, sect.*

CHAP. LXXVI.

Of an Entry into Lands, or into Religion.

Entry, what.

The kinds.

Attorney.

Right or Title
of Entry.

Sett. 1.
Where it is
lawful, or not.
Where the
Entry of one
shall give ad-
vantage to an-
other, or not.

Sett. 2.
Where an En-
try into part
shall gain the
possession of
the whole,
or not.



Entry into Lands is taken two ways. It is most properly taken for the taking or having of possession of Lands or Tenements: But it is also used for a Writ of Possession. The first is either in deed, or an actual Entry; when a man doth by himself, or some other by his appointment, actually enter into Lands, which is by setting his foot upon it, and claiming the Land. Or it is in Law; and so a congeal Claim is an Entry, for it amounts to, and is of the same force with an Entry in deed. The actual Entry may be made by a mans self, or by his Attorney by warrant from him that hath right of Entry; for which see *Attorney*. And he that hath a lawful power to enter, is said to have a Right or Title of Entry: For sometimes a man doth it by a Right of Entry, as a Disseise put out; and sometimes by a Title of Entry, as upon a Condition, or the like. And by this Entry, if he have Right, he brings the Possession and Right together: But if he have no Right, he doth gain no Property in the Land by the Entry in any case, but in the case of an Occupancie, whereby the Freehold is gained. See *Occupancy. Terms of Law. Co. upon Lit. 253. 257. 243. 258. Dyer 337.*

Where an Entry is lawful or not, See in *Discontinuance, Forfeiture, Disseise, Condition*, and other Titles. And where it is necessary, *Co. upon Lit. 258.*

If one Coparcener or Jointenant enter generally, or enter for himself and the rest, or in his own name and the names of the rest of the Jointenants or Coparceners, and the rest do agree to it, or do not disagree to it; this Entry will give advantage to the rest, and put them all into possession of the Land. But if one of them enter specially to his own use; as if Tenant in tail die, having two Daughters, and one of them enter and make a Feoffment of all the Land with Warranty, this Entry of the one Daughter will do the other Daughter no good at all; *Lit. 160. Dyer 128. 53. 4 H. 7. 9.* So if there be Tenant for life, the Remainder in Fee; the Entry of the Tenant for life shall enure him in Remainder. (*Idem.*) So the Entry of the Husband shall avail to the Wife to put her in possession, *Nej 97.*

And so it is if one have issue a Son and a Daughter by one woman, and a Son by another, and is seised of *Capite* Land, and devise all to the youngest Son and die, and then the youngest Son enter into all and die; in this case his Entry shall avail the eldest Son for a third part. And the Entry of one Tenant in Common shall be the Entry of the other; and that so to give him possession, that he may have an Action of Trespass. Adjudg. *Smalls Case, M. 14 Jac. Com. B.* And in all cases where the Entry is not lawfull, the Entry of one shall not benefit or advantage another, *1 H. 6. 5. 8 H. 6. 16.*

If one have cause to enter into any Lands lying in divers Villages within one County, and he enter into a parcel of the Lands or Tenements that are in one Village, in the name of all the Lands and Tenements to which he hath right to enter within all the Villages of the same County; by this Entry he shall get the possession of all the same Lands, unless it be in some special cases hereafter set down; and much more, if all the Land lie in one Village. If therefore one disseise me of two Acres of Land, (though it be at several times) and I enter into one of them in the name of both; this is good for both. *Lit. sett. 417. Dyer 337. 227. Co. super Lit. 252. 9 H. 7. 25.*

The Entry must be made as the Action must be brought: And therefore if the Land lie in several Counties, as there must be several Actions, so there must be several Entries, *9 H. 7. 25. Co. on Lit. 15.*

If one make a Feoffment of several parcels of Land in one County on Condition, and the Condition is broken; in this case an Entry into parcel in the name of all the rest, is good for all. But if the Feoffment were made of several Lands at several times with several Conditions; there such an Entry is not good for any more but what he doth enter upon, 9 H. 7. 25. Co. upon *Lit.* 252.

If Lands be in the occupation of A. B. C. and a stranger enter into the Land in the occupation of A. generally, and without any special Declaration in the name of all the Lands in the occupation of B. and C. this Entry doth not gain the possession of the Lands in the occupation of B. and C. But by a special Declaration it may be good for all, by Just. *Hutton*, 21 Jac. at *Sarum*-Assises. Co. upon *Lit.* 251. And yet if one disseise me of two Acres of Land, and he let the same to three several persons for life; in this case if I will enter, I must enter upon some of the Land in every one of their occupations, and no special Entry will serve here. But if the Leases were made to three persons for years; in this case a special Entry upon one of them in the name of all the rest, will gain the possession of the whole, Co. *super Lit.* 252.

If one disseise me of Land lying in three Villages in one County, and he levy a Fine of the Land in one Village, and after I enter into the Land of one of the other Villages in the name of all the rest; this is no good Entry for to reduce the Possession of the Land of which the Fine was levied, but there must be a particular Entry upon that Land, because the Conusee is in by Title, *Dyer* 337.

If two men severally do disseise me of two Acres, and I enter into one of these Acres in the name of both; this is good only for that whereupon I put my foot, and not for the other. But if these two Acres come after into one hand, then the Entry upon one in the name of both, will reduce the Possession of both, 9 H. 7. 25. Co. *super Lit.* 252. And therefore if in the first case I enter, and make a Lease of the two Acres; this Lease will be good only for the Acre I do enter upon, and not for the other, *Curia M.* 8 Jac.

If my Father die seised of Land in B. he had in his own right, and of other Land he had jointly with my Mother, my Mother being alive, I enter into that he had in his own right in the name of both Lands; this Entry will not give me a possession into the other Land to which I have neither Right nor Title, 39 *Ass. pl.* 16. And in all cases where-ever a man doth intend by his Entry into part to gain the Possession, he must be sure to make his Entry specially, (that is) in that part in the name of the whole, Co. upon *Lit.* 252.

He that hath right to enter into Land, must enter within twenty years of his right first accrued, if there be no let by Infancy, Coverture, Imprisonment, Non-sane-memory, or his being beyond Sea. If so, then within twenty years of that Impediment removed. And after this time he cannot enter, his Entry is gone, 21 Jac. ch. 16.

When a man must enter that hath Right.

Of Entry in Religion:

Entry in Religion is, where a man doth enter into a Profession of any Religious Popish Order of Friars, Monks, or the like. This Religious life, in judgment of our Law, is a Spiritual or Civil death; and he that doth intend so to do, may then make his Will and appoint an Executor. And yet if at any time after he shall leave this Profession again, then he shall have all his Lands and Goods *in statu quo primum*; and this is called a Dearthment, St. 31 H. 8. 6.

Entry in Religion, what.

Dearthment, what.

CHAP. LXXVII.

Of Error.

Error, what.

The kinds.

See, 1.

What shall be
said to be Er-
ror, or not.In Suits.
In Fines
and Reco-
veries.See, 3.
How it shall
be reformed.Amendment,
what.What Errors
are fatal, or
not; and where
Amendments
may be there-
of, or not.
In Suits.

THis word is taken two ways. 1. Either for some fault committed in some Suit, or for a *Writ of Error*; which is a Writ given to the party grieved, for the relief of the party grieved by this Error. In the first sense Error is sometimes in matter of fact, as when one of the parties were dead at the time when Judgment was given: And this point, if it come to issue, is to be tried by Jury; and so of the like Errors. Or it is where there is any discontinuance or undue proceeding in the Suit, which appeareth by the Record it self. And sometimes in matter of Law, which is when it appeareth by the Record as the Case is there, that Judgment was not given according to Law. And these two last sorts of Errors appearing upon the Records themselves are to be tried and determined by the Judges themselves of the same, or of some other Court.

Also the Error is sometimes in the process and proceeding of the Suit before Judgment; and then it will overthrow and nullifie the whole Record. And sometimes it is in the very Judgment it self; and then also it mairs all the Record. And sometimes it is in the Execution after Judgment only; and then the Execution only shall be avoided, and the Proceedings before the Judgment, and the Judgment are good, and a new Execution may be made out. And where there are two Judgments, as in some cases there are, there the last may be avoided, and the first may stand good. And in case where Execution is avoided, Restitution must be made of all that the Sheriff hath levied by vertue of any such Restitution, *F.N.B.* 120. *Co.* upon *Lit.* 259. 288. *Finches ley* 468. 12 *Ed.* 4. 11. *Stat.* 9 *R.* 3. c. 3. 29 *Eliz.* 2. 27 *Eliz.* 3 *fac.* 8. *Crompt. Jur.* 12. 13. 29. 30. 53. Errors may be also in Fines and Common-Recoveries, *St.* 23 *Eliz.* c. 3. 27 *Eliz.* 9.

For this, what shall be Error in any Suit, or not, See *Hob. Rep.* 7, 8. *Brownl. Rep.* 1 *par.* 3. 65. 69. 128. 201. and in very many other Books. And what shall be said Error in Fines and Common-Recoveries, See *Brownl. Rep.* 1 *par.* 3. 65. 66. 128. 30. 35. 36. *Co.* 3. 1. 2. 15. 4. 93. 11. 38. 5. 39. 44. 111. 9. 16. 11. 40. 8. 58. *March Rep.* f. 7. 15. 20. 24. 25. 56. 88. 111. 140. and divers other places.

Some Errors (as before is shewed) may be reformed in the same Court where the Suit is depending; Some must be reformed in other Courts. The Errors in the Court of *Common-Pleas* are to be reformed in the *Upper-Bench*: The Errors in the *Upper-Bench* are to be reformed in the *Exchequer-Chamber*: The Errors in the *Exchequer-Chamber*, or in any other Court, may be examined and reformed in the *Parliament*. The Errors in the Courts of Corporate-Towns, Cities, County-Courts, and Hundred-Courts, may be reformed in the *Upper-Bench* or *Common-Pleas*: And an Error in Process in a Suit, may be reformed in the same Term in the Court where the Suit is depending, *Stat.* 27 *Eliz.* 8. *Dyer* 250. *F.N.B.* 21. *Plow.* 393. 14 *H.* 7. 1. 7 *H.* 9. 28. 23 *Eliz.* 3. 31 *Eliz.* 1. 31 *Ed.* 3. 12. 28 *Ed.* 3. 10. 1 *H.* 4. 15: *Co.* 3. 70. 111. 34. 4. 53. and other Books.

Amendment is, where there is some Error escaped in the Process and Proceedings of a Suit. There in some cases the Judges may amend it, and prevent the bringing of the Writ of Error. For this see *Stat.* 14 *Ed.* 3. 6. 9 *H.* 3. 4. 4 *H.* 6. 3. 8 *H.* 6. 12. 15.

There are some Errors in the Proceedings of Suits, that the Judges of the Courts where the Suits are ought to take notice of, and to stop the Proceedings of the Suit for them. And therefore the Rule is, That of all apparent faults proceeding from the Action, as in false Latine, default of Form in the Writ, Insufficiencie in an Office or Indictment, misawarding of Process, (as if an *Exigent* go forth where none lieth) Impossibility in the Plea, as in Account supposing him to be his Receiver for

for seven years, and the Defendant pleads fully accounted such a day, which is the first day of the seven years. In these cases the Court (*ex officio*) is to take notice of it to abate the Writ, award *Superfedeas* upon such Offices, Indictments, or Process to stay Judgment, if the Defendants Plea be found against him, &c. and this without exception taken, or motion made by the party. And therefore although he that casteth an Effoin cannot plead in Abatement of the Writ by way of Plea, yet if it be a matter apparent to the Court, any stranger as *Amicus Curia* may do it, and the Court is bound to abate it, though the Tenant or Defendant make default. And on the other side, the Judge is to see that either party in a Suit is to be hurt, by any Error of a Clerk of the Court and by his mistake; as where a good Original Writ is ill entred in the Roll; as where the Writ is against *A.* and *B.* and the whole Process against *B.* and *C.* Or a *Scire facias* out of a Fine and part of the Land omitted: Or where the Clerk writeth a syllable or a letter too little, or too much: Or where any Error is assigned by razing, enterlining, adding, subtracting, or diminishing of words, Letters, titles, or parcel of letters in any Record, Process or Warrant of Attorney, Original Writ, or Judicial Pannel or Return, though it appear suspicious to the Judges. For, for such things as these no Judgment or Record is to be reversed or adnulled for Error assigned therein; but the Judges of the same Court, before or after Judgment, may and must amend it.

But in case of Appeals and Indictments for Treason and Felony, and Outlawries thereupon, and after Demurrer joined and entred; the same Court wherein the Suit is depending may amend all imperfections and want of form, other then those which the party demurring shall particularly set down in his Demurrer. And after Verdict given in any cause on the one side or the other, no prejudice shall be to either party because of any variance in form only between the parts of the Record, or for lack of Averment of any life, so the party be alive, and it be proved upon examination: Or by reason any Writ of *Venire facias*, *Habeas corpora*, or *Distingas* is awarded to a wrong Officer: Or by reason the *Visne* is misawarded; or by reason that any of the Jury are misnamed; or in any Return, so as upon examination it appear to be the same person; or by reason of lack of Entry of the Return, or Mis-return, so as upon examination it appear it was duly done: Or by reason that the Plaintiff in an *Ejectione firme*, or any personal Suit, being an Infant, did appear by Attorney therein. For all these things must be amended by the Judges of the same Court. But for all these things, See more *Stat. 21 Jac. 13. 4 H. 6. 3. 14 Ed. 3. 6. 9 H. 5. 4. 4 H. 6. 3. 8 H. 6. 12. 15. 32 H. 8. 10. 18 Eliz. 13. 11 H. 4. 3. 2 & 3 Ed. 6. 32. Co. 11. 6. 7. 4. 62. 8. 133. 5. 37. 45. 27 H. 11. 5. 23 Eliz. 3. Dyer 367. 18 Ed. 4. 3. 4 H. 6. 16. 5 Ed. 4. 7. 7 H. 6. 5.* and divers other places.

Most Mistakes and Errors in Fines and Common-Recoveries, are not fatal, but amendable: For there the Rule is, *Consensus tollit Errorem*; Consent takes away Error. But see for this, *Brownl. Rep. f. 30. 35. 36. 80. 57. 130. 144. 151. 149. 136. 200. 233. 2 par. 101. 103. 270. 273. Co. 5. 44. 38. 2. 57. 77. 1. 76. 8. 58. 11. 69. 77. 23. Eliz. 3. 27 Eliz. 9.*

In Fines and Common-Recoveries.

Where this Writ lieth and may be had, and how, See *Co. 1. 34. 42. 3. 1. 4. 89. 5. 32.* and divers other places.

Self. 2.

The manner of Proceeding herein, is: First, the Record is removed out of the Court wherein the Suit is, into that Court where the Error is to be redressed: And there in some cases Bail is to be put in by the Prosecutor in the Writ of Error; and then he is to assign his Errors, and the Court is to allow of them as fit to be questioned: And then the Plaintiff in the first Suit for whom the Judgment was given, is to be warned by a *Scire facias* to come in, and to defend it and maintain his Judgment. And to this he may plead, That there is no Error; or what he will elset *3 Jac. 8. 27 Eliz. 8. F.N.B. 120. Plaw. 393. Dyer 250.* But the Act of *March 11. 1649.* is at an end.

Where and how the Writ of Error will lie, or not. Writ of Error, and Proceeding in it. Assignment of Errors.

Diminution is where a Record is certified, but not all certified, but there is some Diminution in part of it, then the party concerned may have a Writ directed to the Court to send the whole Record, *F.N.B. 25.*

Diminution, what.

False

False Judgment
what.

False Judgment, is a Writ lying where an erroneous Judgment is given in any inferior Court that is not a Court of Record, as County, Hundred-Court, or Court-Baron, then the party grieved by the Judgment may have this Writ, and remove all the Process of the Suit into the Common-Pleas, and there it shall be examined: And if it be found, the Judgment shall be reversed, and the Suitors or Judges of the Court shall be amerced. And the Errors in this Court are and may be in the kinds thereof, as the Errors of other Courts, *Marl. c. 20. F.N.B. 18. Co. on Lit. 188.*

CHAP. LXXVIII.

Of an Exchange.

1. Exchange or
Exchange, what.



N Exchange is the mutual grant of equal Interests the one in exchange for the other. Or it is, where a man is seised or possessed of Land in Fee-simple, Fee-tail, for life or years, or is possessed of Goods, and another is seised or possessed of other Lands, or possessed of other Goods in the like manner, and they do exchange their Lands or Goods the one for the other. And in this there is a double Grant; for each of them doth grant that which is his, to the other. *Terms of the Law, tit. Exchange. Finches ley 27.*

2. The effect
and fruit of it.

This manner of conveyance (which heretofore was very frequent) is sometimes made by word without any writing; and sometimes it is made by Deed or in writing: And which way soever it be made, it must be made by this word [*Exchange*], which is a word so appropriated to this thing, as the word [*Frankmarriage*] is to a gift in Frankmarriage; neither of which can be made or described by any circumlocution, *Brownlows Rep. 1 par. 40. Co. super Lit. 50. Perk. sect. 153.*

Condition.

Warranty.

The fruit and effect of an Exchange is, that it doth give the interest, and after the property of the things exchanged to either party, according to the Agreement. And if the Exchange be of Lands or Tenements of any Estate of Inheritance or Freehold, whether it be by word or deed, it hath a Condition and a Warranty in Law incident and annexed to it as a thing made by the word *Exchange*, and *tacite* implied in every grant of Exchange: A Condition to give a Re-entry upon all the Land given in exchange, if he be put out of all or part of the Land taken in exchange, and a Warranty to enable him to vouch and to recover over in value so much of his own Land again given in exchange, as shall be recovered from him of the Land taken in exchange, if he be sued for it, *Co. 4. 121. 15 E. 4. 3. 9 E. 4. 21. Bro. Exchange in tot. Fitz. Exchange in toto.*

Assignee.

So that upon every Exchange, either party, if he be put out of or lose by Action the Land he taketh in Exchange, hath a double remedy against the other. And yet this remedy doth go only in the Privy, and shall not go to an Assignee: As if *A.* exchange Land with *B.* and *B.* be put out of all or part of the Land upon a Title paramount by a Recovery in a real Action or otherwise; in this case *B.* may either enter upon his own Land again which he gave in Exchange, or else if it be in an Action brought, he may vouch *A.* upon the Warranty in Law, and shall recover as much in value against him of the Land he gave, as he hath lost of the Land he took in Exchange. But if *B.* alien his Land taken in Exchange to *C.* and *C.* be put out of all or part of the Land upon a Title paramount; *C.* in this case can neither enter upon the Land given to *A.* in Exchange upon the Condition in Law, nor vouch *A.* to Warranty and recover over in value upon the Warranty in Law. And yet *A.* in this case shall have the like remedy against *C.* the Alienee upon the Condition and Warranty both, as he had against *B.* But if *A.* himself implead *C.* for the Land he gave to *B.* in Exchange, *C.* may make use of this Warranty in Law by way of Rebutter against *A.*

Rebutter

And in all these cases, where one of the parties is put out of all or part of the Land, or out of part of the Estate by Entry, and the other party enter upon the others

Land

Land upon the Condition in Law, he may enter upon the whole Land, and avoid the whole Exchange. But if he be impleaded for a part only, or for the whole, and a part only be recovered from him; in this case he shall recover so much in value of the other Land only as he hath lost, and no more. As if an Exchange be of three Acres for three Acres, and after one of the parties is put out of one of the Acres by the Entry of a stranger; in this case he may enter upon the whole three Acres he had given in Exchange, and so avoid the whole Exchange if he will. And if A. and B. be Jointenants for life, and the Fee-simple to the Heirs of A. and A. exchange this Land with C. in Fee, and then die, and B. enter and avoid the Exchange for his life (as he may) in this case C. may avoid the whole Exchange, and enter upon his own three Acres again. So if he in Reversion disseise his Tenant for life, and then exchange the Land, and after the Tenant for life enter; in this case the other party may defeat the whole Exchange. But in this case of an Exchange of three Acres for three Acres, if one of the Acres were gained by Disseisin, and the Disseisee bring an Assize and doth recover it against the Disseisor; in this case if he vouch over the other party to the Exchange, he shall recover so much in value only of the three Acres he gave in Exchange, as the Acre he hath lost, and no more.

To the perfection of an Exchange, and to make things to pass by this kind of Conveyance, these things are requisite. 1. That the persons or parties thereunto be able to give and take, and not disabled by any special impediment. And for this it must be known, that such persons as may be Grantors and Grantees, may make Exchanges; and such persons as are disabled to grant, are disabled to make Exchanges. See *Grant* *Ramb. 4.*

An Exchange made between the King and a Subject is good, albeit the King hold his Land in one capacity, and the Subject in another, *Ca. super Lit. 51.*

An Exchange made between an Infant and another is not void, but voidable only; for the Infant at his full age may affirm or avoid it at his election, *Idem.*

An Exchange made between a Tenant in tail and another, is not void, but voidable; for it is good against himself during his life, and his Issue at his full age may affirm or avoid it at his election, *Bro. Exchange 9. Perk. sect. 279.*

An Exchange made between a man *de non sane memorie* and another, is not void, but voidable; for it is good against him, but his Heir may avoid or affirm it at his election, *Bro. Exchange 9.*

A man that doth hold Land in Fee-simple, Fee-tail, or for life in the right of his wife, may exchange this Land, and the Exchange will be good as long as he and his wife doth live. And he with his wife may exchange it for longer time, and the Exchange is good against him; but his wife after his death may affirm or avoid it if she will, *Bro. idem. Perk. sect. 279.*

One Parson or Vicar may exchange his Church or Benefice with another, and this Exchange is good, *Perk. sect. 288.*

The Disseisor and Disseisee may joyn together and exchange the land whereof the disseisin was made with a stranger for other land: but if it be made out of the land and before the entry of the disseisee it shall not bind the disseisee, for he may avoid it. And a disseisor cannot exchange the land he hath gotten by disseisin with the disseisee for other land, for this exchange is void, unless it be by indenture, or fine, that it may work by way of estoppel, *Perk. sect. 280. 273.*

The Lessor and Lessee may joyn together and exchange the Land leased for other Land, and this is good; for it shall be said to be the Surrender of the Lessee to the Lessor, and the Exchange of the Lessor; and therefore the Lessee (as it seems) shall have nothing to do with the Land taken in exchange. *Sed quare* of that. *Perk. sect. 279.*

Jointenants for life, the Fee to one of them, may exchange their land with a stranger for other land to hold in the same nature, and the Exchange is good. But Jointenants, Tenants in common, and Coparceners cannot exchange the lands they do so hold with another, before they have made partition, *Perk. sect. 277. 281.*

If A. and B. be Jointenants for life, the Fee to A. and A. exchange the whole land with another for other land; this is good only for his moiety, as some have said: But it seems notwithstanding it is good for the whole, until it be avoided by the other Jointenant, *Perk. sect. 277.*

3. How an Exchange must be made, and what shall be said a good Exchange, or not.

1. In respect of the parties thereunto, and their estates.

Infant.
Tenant in tail.

De non sane memorie.

Husband in right of his Wife.

Surrender.

Jointenants.
Tenants in common.

The

2. In respect of the matter whereof it is made, or the nature of the thing exchanged. And of what things and estates an Exchange may be made,

The second thing required in a good Exchange is, that the things exchanged be such as whereof an Exchange may be made. And for this it must be known, that an Exchange may be made of things of the same nature, as of a temporal thing for a temporal thing, a spiritual thing for a spiritual thing; as a house for a house, land for land, a Manor for a Manor, a Church for a Church, Rent for Rent, Common for Common, a Horse for a Horse, one Piece of Plate for another, or the like: Or it may be made of things of a divers nature; as of a temporal thing for a spiritual, as of a House for Land or Rent; a Chamber in a house for Common, or for a Reversion, Seignior, or Advowson; of Land or Rent for a Right of Land, or Release of Right; of an Advowson for Land; of a Rent for a Way; of a Horse for a Piece of Plate; of a Gown for a Horse, or the like. And Exchanges made of these things, albeit the things exchanged do lie in divers Counties, are good. Also a Seignior by Homage and Fealty, or the like, which is not valuable, may be exchanged for Land, Rent, or any other such like thing. So may a Seignior by Divine service. But a Seignior in Frankalmoigne cannot be exchanged with any but the Tenant of the Land that doth hold by the Tenure. And Houses, Manors, Lands, Rents, Commons, Seignior, Reversions, and the like, may be exchanged in Fee-simple, Fee-tail, for life or years. So that an Exchange may be of an Inheritance for an Inheritance, of a Frank-tenement for a Frank-tenement, and of Chattels real for Chattels real. *Perk. sect. 263. 261. 262. 266. 258. Lit. sect. 62. Co. super Lit. 51. 52. Perk. sect. 259. 260. 258.*

If one grant White-acre in Exchange for Black-acre lying within the same, or in two Counties, this is a good Exchange. So if I grant a Rent-charge issuing out of my land in Exchange to *J. S.* for an Acre of his land, &c. this is a good Exchange. So if I have a Rent issuing out of the land of *J. S.* and I grant this to *J. K.* in Exchange for Land or other Rent; this Exchange is good, when the Tenant hath attorned to the Grant of the Rent. So if one have a Rent out of my Land in Fee, and I have the Land in Fee, and I grant the Land in Exchange for the Rent; it seems this is a good Exchange. But if one grant me a Manor or Land, and I in Exchange for the same Manor or Land grant unto him a Rent *de novo* issuing out of the same Land or Manor, this cannot take effect as an Exchange. So if one release his Estovers that he hath in such a Wood, and deliver the Release in Exchange for Land given to him in Exchange for the same Release; this is a good Exchange. *Perk. sect. 244. Idem 263. 3 E. 4. 10. 9 E. 4. 21. 9 E. 4. 21. Perk. sect. 262. 266. Fitz. Exchange 16.*

If there be a Disfeisor and Disfeisee, and the Disfeisee release his right to the Disfeisor in Exchange for other Land, this is a good Exchange. So if the Disfeisor of an Acre of land enfeoff a stranger of the same Acre of land, and the Feoffee give to the Disfeisee an Acre of land in Fee in Exchange for a Release of all his right in the Acre of land of which he was disfeised; this is a good Exchange. *Perk. sect. 271. Idem 282.* But if the Disfeisee grant his right to a stranger that hath nothing in the land, in Exchange for an Acre of land; this Exchange is not good, neither shall the stranger take any thing by this Grant, *Idem sect. 271.* If there be Lord and Tenant by Fealty, and Twelve pence Rent, and the Lord exchange the Seignior with the Tenant for the Tenancie, or *à converso*, by Deed indented; this is held by some to be a good Exchange, *Perk. sect. 260.* If I have a Rent issuing out of the land of *J. S.* and I grant or release the same land to *J. S.* in Exchange for other land; this is a good Exchange. So if I release the same Rent unto him in Exchange for a Way over his ground; this is a good Exchange, *Perk. sect. 267.* If I be seised of lands to which *J. S.* hath a right of Action, and I give to him other land for a release of his right; this is a good Exchange. And the same Law is of an Exchange of Land, and an Advowson by Deed indented, for a Release of right in another Advowson to an Usurper, when his Incumbent hath been in possession of the Church six moneths, *Idem 268, 269.* If two Parsons of a Church make an Exchange of their Benefices by words of Exchange, and each of them resign his Benefice into the hands of the Bishop to the same intent, and the Patrons present accordingly, and the Presentations are *per viam permutationis*; this is a good Exchange, *Perk. sect. 257.*

If three Acres of Land with an Advowson Appendant be given in Exchange by *T. K.* to *J. S.* for a Chamber to be assigned by the said *J. S.* at the election of *T. K.* and he assign two Chambers, and *T. K.* chuse and enter upon one, and *J. S.* enter upon the Land; this Exchange is good, notwithstanding the incertainty. So if *J. S.* give his Manor of *A.* to *T. K.* in Exchange for his Manor of *B.* or for his Manor of *C.* and he enter upon one of these Manors, and *T. K.* enter upon the Manor of *A.*; this Exchange is good, *Park. sess. 264, 265.*

Out of all which, these things by the way, may be observed.

1. That the things exchanged need not to be in *esse* at the time of Exchange made, for a man may grant a *Rent de novo* out of his Land in Exchange for a Manor. And yet if I grant to another the Manor of *A.* for the Manor of *B.* which he is to have after his Fathers death by descent, it seems this Exchange is void, *Co. super Litt. 50. Park. sess. 265.*

2. There needs no Transmutation of Possession, for a Release of Rent, Estovers, or Right of Land, for Land is good.

3. The things exchanged need not to be of one nature, so as they concern Lands or Tenements, for Land may be exchanged for Rent, Common, or any other Inheritance which doth concern Lands or Tenements, or Spiritual for Temporal things, as Tithes: A Tenure by Divine Service for Land, or a Temporal Seignior. But Annuities, and such like things, which charge the person onely, and do not concern Lands or Tenements, or Goods and Chattels, cannot be exchanged for Land.

The third thing required in a good Exchange is, That it be made in that manner and order, that Law doth require, wherein these things are to be known.

1. That if all or part of the things whereof the Exchange is made, do lie in several Counties; or if all or part of the things whereof the Exchange is, be such as lie in grant and not in Livery, albeit it be in the same County; in these cases the Exchange must be made by Deed indented in Writing. But where the Exchange is of Lands, and of Lands lying in the same County, albeit it be of any Estate of Inheritance or free hold, yet it may be by word of mouth without writing. And so also may it be when the things exchanged do lie in divers Counties, when the Exchange is made onely for a term of years: And therefore if an Exchange be made between *J. S.* and *T. K.* of Lands lying in one and the same County in Fee, or for life, it may be by word of mouth: But if all or part of the Lands of *J. S.* lie in one County, and all or part of the Lands of *T. K.* do lie in another County, the Exchange must be made by Deed indented. If an Exchange be made of Rent for Land, and the Land out of which the Rent is issuing, and the Land given in Exchange for it do both lie in one County; this Exchange cannot be good without Deed: So if an Exchange be made of the Reversion of an Acre of Land for three shillings of Rent issuing out of another Acre of Land, and both Acres are in one County; this Exchange must be made by Deed indented, or it will not be good. So if an Exchange be made of an Acre of Land, and a Rent out of another Acre, for another Acre of Land and Common for three Beasts, and all is in one and the same County, this Exchange must be by Deed indented, or it will not be good. But if I be seised of a Manor to which I have Common Appendant or Appurtenant, and *T. K.* is seised of another Manor to which he hath a Villain Regardant, and both the Manors are in one County, an Exchange may be made of these Manors by word of mouth without writing, and the Common and Villain will pass as incidents well enough. And yet if *J. S.* hath an Office whereunto Land doth belong, and *T. K.* hath Rent issuing out of the Land of a stranger, and all the Land is in one County, and the Office is to be used and occupied in the same County; if these things be exchanged, it must be by Deed indented, *Park. sess. 244. Co. super Litt. 51, 52. Litt. sess. 61. Co. 9. 14. Park. sess. 247, 248, 249, 250, 246.*

2. The word [*Exchange*] or [*Exchanges*] must be had and used between the parties in the making of the Exchange. And grant to you Whiteacre. To have and to hold to you and your Heirs in Exchange for Blackacre: And in consideration hereof you grant to me and my Heirs Blackacre in Exchange for Whiteacre, for this word is so individually requir'd as it cannot be supplied by any other word, neither

3. In respect of the manner of the making of the Exchange: And where it shall be good without Deed, or not:

Exch. of a villanage to villanage is good without deed, as the former.

Livery of Sei-
fa.

Attornment.

Livery of Sei-
fa.

Warrant of
Tenants to
pursue
the
land
shall be
shown
to the
court

4. In respect
of the quality
or equality of
the Estates or
Interests ex-
changed.

Husband and
Wife.
Tenant in Tail.

will any Averment that it was in Exchange, help in this case. And therefore if *A.* by Deed indented, give to *B.* an Acre of Land in Fee-simple, or for life, and by the same Deed *B.* doth give to *A.* another Acre of Land in the same manner, this cannot count as an Exchange: And therefore if no Livery of Seisin, so as it may take effect by way of Grant, it is utterly void. But by this means, Lands may be granted from one to another, for there needs no Livery of Seisin. So if an Exchange be made by words between two of Lands in one County, and before their Entry, Indentures are made between them of the same Lands without words of Exchange, and no Livery of Seisin is made; this shall not pass by way of Exchange: And yet it hath been held by some, that *Permutatio*, or some other word of like effect may supply this word Exchange, *Co. super Lit.* 50, 51. *Perk. fess.* 252, 253. *92d. 421. Fitz. Exchange* 12.

3. That if any Rent, Reversion, Seignior, or the like, be granted by either party, that then the Tenant do Attorn to the Grant, for that Attornment is requisite in this case. And yet in the case of the Grant of Land, in Possession, in Exchange, no Livery of Seisin is needful. Neither is it needful that either party to the Exchange come to the thing given to him in Exchange, by the same mean and manner of Assurance: For if Lessee for life of one Acre, give another Acre to his Lessor, in Tail, in Exchange for a Release from him of that Acre, To have and to hold in Tail in like manner; this is a good Exchange, *Perk. fess.* 259. 263. 289. 276.

An Exchange may be made to take effect in *presenti*, as well as in *passenti*, for if an Exchange be made between me and *T. K.* That after the Feast of *Easter T. K.* shall have my Manor of *Dals* in exchange for his Manor of *Sals*, this is a good Exchange, *Perk. fess.* 265.

If an Exchange be made in writing of Land, and it doth limit and express no estate, that either party shall have in the thing exchanged, yet this is a good Exchange. But if an estate for life be limited expressly to one, and no express estate is limited to the other; this is not a good Exchange, as shall be shewed in the next place, *19 H. 6.*

27. *Perk. fess.* 275. The fourth thing required in a good Exchange, is Equality of Estate, viz. That either party have the like kinde of estate of the thing exchanged; so that if one have an estate in Fee-simple, the other have so likewise, and so for other estates: For if the one grant that the other shall have his Land in Fee-simple, for the Land which he hath of the other in Fee-tail; or that the one shall have in the one Land Fee-tail, and the other in the other Land but for term of life; or that the one shall have in the one Land Fee-tail general, and the other in the other Land Fee-tail special; or that the one shall have in the one Land for life, and the other in the other Land but for years; these Exchanges are void, and cannot take effect as Exchanges, *Fitz. Exchange* 14. *2d. Inst. fess.* 64, 65. *Co. super Lit.* 50, 51. *Perk. fess.* 276. And therefore if the Lord release to his Tenant his Services in Tail, in Exchange for other Lands given to the Lord in Exchange in Tail also; this Exchange is void, for by this Release made by the Lord the Services are gone for ever, *Perk. fess.* 283. So if Tenant for his own life exchange with him that is Tenant for life of another; this is not a good Exchange. And by the same reason it should seem if Lessee for twenty years of his Land Exchange with another for other Land for forty years, that this should not be a good Exchange, *Perk. fess.* 275. *Fincles Ley* 29. But if Lessee for life be of an Acre of Land, and he give another Acre of Land to his Lessor in Fee-tail in Exchange for a Release of all his Right in the Acre that he holdeth for term of his life, To hold to him and the Heirs of his body engendred; this is a good Exchange, *Perk. fess.* 276. Or if Tenant for his own life exchange with him that is Tenant in Tail after possibility of Issue extinct; this Exchange is good, *Co. lit.* 89. And yet if an estate for life be expressed to the one party upon the Exchange, and no estate is expressed to the other party; it is said, that this Exchange is not good, and yet where no estate is expressed, the party shall have an estate for his own life, *Perk. fess.* 275. *19 H. 6.* 27.

But in these cases it is not necessary that the parties to the Exchange, be seized of an equal estate at the time of the Exchange made; for if Tenant in Tail or Husband in right of his Wife, exchange their Land in Fee-simple, with another for Lands he hath in Fee-simple; this is a good Exchange until it be avoided by the issue or the

the Wife, *Co. super Littl.* 511. *Perk. fect.* 289. *Littl. fect.* 65. *Perk. fect.* 280, 281: Neither is it necessary that both Estates be in possession, for one may grant an Acre in possession in exchange for an Acre in Reversion, and this Exchange is good, *Idem.* Neither is it necessary that there be an equality in the value or quantity of the Lands exchanged, for if the Land of one of the parties be worth one hundred pound, and the Land of the other but ten pound, or the Land of one of the parties be one hundred Acres, and the Land of the other but ten Acres, if the Estates given be equal, the Exchange is good, *Idem.* Neither is equality in the quality or manner of the Estates requisite, *Idem.* For if two Joyntnants be in Fee of an Acre of Land, and they grant that Acre to another in exchange for other Lands, To have and to hold a Moyety to one of them and his Heirs, and a Moyety to the other and his Heirs, which is an Estate in Common; or two men give Lands in exchange to A. and his Heirs, for Lands from A. to them two and their Heirs, albeit the one party hath a Joynt estate, and the other a Sole estate, yet the Exchange is good. The like Law is if the Land of one of the parties be of a defeasible Title, and the Land of the other of an undefeasible Title, this Exchange is good till it be avoided.

The fifth and last thing required in a good Exchange is, That there be an execution and perfection of the Exchange by Entry or Claim in the life time of the parties, *viz.* That both the parties to the same Exchange, do enter into the things taken in Exchange; if they be such things as they may enter into, for until the Exchange be executed by Entry, or the like, the parties thereunto have no Freehold in Deed, or in Law, in the things exchanged, albeit the same things do lie in one County: And if either of the parties die before he enter into the Lands by him taken in Exchange, hereby the whole Exchange is become void, if his Heir will; but if one of the parties enter, he shall not first begin to avoid the Exchange. But if the parties enter at any time, during their lives, it is sufficient, unless the possession be before divested by an elder Title, as by Entry for a Condition broken, Entry by a Disseisor or his Heir, or the like, and not re-vested again before the Entry. As if an Exchange be had between two of Land, and before their Entry by force of the Exchange they are, or one of them is disseised of the Land exchanged, and the Disseisor die seised thereof, and then they enter according to the Exchange, and put out the Heir of the Disseisor, this shall not be said to be an execution of the Exchange; but if the Disseisor have recovered the same Land against the Heir of the Disseisor by Writ of Entry, and have Execution, then he may execute the Exchange by Entry: And in case where a Reversion, Rent, or Seignior, is granted in Exchange, it must be perfected and executed by the Attornment of the Tenant in the life time of the parties, otherwise the Exchange is not good; but in this case after Attornment is made, it seems the Exchange is perfect without any Entry or Claim, *Co. super Littl.* 50, 51. *Co.* 1. 98. 105. *Perk. fect.* 284. 286. 292. 289.

If two Parsons exchange their Churches, and resign them into the Bishops hands, this is not a perfect Exchange until they be inducted; and therefore if either of them die before they be both inducted, the Exchange is void, *Perk. fect.* 257.

Where a Deed shall take effect as an Exchange, there must be all the Conditions before mentioned in the case. And yet note that where one thing is granted for another in the nature of an Exchange, and for some of the causes aforesaid, the things cannot pass by way of Exchange, there they may pass notwithstanding by way of Grant, and the Deed may take effect to other purposes, albeit it may not enure and take effect as an Exchange. And therefore if two be seised of several Acres of Land, and the one of them by Deed doth give his Acre to the other, and the other his Acre to him without any word of Exchange, and each of them doth make Livery of Seisin to the other; in this case albeit the Acres will not pass by way of Exchange, yet will they pass by way of Grant. And in this case, if no Livery of Seisin be made, either of them shall hold the Lands granted at will onely. And in like manner it is if two agree to exchange Land, and after each of them levy a Fine or make a Feoffment of the Land to other; by this the Land will pass each to other, but not by way of Exchange. So if A. and B. his Wife, and C. and D. his Wife agree to

3. In respect of the Execution of it.

4. When a Deed shall take effect as an Exchange, or not.

Exchange Lands, and *A.* and *B.* enter into the Land, they are to have in exchange, and then they do make a Feoffment of their own Land unto *C.* and his Father, and not to *C.* and *D.* his Wife; this shall not enure as an Exchange, and therefore *C.* and *D.* may enter upon their own Land again; but the Feoffment is good. And if one assign a Woman her Dower in exchange for Land; this shall not take effect as an Exchange, but it shall enure to be a good Assignment of Dower, *Perk. Sess. 255, 256.*

Fitz. Exchange 14. Perk. Sess. 272.

5. How an Exchange shall be construed and taken,

If two do exchange Land by Deed, and limit no Estates, this shall be taken for Estates for life, and the Exchange is good; but if an Express estate be limited to one, and no Express estate to the other, it is said this is not good, and that construction of Law will not help it. *19 H. 6. 27. Perk. Sess. 275.*

If an Exchange be made between two men of two Acres of Land by Deed, and in the habendum, it is set down that each of them shall have the Acres given in exchange with divers other Acres not expressed in the premises; this addition shall be taken as surplusage, and the Exchange shall be good for the two Acres. See more in *Exposition of Deeds, Perk. Sess. 251.*

6. Where an Exchange shall be determined, or the nature of it changed by matter Express facto, and how, and where not.

If after an Exchange is made before or after the parties enter, all, or part of the Land given to either party be recovered from him upon an elder Title, as by an Entry upon a Condition broken, alienation in Mortmain, or upon a Disseisin; in these cases if that party enter again upon his own Land, which he gave in exchange (as he may) hereby the whole Exchange is determined. But if after the Exchange is perfect, one of the parties do enter upon the Land, he doth give in exchange, this doth not make void the Exchange, neither may the other party hereupon enter upon the Land he doth give in exchange, but he may have an Assize, or an Action of Trespass against the other: And yet if an exchange of a Common for a Way, or a Rent, or the like, if the one party deny the Common, it hath been said the other party may deny the Way, or the Rent. *Sed quere. Perk. Sess. 286. Co. 4. 122. Perk. Sess. 299. Broo. Exchange 12. Perk. Sess. 299.*

If an Exchange be made of Fee between two of a Manor, whereof the one half is in Tail, and the other half is in Fee-simple, and the Tenant in Tail that made the Exchange, die; and his issue disagree to it, so that the Exchange of the tailed Land is become void; this doth determine the whole Exchange, for when an Exchange becometh void in part, it becometh void in all, and until it be avoided it is good for all. As if one be seised of White-acre, and he exchange White-acre and Black-acre (which is none of his) with another for two other Acres, this shall continue for a good Exchange, and not be avoided until he that hath right to Black-acre doth evict him that hath it in exchange, *Broo. Exchange 8. Perk. Sess. 297.*

If an Exchange be made by Tenant in Tail, and his issue after his death wave the possession of all or part of the Land taken in Exchange, and disagree to the Exchange, hereby the whole Exchange is determined. So if the Wife after the Husbands death, the Infant at his full age, or the Heir of him that is *de non sane memorie* disagree to the Exchange of the Husband, the Infant, or him that is *de non sane memorie*, hereby the whole Exchange is determined, and no subsequent Agreement can make it good again, *Co. 4. 122. Perk. Sess. 296. 294. 290. 298.*

If two do make an Exchange by word of mouth, and after before either of them enter, they make Indentures of the Lands exchanged, and grant the same from one to another; it seems hereby the nature of the Exchange is changed, and the Exchange determined, *15 Ed. 4. 3.*

7. Who may take advantage of a void or avoidable Exchange, or not, and when.
Infant.
Tenant in Tail.
Husband and Wife.
Heir de non sane memorie.

The parties themselves, and all privies and strangers for the most part may take advantage of such Exchanges as are void for the defects before-named; but when the Exchange is onely voidable, *contra.* And therefore when an Exchange is made by an Infant; the Infant himself at his full age, or his Heir, and none other may avoid it: And when an Exchange is made by a Tenant in Tail, the Issue in Tail after the death of his Ancestor, and none other may avoid it. And when an Exchange is made by the Husband, or Husband and Wife of the Wives Land, the Wife after the Husbands death, or Heir of the Wife after her death, and none other may avoid it. And when an Exchange is made by a man of *non sane memorie*, his Heir after his death and

and none other may avoid it. But in all these cases of Infant, Tenant in Tail, Woman Covert, and a man *de non sane memorie*, and where Lands are recovered by an elder Title, the other party may not enter, and avoid the Exchange until the Infant, Issue in Tail, Woman, or Heir of him that is *de non sane memorie*, or him that doth lose the Land, by an elder Title, doth first enter. *Park. Sect. 285. Co. 1. 105. Dyer 285. Perk. Sect. 290. 294. 298. Co. 1. 98.*

If an Infant exchange Lands, and after at his full age occupy the Lands taken in Exchange for his own Lands, hereby the Exchange is made good. So if Tenant in Tail exchange his intailed Lands with another, and after his death the issue occupy the Lands taken in exchange by his Ancestor, hereby the Exchange is made good for the life of the issue in tail. So if the Husband and Wife exchange the Land of the Wife for other Land, and the after her Husbunds death agree to it, and enter into and agree to the Lands taken in Exchange, hereby the Exchange is made good. But if the Husband alone make an Exchange of his Wives Land, and she after his death agree to this, and enter into the Land, it seems this will not make the Exchange good. And if a man leased of Land in right of his Wife in Fee thereof Infeoff a stranger, and take an estate back again to him and his Wife, and a third person in Fee, and they three joyn in exchange of the same Land in Fee for other Lands to a stranger in Fee, and the Exchange is executed, and the Husband dieth, and she doth occupy the Land taken in exchange with the other third person, hereby the Exchange is made good. If a man *de non sane memorie* make an Exchange, and his Heir after his death enter into the Land taken by his Ancestor in Exchange, and agree to the Exchange, hereby the Exchange is made good. And in all these cases, when the Exchange is once by Agreement made good, it can never by any subsequent disagreement be afterwards made void. *Co. super Litt. 51. 12 H. 4. 11. Perk. Sect. 290. 294. Fitz. Exchange 13. Perk. Sect. 291. 279. 293. 298.*

8i Where an Exchange voidable at first doth become good by matter Ex post facto; or not. Tenant in Tail. Husband and Wife.

CHAP. LXXIX.

Of Estates.



NE Estate is, that Title, Time, or Interest, that a man hath to Lands or Tenements. *Terms of the Law.*

Estates are either of Freehold, that if they continue go to the Heir, or are Chattels that go to the Executor.

Estates of Freehold, are either Estates of Inheritance, or Franck-tenement.

Estates of Inheritance, are either Fee-simple or Fee-tail. Fee-simple is either absolute and indeterminable, as where Land is given to a man and his Heirs, or it is determinable; And

then it is either Express, when it is derived out of an absolute and pure Estate in Fee. As first, where it is upon Condition, as in case of Mortgage; and this is called Fee-simple Conditional: And for this see *Condition*. Or secondly, it is by Limitation, as where Land is given to A. and his Heirs, so long as B. hath Heirs of his body; this is called Fee-simple limited or qualified: And for this see *Limitation*. Or else they are implicate and derive out of an Estate-tail: As where Tenant in Tail doth bargain and sell his Land by Deed, indented and inrolled, and after levy a Fine of it to the Bargainee and his Heirs, with Proclamations; by this the Bargainee hath an Estate in Fee-simple so long, as the Tenant in Tail hath Heirs of his body.

Fee-tail is either General, as where Lands are given to J. S. and the Heirs of his body; or Special, as where Land is given to J. S. and the Heirs of his body begotten on the body of J. D.

Franck-tenement is also Express or Implied, Express is where Land is granted to one

Se. 1. 1. Estate, what. The kinds of it.

Heir. Executor.

one and his Heirs, during the life of *7. S.* Or where Tenant for life doth grant his estate to another and his Heirs; in these cases the Lessee or Grantee hath an estate of *Franch-tenement* descendible: Or it is Implied, as where Tenant in Tail doth pass his Land by way of Bargain and Sale, to another and his Heirs; by this the Bargainee hath an estate descendible, and determinable upon the death of the Tenant in Tail.

Chattels. Estates that are called Chattels, and go to Executors, are either Leases for years, Leases at Will, or at Sufferance; or heretofore Wardships in *Capite*, and Knights Service now abolished, *Co. 10. 97. 4. 30. 82. of Copbold, sect. 47. Plow. 555. &c.*

All Estates may be Conditional, as well as Fee-simples. Some divide Estates into Certain, as Fee-simples; and for life or years; and Incertain, as Estates at Will or Sufferance.

3. Fee-simple,
what:
The nature of
it.

Fee-simple is where one hath any Lands or Tenements inheritable by a perpetual Right, to him and his Heirs for ever: And this is of all kinde of Estates, the greatest, largest, and most excellent; and therefore no Remainder can depend upon this. And he that hath this Estate, may give, grant, or charge it by his Deed, or will at his pleasure. He may make what waste or spoil upon it he pleaseth; he may charge it in his Heirs hand by any Obligation or Warranty, he shall make in his life time. The Wife of him that hath it, will be endowed of a third part of it; the Husband of her that hath such an Estate, will be Tenant by the Courtesie. But this Estate is forfeitable by Treason or Felony. See for all this in *Treason, Felony, Dower, Tenant by the Courtesie, Heir, Littl. f. 1. Co. super Littl. 273. Dyer 33. 330. Perke. sect. 276. Crofts. Jur. 214. &c.* To what Execution it shall be liable, see *Execution*.

For Answer hereunto, take these things,

Señ 2.
What shall be
said a *Fee-sim-*
ple, or not.
And how
words of Li-
mitation of an
Estate shall be
taken.
Exposition of
Deed.

1. It is a Rule, that Fee-simple is commonly made by a Deed, and by this word (Heirs) and cannot well by Deed be made without it. But in a Will it may be made by other words. And when it is made by Deed, it is commonly made by Livery of Seisin, and cannot otherwise be made; and yet it may be, and sometimes is made without Deed, without the word Heirs, and without Livery of Seisin, *Littl. 1. C. 61. 62. super Littl. 12. 94.*

2. If Lands be given or granted by Fine, Deed, or Will, in Possession, Reversion, or Remainder, *Plow. 134.* to a man and his Heirs; this is a Fee-simple.

3. If Lands be given or granted by Deed, or Fine, or any such like way to *7. S.* and his Heirs Males, or to *7. S.* and his Heirs Females; these are Fee-simples. But if it were by Will, it would be Estates Tail; and so if it were the Kings gift, *27 H. 8. 27. Littl. sect. 31.*

4. If Lands had been given to *7. S. & haredibus*, without the word *Sein*; these words make a Fee-simple: But if it be to two *& haredibus*, it maketh but an Estate for life, *20 H. 6. 35.*

5. If Lands be given or granted to *7. S.* and to the Heirs of *7. S.* this doth make an Estate in Fee-simple, *20 H. 6. 35.*

6. If Land be given or granted to *7. S.* and his right Heirs; this is a Fee-simple, *Co. 2. 91. 33 H. 6. 5.*

7. If Lands be given or granted to *A.* for life, the Remainder to *B.* for life, the Remainder to the right Heirs of *A.* By this *A.* hath a Fee-simple, *40 Ed. 3. 9. Bro. Dones 55.* So if Lands be given or granted to the Wife of *7. S.* for life, after to *7. S.* in Tail, and after to the right Heirs of *7. S.* By this *7. S.* hath a Fee-simple, *Co. 2. 91.*

8. If Lands be given or granted to a man and his wife, and the Heirs of them issuing, or their Heirs issuing; this is a Fee-simple, and not a Fee-tail, *Bro. Estates 34.*

9. If one make a Lease of Land to another for twenty years, and that after the twenty years the Lessee shall have it to him and his Heirs by the Rent of ten pound a year; if in this case Livery of Seisin be made upon the Deed, this will be a Fee-simple, otherwise but a Lease for twenty years, *Co. super Littl. 217.*

10. If Lands be given or granted to a Corporation aggregate of many; this is a Fee-

Fee-simple without words of [*Heirs or Successors*] But if it were to a sole Corporation, as a Bishop, Parson, or the like; by this he hath onely an estate for life, *Co.* upon *Littl.* 24.

11. If one seised of Land in Fee, make a gift of it in Tail, or Lease for life, the Remainder to the right Heirs Males of the Body of the Donor; it seems this Remainder is a Fee-simple, and not a Fee-tail, because the Donor cannot make his right Heir to come in as a Purchaser, unless he put the Fee-simple out of his person, *Dyer* 156.

12. If one by Deed, or Will, give or grant Land to *J. S.* and his Heirs, and if *J. S.* die without Heirs, that *J. D.* shall have it to him and his Heirs; by this *J. S.* hath a Fee-simple, and *J. D.* no estate at all, *Dyer* 4. 33.

13. If one by the first part of a Deed, called the Premises give or grant Land to one and his Heirs, and in the *Habendum* say, To have and to hold to him for life or years onely, and make Livery of Seisin upon the Deed; this is a Fee-simple, *Co.* 2. 21, 24.

14. By a Will an Estate in Fee-simple may be made without the word (*Heirs*) *Will*, And therefore if one by Will devise any Land or Rent, &c. to *J. S.* and his Assigns for ever, or to *J. S.* for ever, or to *J. S.* paying ten pound to *J. D.* in all these cases there is a Fee-simple made, *Co.* 3. 21. 1. 44. 85. *Dyer* 4. 33. *Littl.* 1st. 1.

15. Upon a Partition a Fee-simple may be made without the word (*Heirs*) See *Partition*, *Plow.* 134. *Co.* upon *Littl.* 94. 22.

16. If a Grant or Gift, or Devise, be of a Reversion, Common, Rent, or the like things which lie in Grant, there the like words do make the like Estate. And then it passeth by the Sealing of the Deed without any Livery of Seisin, *Co.* 2. 21. 24. But for this point, see much more in my Book of *Common Assurances*, fol. 101, 103, 439, 440. *Brownl. Rep.* 1 part 47. 49, 167, 169. 2 part. 271, 272. Who shall take by such an Estate, or not, see *Discontinuance*.

Fee-tail is a kinde of Fee-simple, but limited in it self, and cut off from the pure and absolute Fee. *Terms of the Law*. And this kinde of Estate may be made of any Manors, Lands, Tenements, Commons, Rents, Advowsons, Mesuagies, Services, and of some Offices and Dignities, as the Office of a Steward, Bailiff, or Receiver of a Manor; the dignity of a Duke, Countie, or the like. Also Uses, Offices, and Dignities that concern Land, and certain places; as the Office of the fourth part of the Serjeant; the Office of keeping the Church of our Lady in *Lincoln*; and so likewise of all other things that favor of the Realty: But an Annuity is not to be In-tailed, nor Copihold Land, but by Custom, *Brownl. Rep.* 2 part. 42, 43. *Co.* 9. 105. upon *Littl.* 30.

This is the next great Estate to a Fee-simple; and therefore he that hath this Estate, however he cannot give, grant, or charge it by his Deed or his Will, as he may a Fee-simple estate; for he cannot so grant or charge it for longer then his own life: Nor can he make the Land in the hands of his Issues liable to his Warranty, or Obligations, or Debts, unless it be the Kings debts; yet by a Fine, or Common Recovery, he may dispose his Estate and bar his Issues, and all the Remainders to come after his own estate. And he is not punishable for any spoil or waste he doth upon the Land, his Wife shall be endowed, and her Husband that hath it, shall be Tenant by the Courtesie; and if he commit Felony, he doth not forfeit it; and yet if he commit Treason, he forfeits his Land, so long as he hath Heirs of his Body, *Westm.* 2. chap. 1. 5, 6 *Ed.* 6. 11. 32 *H.* 8. 36. *Co.* 6. 40. 7. 41. 10. 39. And see the Titles of *Heir, Felony, Treason, Recovery, Fine, and Warranty*.

And to what Execution it will be liable for payments of the Debts of the owner thereof, see *Execution*, or *Debt*.

3. Fee-tail, what, Of what it may be made, or not.

The nature of this Estate.

See 3.

4. What shall be said an Estate-tail, or not.

And how words of Limitation shall be taken herein.

For Answer to this Question, these things are to be known; 1. If Lands be given or granted to one, and the Heirs Males of his Body, or his Heirs Males of his Body, or to the Heirs Females of his Body, or his Heirs Females of his Body, or to the Heirs Males of his Body begotten, or to one and to his Issues Males begotten, or to one, and his Issues Females begotten, or to *J. S.* and his

General Tail.
Deed.

his Heirs, if he shall have any Heirs of his Flesh, and if none, that then the Land shall Revert, or to *J. S.* and his Heirs, if he have issue of his Body, or to *J. S.* and the right Heirs Males of his Body, or to *J. S.* and his Heirs; provided, that if he die without Heir of his Body, that the Land shall Revert; or to *J. S.* and the Heirs of his Body issuing, the Remainder to *J. B. in forma pradiſta*. In all these cases there is, whether it be in a Deed or Will, by these words made an Estate in Tail in General; and so to him in the Remainder, in the last case, by the words in form aforesaid, *Litt. Sect. 13, 14, &c. 18 Ed. 3. 45. 37 Aff. 15. Dyer 156. Plow. 140. Co. upon Litt. 20. 385. 26.* And by these words *in forma pradiſta* any other Estate may be made, Adjudge, *Hil. 17 Jac. B. R.* And so if it be to *J. S.* and his Heirs, To have and to hold to him and the Heirs of his Body; but in this case he hath a Fee-simple after the Estate-tail, 35 *Aff.*

2. If Lands be given or granted to *J. S.* and *M.* his Wife, and the Heirs of the Body of the Survivor of them; by this the Survivor hath an Estate in General-tail after the others death, *Co. upon Litt. 26.*

3. If one give or grant to *J. S.* that if he and the Heirs of his Body be not yearly paid forty shillings, that he shall distrain in the Land of the Grantor; this is an Estate-tail of this Rent, *Co. upon Litt. 147.*

Will.

4. If one by Will give Lands to *J. S.* and his Heirs Males, or his Heirs Females; this makes an Estate-tail in either of these cases, otherwise it is if the words were in a Deed, 27 *H. 8. 27. 20 H. 6. 35.*

5. If one Devise Land by Will to *J. S.* and his Children; this if he have no Children at the time, will make an Estate-tail: But if he have, they will all have Estates for their lives jointly with the Father: And so it is if the Land be given to him and his issues, *Co. 6. 17.*

6. If one Devise to his Wife for life, and after to his Son; and if his Son die without issue, having no Son, then that the Land shall go to another; this is an Estate-tail to him, and the Heirs Males of his Body: So if the words had been, if he die having no Male, Adjudge, *Trin. 7 Jac. Co. B. Robinson case.*

7. If one by Will Devise Land to *J. S. & femini suo* to his Seed, these words do make an Estate in Tail. But if it be to him *& sanguini suo*, to his Blood; these words make a Fee-simple, Adjudge, *Mich. 40, 41 Eliz. Downhal and Gashin case Broo. Tail 21.*

8. If one have issue three Sons, and Devise his Land (to wit) one part to one Son, another to another, another to another in Tail, and that neither of them shall sell his part, but that every one of them shall be Heir to the other, this is an limited Estate: So as if one of them die without issue, his part shall not Revert, but shall go to the other for it is an implied Remainder, *Broo. Devise fol. 38.*

Sect. 4.
Tail Special.

9. If one give or grant Lands to *J. S.* and *M.* his Wife, and the Heirs [or Heirs Males, or Heirs Females] of their two Bodies begotten; or to the Heirs [or Heirs Males, or Heirs Females] of the Husband begotten on the Wife, or to *J. S.* and *M.* his Wife, and the Heirs he shall beger on the body of his Wife, or to *J. S.* and his Heirs, which he shall have by his Wife *M.* or to *J. S.* and *M.* his Wife, and the Heirs of their two Bodies: All these Limitations, whether it be by Deed, or Will, make Estates in Special Tail, *Litt. Sect. 13, 14, &c. Co. 140. 141.*

10. If Lands be given by Deed to *J. S.* and *M.* his Wife, To have and to hold to the use of the Husband and Wife, and of the Heirs of their two Bodies, this is an Intail in them; otherwise it were if the use were limited to a stranger, Adjudge, *Hil. 6 Car. B. R.*

11. If Lands be given or granted to a Man and Woman unmarried, and the Heirs of their two Bodies; by this they have an Estate-tail, *Co. 1 part. 26. 5 H. 7. 10.* So if Lands be given or granted to the Husband of *M.* and Wife of *K.* and the Heirs of their two Bodies; this is an Estate-tail to them, *Co. super Litt. fol. 20.*

12. If Lands be given to another, and to his Heirs on the Body of such a Woman lawfully begotten; this is an Estate in Special Tail, and begotten shall be intended begotten by the Donee, *Co. on Littl.* 26.

13. Husband and Wife be, and they have issue a Son and Daughter, and the Husband die, and Lands are given to the Wife, and the Heirs of her late Husband on her body begotten; by this the Wife hath estate for life, and the Son a good Estate-tail, and if he die without issue, the Daughter shall have it, *Co. upon Littl.* 16.

14. If Lands be given or granted to the use of a man and his wife for their lives, and after to the use of their next Issue Male to be begotten in Tail, and after to the use of the Husband and Wife, and of the Heirs of their two Bodies begotten, they having then no Issue Male; in this case the Husband and Wife are Tenants in Special Tail executed, and after they have Issue Male, they are Tenants for life; the Remainder to the Son in Tail, the Remainder to them in Special Tail, *Co. upon Littl.* 28.

15. If Lands be given or granted to a man and his wife, and to one Heir of their Bodies lawfully begotten, and to one Heir of the Body of that Heir only; this is an Estate-tail, but it is for so long only, *Co. on Littl.* 22.

16. If Lands be given with ones Daughter or Cousin in Franck-marriage; this is an Estate in Special Tail. See for this *Littlton*, *Self.* 17. *Co. upon age.* *Littl.* 21.

17. If Lands be given by Will to *J. S.* and *M.* his Wife, and the Men-children of their Body begotten, and at this time they have no children, this is an Estate-tail, *Co.* 6. 17.

18. If one have issue, a Son, and die, and Lands are given to the Son, and the Heirs of the Body of his dead Father; this is a good Estate-tail: But it seems in this case the Son shall have it but for life, unless he also be the Issue in Tail to the Father *per formam doni*. So if the gift were to the Father, and the Heirs of the Body of the Son, *Littl. cap.* 30. *Co.* 8. 87. *Dyer* 247. 12 *H.* 4. 1. So if there be Father, Mother, and Son, and the Father die, and the Limitation is by Deed, To the Son and the Heirs of the Body of the Father and Mother; it seems this is a good Estate-tail, *Littl. Self.* 352. So if Lands be given or granted to *J. S.* and the Heirs, that he shall happen to have of his Wife; this is a good Intail to *J. S.* but the Wife hath nothing in it, 12 *Hen.* 4. 1. So if Lands be given or granted to *J. S.* and the Heirs of the Body of his Wife (she being then dead) engendred; this is a good Estate-tail, 12 *H.* 4. 1.

5. What shall be said a good manner of Intail, or not.

19. If one Lease Land to a Woman sole for years, and then she take a Husband, and the Lessor doth release and confirm to them, and the Heirs of his Body, or the Heirs of her Body; these are good Estates in Tail, 6 *Ed.* 3. 19.

20. If one give or grant Land to *J. S.* and *M.* his Wife, and one Heir of his Body lawfully begotten, and one Heir of that Heir only; this is a good Intail, 39 *Aff.* pl. 20.

21. If one give or grant Land to *J. S.* and *M.* his Wife, and their Heirs, and other Heirs of the said *J. S.* If the said Heirs of the said *J. S.* and *M.* issuing shall die without Heir *de se* (that is) of them, &c. this is a good Estate-tail, 5 *Hen.* 5. 6.

22. If one give or grant Land to *J. S.* and the Heirs he shall beget of his first Wife, or the Heirs he shall beget of his Wife; these are good Estates in Tail, albeir there be no Wife at the time. So if it be to *J. S.* and the Heirs of his Flesh, or the Heirs *de se* from him, or to the Heirs that he shall happen to have, or that shall happen to him, *Co.* 1. 20.

Self. 5.

23. If Lands be given or granted to the Husband and Wife, and to the Heirs of the Body of the Husband, the Remainder to the Husband and Wife, and the Heirs of their two Bodies begotten; this Remainder in Special Tail is void, *Co. upon Littl.* 28.

24. The words begotten, and to be begotten, do extend to Issues begotten before or after.

T t t

But

But for all these things, see much more in my Book of *Common Assurances*, fol. 102, 103, 104, 440, 441, 442.

For Answer to this Question, these things are to be known.

6. What Acts such a Tenant in Tail may do to Alien or Bar his own Estate, or nor.

1. Regularly, he that hath this Estate can lawfully grant no longer time, but for his own life: And therefore if he grant by way of Bargain and Sale, indented and enrolled more then that as Fee-simple or Fee-tail, no more will pass, but what he may lawfully grant. But if he make such an Estate in Fee-simple or Fee-tail, by Fine, or Peoffment; this will make a Discontinuance, and raise another Estate, but a tortious one, Co. 1. In *Alton Woods* case, Brob. *Discontinuance* 35.

2. But he that hath an Estate-tail of Land, may levy a Fine, or suffer a Recovery of it, and by this to convey his estate, that the Issues in Tail and all Remainders may be barred, and a good Estate made of the Land to another: And for this see Co. 9. 140. 30. 50. and *Littl.* 371. and in my Book of *Common Assurances*, fol. 41, 42, 43, 44, 24, 25, 26.

3. This Estate may be barred by a Lineal or Colateral Warranty and Assets, Ca. upon *Littl.* 371. See for this in my Book of *Common Assurances*, fol. 190, 191, 192, &c.

4. The Tenant in Tail may make a Lease for three lives, or one and twenty years of the Land, so usually let. See 32 H. 8. 28. and my Book of *Common Assurances*, fol. 277, 278, 279, &c.

5. Tenant in Tail of a Copihold Manor, may grant Copihold Estates according to the Custom of the Manor, as well as any other man. See my Book of *Copihold*.

6. If another man have Right to his Intailed Land, and he grant a Rent-charge out of the same Land to him, for a Release of his Right to the Land; and this will binde the Issues in Tail.

7. If the Tenant in Tail do commit Treason, he doth forfeit his Land Intailed, whether it be in Possession, or in Right only; but otherwise it is in the Case of Felony. See for this Co. upon *Littl.* 372. 392. 34 H. 8. 20.

8. But Regularly, no Grant, Gift, or Charge, made or done by a Tenant in Tail, of or upon the Land Intailed, if it be executed by Deed, will binde or be good longer then for the life of the Tenant in Tail, and will not conclude the Issues; and yet if Tenant in Tail make a Lease for life or years, or grant a Rent-charge out of the Land, and after this he levy a Fine, or suffer a Recovery of the Land; this may make good the Lease, or Charge for all the time, Co. 1. 48 62. upon *Littl.* 373, 383. 24 H. 8. 5.

9. If there be Tenant in Tail in Possession, the Remainder to another in Tail; in this case, he in the Remainder may do for the most part, all that he in the Possession may do, and it will bar him and his Issues when it hapnech, as it will him in the first Estate, and his Issues. But if the Tenant in Tail in Possession, suffer a Recovery; this will utterly bar and overthrow the Remainder Estates, and all that the owners thereof have done upon them. And if both of them make Leases of, or Charges upon the Land, the Leases and Charges of the Tenant in Tail in Possession, shall be preferred before the Leases and Charges of him in Reversion or Remainder, Co. 1. 61.

10. If Tenant in Tail levy a Fine with Proclamation, according to the Statute; it is true, this is a Bar to the Estate-tail; but it is no Bar to him in Reversion or Remainder, if he make his Entry or Claim, or bring his Action within five years after the Estate-tail spend.

And if a Gift be to the eldest Son, and the Heirs of his Body, the Remainder to his Father, and the Heirs of his Body; the Father dieth, the eldest Son levieth a Fine with Proclamations, and die without Issue; by this the second Son is barred, Co. on *Littl.* 372.

And if Tenant in Tail be disseised, or have a Right of Action, and the Tenant of the Land levy a Fine with Proclamations, and five years pass, the Estate-tail is barred. See *Discontinuance*.

For Answer to this, take these Cases.

1. If the Limitation be to the Heirs Males, then the Heirs Females can never enjoy it. And if it be to the Heirs Females, the Heirs Males shall never have it. And therefore if Lands be given to one, and the Heirs Females of his Body, and he have a Son and Daughter, in this case his Daughter, and not his Son, shall have it, Co. on Litt. 25. 164. Litt. sect. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

2. And whatsoever will make his Claim as Heir *per formam doni*, to such an Estate, he must make his Descent by such Heirs, as if it be to Heirs Males, he must derive his Pedigree by Heirs Males, one after another; and so if it be by Heirs Females. And therefore if a Gift be to one, and then Heirs Males of his Body, or to a man and his wife, and the Heirs Males of their Bodies, and he or they hath or have Issue a Daughter, who hath Issue a Son, and die; in this case this Son shall not inherit it, because he cannot make his Descent by Heirs Males, Co. upon Litt. 376. 377. And if Lands be given to one and his Heirs Males of his Body, and he hath two Sons, and die, and his eldest Son enter, and hath Issue a Daughter, and die; in this case the eldest Son's Daughter shall not inherit the Land, but the youngest Brother shall have it: And yet the Daughter is next Heir at Law, and were it Fee-simple, would have it, Litt. sect. 22. 23.

3. If Lands be given to the Husband and Wife, and Heirs of their two Bodies begotten, and they have two Sons, and the eldest die, and leave a Daughter; in this case, she and not the youngest Son, shall have it. So if the Limitation be to a man, and the Heirs of his Body issuing, and he die and have two Sons, and the eldest die, leaving a Daughter; in this case, she and not the other Son, shall inherit the Land, Litt. sect. 23.

4. If Lands be given to one, and the Heirs Males of his Body, the Remainder to him, and the Heirs Females of his Body, and the Donor hath Issue a Son who hath Issue a Daughter, who hath Issue a Son; in this case, the Son is not inheritable to either of these Estates-tail, but the Land shall Revert to the Donor for lack of Heir: For in case where there is no Heir to inherit and take *per formam doni*, as when Issues fail, then the Land shall return to the Donor, or go to him that is to have it after the Estate-tail, determined and spent, Co. upon Litt. 25. Litt. sect. 24. And if the King had given Lands to one and his Heirs Males, which is a Fee-simple in case of a common person, and he die without Heirs Males; the Land (as it seems) shall Revert to the King, *Locals case*.

5. If Lands be given to Husband and Wife, and the Heirs of their two Bodies, or in any such like manner, and the Husband alone levy a Fine, or is attainted of Treason or Felony; in this case, the Issues they have are barred to Claim the Land; For they cannot make themselves Heir to them both, as he must do that will Claim the Land by Inheritance; for the Husband's Blood is corrupted by the Felony, and no man can be Heir to him, Co. 9. 138. Plow 351. Dyer 332. 333. But see more for this in *Disens*.

An Estate-tail after possibility of Issue extinct, is where Lands are given to a man and his wife in Possession or Remainder, and to the Heirs of their two Bodies engendred, or to him and his Heir of the Body of his wife issuing, or in any other manner in Special Tail, and one of them die, having no Issue between them, or the Issue die, living the Father or Mother; so that now there is no Issue to inherit it *per formam doni*. In these cases he or she that doth so survive, hath this Estate, and it is called an Estate-tail after possibility of Issue extinct, Co. 11. 82. 26 Hen. 6. 77. 2 H. 4. 17. Co. 9. 139. 8. 75.

This Estate is an Estate made by the Act of God, and the Law together, and not *ex provisione hominis*, doth much relish of the nature of an Estate-tail, out of which it is derived; and of which, it is the Remain and Residue: And therefore as to the qualities of it, it hath more Privileges than any other Estate for life hath. For first, the Tenant of this Estate of Land is not punishable in Waste. Secondly, If he alien the Land, he in Reversion cannot have a Writ of Entry *in casu consuetudinis*. Thirdly, He shall not be compelled to Attorn. Fourthly, He shall not have need to require aid. Fifthly, No Writ of Intrusion lieth after his death. Sixthly, He may joyne the Mife

Self. 6.

7. What persons shall take and inherit by an Inail upon Gift, or not.

Self. 6.
7. What persons shall take and inherit by an Inail upon Gift, or not.

Self. 72

8. Tail after Possibility of Issue extinct, what.

The nature of this Estate.

in a Writ of Right is a special manner: Seventhly, In an Action brought by or against him, he shall not be named Tenant for life; and all these run in the Privy for if he grant away his Estate, they are all gone: But in respect of the Quantity of the Estate, this Estate hath no privilege above other Estates for life. And therefore if a Tenant of Land by this Estate, make a Feoffment of the Land, he in Reversion may enter upon him for the Forfeiture. 1. If the Fee-simple, or any greater Estate then this descend upon him: this Estate is drowned. 2. If he be impeaded for the Land, he in Reversion shall be received upon his default. 3. If he exchange his Estate with a Tenant for life, it is a good Exchange. 4. A Confirmation by him in Reversion to him, is good to enlarge his Estate. Co. upon Little 18. Co. 9. 139. 18 H. 6. 45. Ed. 3. 12. Little 34.

For Answer to this Question, take these cases.

9. How a Limitation to divers persons, and of divers Estates shall be taken; and what manner of Estates every one shall have.

1. If a Grant or Gift be to a Husband and Wife, and a third person; and to the Heirs of the Husband, and the third person: By this the Wife hath only an Estate for life in a Moyety with her Husband, and the Husband and the third person, Estates in Fee, in Joynutenancy of the rest by Moieties. Dyer 103.

2. If Lands be given to a man and his wife, and the Heirs of the Body of the Husband; by this the Husband hath an Estate in General Tail, and his Wife but an Estate for life. Little 27.

3. If Lands be given to two Sisters [or two Brothers, or to a Brother and a Sister] and to the Heirs of their Bodies begotten; by this they shall have Joynt Estates for lives; so that the Survivor will have all for his life, and after both their deaths, their Heirs have several Inheritances (that is) Estates in General Tail by Moieties in common one with another. So if Lands be given to Father and Son, and the Heirs of their two Bodies engendered, or to two men that have wives, and their wives and the Heirs of their Bodies engendered; in these cases they have Joynt Estates for lives, and after the one Husband and Wife shall have one half, and the other Husband and Wife the other half of the Land in Common. So if it be to a man and two women in Tail, by this all three of them shall take severally; so in other like cases. Cur. 140. 8. 87. 10. 50. 8. Aff. 33. Dyer 149. 17 H. 4. 16. Co. on Little 25.

4. If Lands be given in Tail in the Premises of a Deed, To have and to hold to the Donee and his Heirs; by this Limitation there is made an Estate-tail first, and a Fee-simple upon it. But otherwise it is where the words of Fee-simple be in the Premises, and the words of Intail in the Habendum, for then there is made by it only an Estate-tail according to the Habendum, and no Fee-simple Expectant upon it, Co. 8. 154. Dyer 126. 45. Ed. 3. 19.

5. If Lands be given to a man and the Heirs he shall beget upon the Body of his Wife; by this he hath an Estate-tail, but she hath no Estate at all. But otherwise it is where it is a Gift to a man and his wife, and to the Heirs they shall beget. So if Lands be given to the Husband and Wife, and to the Heirs of the Wife upon her Body, begotten by the Husband; by this the Husband hath but an Estate for life, and the Wife an Estate in Special Tail. So if Lands be given to Husband and Wife, and the Heirs of the Husband, which he shall have by his Wife; by this the Wife hath only an Estate for life, and the Husband an Estate in Tail. Little 26, 18, 29. Co. on Little 26.

6. If Lands be given to a married man, and the wife of another man, and the Heirs of their two Bodies, or in any such wise; by this is made and executed a good Estate-tail presently, and while the Husband and Wife of the Donees live, they hold for life; and if they happen to die, and the Donees to marry and have Issues, then their Issues shall have it according to the Intail, 15 H. 7. 10.

7. If a Gift be made to a man, and to such a woman as shall after be his wife in Tail; this may be a good Estate-tail, but the Wife whom he doth after marry, hath nothing by it. But if a Feoffment be made to the use of a man, and the wife he shall after marry, and after he take a wife; in this case the Wife may happily have a good Estate joyntly with her Husband. Co. 1. 101. Dyer 340.

8. If Lands be given to two men, To have and to hold to the one for life, the Remainder to the other in Fee; this is good, and shall enure according to the Deed. Dyer 126. 50.

9. If

See 8.

2. If one by his Will Devise his Land to his two Daughters, and the Heirs of their Body engendered; by this they are Joynttenants in Tail, and if one of them die before, *Remainder* made, the Survivor will have all the Land, *Dyer* 198. 20. And so it is of Remainders, as it is of Possessions. For if a Remainder be limited to two Brothers in Tail, they shall have several Inheritances by it, *Dyer* 199. And if a Remainder be given by Will to two Sisters, and the Heirs of their two Bodies, to be equally divided; by this they have several Estates-tail, and shall hold the Land in Common, *Co. l. c. 3710*. See more of this in my Book of *Common Assurances*, fol. 114.

An Estate for life, it where one hath any thing for his own, or for anothers life. This is but a Particular Estate derived out of the Inheritance, upon which a Reversion or Remainder may depend. And this some call a Frank-tenement, and is an Estate in some cases descendible to the Heirs, as when Lands are granted to J. S. and his Heirs for the life of J. D. In this case if J. S. die, his Heir shall have it, during the life of J. D. And this is called a Frank-tenement descendible, whereas in these and such like cases of Grants for anothers life, as it doth not so contrived, to be made to the Heirs of the Grantee after his death, it will be an Occupant, and he that can first get into the Possession, after the death of the Tenant for life, shall have the Estate. And this Estate is next in order to an Estate-tail, and may be made without Deed, but not without Livery of Seisin.

He that hath this Estate may charge or grant it, during the time, for which he hath it, and not longer. He may have Fire-boat, Plough-boat, House-boat, &c. (see *House-boots*.) He cannot do Waste upon it, and if he make any Feoffment of the Land a man holdeth for life, he doth forfeit to his Wife that hath this Estate, is not to be endowed of the thirds, nor her Husband that hath it, to be Tenant by the Courteseie, no, though it be an Estate descendible to his Heirs. It will be liable to Execution for the Debt of the owner, but it must be by Extent only, for the Sheriff cannot sell it, as he may a Lease for years. It will not be forfeited by an Outlawry against the owner, as a Lease for years will be. But if the owner commit Felony, or be Outlawed for Felony; by this it will be forfeited. Nor it is forfeited by *Peine Levaine*, nor upon a *Fugam fress*, nor in case of Premunire, nor for departing the Realm without Licence, *Co. l. 140*. *Dyer* 253. *Fines Ley* 23. 39 *Edw. 3*. 25. See the Titles in their places; and see in my Book of *Common Assurances*, chap. 14.

For this matter, take these cases.

1. If a Gift, Grant, or Feoffment, be made to another by Deed in Fee-simple, or Fee-tail, in the intent of it; but there are no words [*Heirs, or Heirs Males*] or other words equivalent in the Deed, such as are in the cases above; this will make only an Estate for life. So if one bargain and sell to another by Deed indented and inrolled, and the word [*Heirs*] be omitted, by this no Estate but for life only is made, *20 H. 6. 33*. *Co. l. 100*.

2. If Lands be given or granted to two *et heridibus*, without the word [*et*], by this they take Estates for their two lives only, *20 H. 6. 33*.

3. If Lands be given or granted by Deed, To have and to hold to him or his Heirs, in the dis-junctive; by this he hath only an Estate for life, *Co. l. 311*.

4. If a Tenant in Fee-simple, or Fee-tail, grant all his Estate without the word Heirs; it seems this is but an Estate for life, in the first case of the Grantee, in the last of the Grantor, *Little. Plow. 361*.

5. If one give or grant to J. S. and to his Successors; this is but for life. But this grant to a Body Politick, will make a Fee-simple, *Co. l. 11* part. 8.

6. If one give or grant to J. S. *et semini suo*, or to J. S. *et heredibus vel prole sua de corpore suo*, or the like; by this is granted no more but an Estate for life, *Co. upon Little. 20*.

7. If one give or grant to J. S. and his Heir (in the singular number) by this he hath only an Estate for life, *Co. upon Little. 8*.

8. If Land be granted to A. and B. for their lives, to the use of C. for his life; this is an Estate for the life of C, if A. and B. so long live, *Dyer* 186.

9. If one have a Son and Daughter, and dieth, and Lands be given to the Daughter, and

10. Estate for life, what.

The nature of it.

Occupant.

House-boat, Hedge-boat, Fire-boat, &c.

What shall be said an Estate for life, and how words of Limitation herein shall be taken.

and the Heirs Females of the Body of her Father : by this the Daughter hath onely an Estate for life, Co. upon Littl. 24.

10. If one give or grant to a Woman *dom sola sua*, or *durant viduitate*, or *quandis se bene gesserit*, or to *J. S.* and *M.* his Wife, during the Coverture, or as long as the Grantee shall dwell in such a house, or so long as he pay ten pound a year, or until he be promoted to a Benefice, or for any such incertain time: In these and all such like cases, if it be of Land, the Lessee hath onely an Estate for life, when Livery of Seisin is made: But if it be of a Rent, or any such like thing that lieth in Grant, there by the Sealing, and Delivery of the Deed he hath the Estate for life. And so it is to be understood of most of the Cases here, Co. on Littl. 41. 234. 238.

11. If one grant Land worth twenty pound a year to *J. S.* till one hundred pound be paid by this, if Livery of Seisin be made, there passeth an Estate for the life of *J. S.* determinable upon the payment of the one hundred pound. But if it be of a thing Certain, as of a Rent of five pound a year till twenty pound paid, this were a Lease for four years, Co. on Littl. 42.

12. If one leased in Fee of Land, make a Lease to another for life, and doth not say for what life, this shall be taken for the life of the Lessee. But if he be seised of an Estate-tail, it shall be taken for the life of the Lessor: And so if he have onely an Estate for his own life, Co. on Littl. 42. 183.

13. If one Devise by Will to *A.* for life, the Remainder to *B.* and *C.* his Wife, and after their decease to their Children, and they have Children at the time of the Devise, by this *B.* and *C.* shall take for their lives, and their Children they then had shall have it for their lives after them, Co. 64. 6. 114. W. ob. 100. 11. (100. 11. 100.)

14. If a Gift or Grant be to *J. S.* and doth not say for what time, nor doth limit any Estate, this maketh an Estate for life of the Grantee, Co. 85. Dyer 300. Co. 86.

15. If one have a Lease for anothers life, and be in Reversion confirm to him for his own life, by this he hath for his own life, D. & S. 20.

16. If one grant to *J. S.* and to his Heirs and Assigns for his life, and for one year over, this is but an Estate for his life, Co. 111. 39. E. 43. 25.

17. If a Grant be to two & *sui*, or to two & *assignis sui*, this is but an Estate for life, Co. 4. 29.

18. If one grant to *J. S.* and *M.* his Wife, and to the men-children of their Bodies begotten; this maketh an Estate for life to the Parents, and those children they then have, Co. 6. 17.

19. If one grant his Land to another to pay his debts, and say not for what time, this is an Estate for life of the Grantee, Co. 8. 96.

20. If Tenant for life be the Remainder to an Infant, and they two joyn in a Fine to a stranger of this Land, and after the Infant doth Reverse it for Minority; yet the stranger hath an Estate left, during the life of Tenant for life, Co. 1. 76.

21. If a Lease be made to *A.* for life, the Remainder to *B.* in Tail, the Remainder to *C.* in fee, *in forma predicta*; by this it is said *C.* hath onely an Estate for life, Dyer 15. 81. Co. on Littl. 42.

22. If a Feoffment be made to two & *hereditis sui*, to the use of the Feoffor and *J. S.* and say no more; it seems that by this the Feoffor and *J. S.* have onely Estates for their lives, Dyer 169. Ch. Just. Trin. 14. 1st. B. R. And so of other Declarations of Uses, Co. on Littl. 42.

23. If one grant that if *A.* be not paid yearly for his life twenty pound a year, he shall distrain for it; this is a good Grant of it for life, Co. on Littl. 147. And if one grant an Annuity to another, and his Heirs; but the Grantor doth not say for him and his Heirs, nor is it chargeable upon any Land; it is said this shall be taken for a Grant onely for the life of the Grantor, 21 H. 7. 4. Dyer 344.

24. If one grant to *J. S.* Common in his Land, when he doth put in his own Beasts there, or Estovers when he comes to his Manor; this is for life of the Grantee, 17 Aff. 117.

Dower hath two significations, First, That which the Wife bringeth to her Husband in marriage: Secondly, (and so it is most commonly in this place taken) A Portion

Portion of the Husbands Lands given to the Wife, after his death, for the Term of her life; which is in five manners, 1. By the Common Law, and then it is a third part of all his Fee-simple Land. 2. By Custom, and then it is a Moyety, or all his Land, as the Custom is. 3. *Ex assensu patris*, and then it is so, as is agreed upon. 4. *Ad osium Ecclesie*, and then it is of as much as is agreed. 5. *De la plus Beale*, and then it is of a third part onely. *Terms of the Law. Littleton, Tit. Dower.*

Dower by the Common Law is a third part of all the Fee-simple, and Fee-tail Lands of the Husband, which the Law doth give to the Wife after her Husbands death, for her livelihood. And this she may not enter, and take her self; but the Heir, or he that hath the Land, may assign it to her by Deed in the Country: Or if it be not done, but she be denied, or delayed, and she have no part of it, she may have her Writ of Dower, *unde nihil habet*; or if she have received part she may have her Writ of Right, of Dower, for the rest: And by these means she shall recover her Right.

Dower by Custom, is a Portion that the Wife is to have of the Husbands Lands after his death, by the Custom of some place: as in *Burrough-English*, all, in *Gavelkind*, a Moyety; and this she must take and enter to, according to the Custom of the place, *Perk. sect. 435, 436.*

Dower *ad osium Ecclesie*, is where one of full age is seised in Fee-simple, and about to be married, when he cometh to the door of the Church to be married, doth there after affiancing between them, endow his Wife of all, or part of his Land, and openly shew the quantity and certainty of it: In this case the Wife after the death of her Husband, may enter into the said quantity of Land assigned to her without any other Assignment, *Perk. sect. 437, &c.*

Dower *ex assensu patris*, is where the Father is seised of Tenements in Fee; and his Son and Heir apparent (when he is to be married by a Deed of his Fathers consent also) endow his Wife at the door of the Church, of part of his Fathers Lands, and declare the certain quantities: In this case also, the Wife after the death of her Husband, may enter into the Land assigned to her, without any other Assignment, *Perk. sect. 441.*

Dower *de la plus beale*, is in case where a man seised of twenty Acres, ten in Capite, and ten in Socage, held of several Lords, and hath issue a Son, within age and die, and the Lord of whom the Land in *capite* is held, enter into that Land as Gardein, and the Mother of the Issue enter into the rest as Gardein in Socage; and she brings Dower against the Gardein in Chivalry. In this case the Gardein in Chivalry may shew all this matter, and pray that Judgment may be given, that she shall endow her self *De la plus beale*, i. e. that she may take her whole Dower out of that Land; and after such a Judgment given, she may in the presence of her Neighbors, endow her self accordingly; and this she shall hold for her life, *Perk. sect. 450.*

And if in the cases before of Dower *Ex assensu patris*, & *ad osium ecclesie*, the Wife after the death of the Husband do enter into the Land assigned her, and so agree to it, then she is concluded to claim any other Dower by the Common Law of any of the Lands of her Husband; but if she will refuse such Dower, then she may be endowed according to the course of the Common Law, *English Lawyer*.

In all cases where the Wife shall be endowed, these things must necessarily concur.

1. There must be a good marriage.
2. There must be a Seisin or Possession in Deed, or in Law in the Husband, of that thing whereof she demandeth Dower.
3. The Frank-tenement and Inheritance must be *Simple and Several* in the Husband, at some time, during his life.
4. The Husband must be dead when she doth demand her Dower.
5. The Husband must be seised of an Estate of Fee-simple or Fee-tail, at the least, *Plow. 373. Co. 20. 49.*

The kinds of it.

Sec. 10. Ad osium Ecclesie, what.

Ex assensu Patris, what.

De la plus Beale.

12. In what case, and of what Inheritance and Possession of the Husband, the Wife shall have Dower after the Husbands death, or not.

If the Husband be Sole seised, during the Coverture of any Lands or Tenements in Fee-simple, or of such an Estate-tail, as by possibility the issue had between the Husband and Wife, during the Coverture, might or may inherit it, though they have no issue, yet the Wife shall be endowed, and though the Estate-tail be determined, yet the Wife shall be endowed, *Co. 1 part. upon Littl. 35. Co. 8. 34. Perk. Sect. 302.*

Per metas & Bendas.

If the Husband be seised of Land in Common, with others, the Wife shall be endowed of it; but here the Judgment shall not be, That she shall hold *per metas & bendas* in several, as in other cases upon the Writ of Dower, but she shall hold in Common her part, with the Tenants in Common, *F. N. B. 149.*

If one seised in Fee, make a Lease for years, and after take a Wife, and die, she shall be endowed; but she must stay the end of the Lease for Execution. If a Lease be made for years, the Remainder to *B.* for life, and after to the right Heirs of *B.* and after *B.* takes a Wife, and dies, during the years; in this case his Wife shall have Dower, but she may not enjoy it, till the Lease for years be ended. So if a Lease be made to *J. S.* for life the remainder to a stranger for years, the Remainder to *J. S.* in Fee, and *J. S.* take a Wife, his Wife shall have Dower; but she cannot have the Execution of it, till the Lease for years be ended; and if there be any Rent reserved, it seems she shall have her thirds of that in the *interim.*

If Lands be given to *A.* and *B.* in Special Tail, the Remainder to *A.* in General Tail; and his Wife die without issue, and he take a second Wife, and die, this second Wife shall be endowed, *Broo. 372. Co. upon Littl. 321. Co. 10. 46. Perk. Sect. 343.*

Election.

If the Husband after the Coverture exchange Land, his Wife may have Dower of the Land given, or the Land taken in exchange at her Election, but she cannot have Dower out of both. So if a Lord purchase the Tenancy after the Coverture, she may chuse to be endowed of the Tenancy or Signiory: So if a Husband were seised in Fee of a Rent, and after purchase the Land out of which the Rent did issue, she may chuse to have her Dower out of the Land, or out of the Rent, *F. N. B. 149. Perk. 343.*

If a Tenant in Tail that hath a Wife, die without issue, so that the Land Revert to the Donor; yet his Wife shall be endowed, *F. N. B. 149. Co. 8. 34.*

If one Devise his Land for payment of his Debts, or until his Debts be paid, to his Executors, and die, and his Heir take a Wife, and after the Debts are paid, or the Heir die before the Debts: After the Debts paid, she shall recover and have her Dower in this Land, *Co. 8. 96. 36.*

Sec. 11.

If a Father die seised of Land, and his Son having a Wife die before any actual Entry made into the Land, yet the Wife shall be endowed upon this possession in Law. And so is the Law, if the Father be a Disseisor and die seised, and his Son enter not, *4 H. 7. 1. 1 H. 7. 17. Littl. Sect. 448. 681.*

If I make a Feoffment to *J. S.* on Condition, That if I pay him ten pound such a day, the Feoffment to be void, and *J. S.* take a Wife, and I fail to pay the money at the day, in this case his Wife will have Dower, and *J. S.* and *J.* cannot defeat her of it by Agreement, to accept the money after, *Perk. Sect. 392. Kitch. 161.*

If the Kings Tenant die, and his Son die before any Entry made, or Livery sued, yet the Wife of the Son shall be endowed; and so where the Son entreteth and dieth before Livery sued, and Office found, and so of any Seison in Law, for which *vide Franch. tenement, 1 H. 7. 17. 17 Ed. 2. 17.*

If one give Lands to *J. S.* and the Heirs, that he shall beget on the Body of *M. S.* his Wife, and he die, his Wife shall be endowed, *Littl. Sect. 53.*

If Lands be given to *A.* and to the right Heirs of *A.* and *A.* take a Wife, and die, she shall be endowed of this Land, *Perk. 337. 338.*

If a Lord take a Wife, and after his Tenant die without Heir, so that the Land Escheat, and a stranger abate, and the Lord die before this Entry; yet it seems his Wife shall be endowed of the Tenancy, because she hath a possession in Law; So

So if a Lease be made for life, the Remainder to *J. S.* in Fee, and *J. S.* take a Wife, and the Lessee for life die, and a Stranger enter, and after *J. S.* die, it seems his Wife shall be endowed; *Perk. Sess. 372. 373.*

If a Tenant in Tail Covenant to stand seised to the use of himself for life, with the Remainder over, and the Tenant in Tail die; his Wife shall be endowed notwithstanding this Covenant for *Nihil operatur*, Co. 2. 52.

If a Feoffment be made on Condition to refoff, and the Feoffee take a Wife, and die, she shall have Dower till the Reinfcoffment be made, or an Entry for Forfeiture: So if a Tenant in Tail grant *Totum statum suum*, or bargain and sell his Land, and the Grantee or Bargainee, their Wives shall hold their Dower till the Issue in Tail our them: So of other Defeasible Estates; Co. 2. 59, 384. 96. *Perk. Sess. 420. 303.*

Sess. 12.

If there be a Lord and a Feme-tenant, and the Lord inter-marry with his Tenant, and he die, the Wife shall be endowed of a third part of the Services by way of a Retainer.

A. is a Tenant in Tail, the Remainder to *B.* in Tail, the Remainder to *A.* in Fee, *A.* bargain and sell the Land to *C.* and his Wife; now in this case the Wife of the Bargainee shall have Dower determinable upon the death of the Tenant in Tail, Co. 2. 96.

If a Tenant in Tail commit Treason, and the King have his Land, and grant it away, and the Grantee die, his Wife will have Dower; and so the Wives of the Heirs, as long as any Issue live of the Tenants in Tail, *Plow. 557.*

If the Tenant after the Covelure alien in Mortmain, and the Lord enter, and then the Tenant die; his Wife shall be endowed of the Tenancy. *Perk. Sess. 390.*

So also it seems, if the Tenant *ceffe*, and the Lord by a *Cessavit* recover the Tenancy, and the Tenant die; yet the Wife of the Tenant shall be endowed. *Idem.*

If a Rent be granted to one in Fee, and the Grantee accept the grant, and take a Wife, and at the day of payment the Tenant of the Land tender the Rent, and the Grantee refuse it, and doth not take Seisin, and die; yet his Wife (as it seems) shall be endowed of it, 11 H. 4. 88. *Perk. Sess. 373.*

If the Baron be seised of a Rent, and after Release it, to the *Terry* Tenant; yet the Wife shall have her Dower out of it, Co. 7. 38.

Sess. 13.

If a Man alien the Land, he is seised of; after he hath a Wife, and after Disseise the Alienee, and the Alienee bring an *Affise* and recover the Land, in this case the Wife shall notwithstanding be endowed of the Possession that her Husband had before the Alienation, 1 H. 7. 19.

If there be Grand-father, Father and Son, and the Grand-father hold of the King, and the Father take a Wife, and the Grand-father die, and the Father have Issue, and die before Office found, or any Entry made, and after an Office is found of this, in this case the Wife of the Father shall be endowed. *Statute of 1 H. 7. 19.*

If a Rent be disceded to the Husband, and he die before any day of payment happen; so that he is never seised of it, yet his Wife shall be endowed of this Rent, *Statute of 1 H. 7. 19.*

But if One marry his Concubine, in this case there were never any good marriage: If the Husband had never any possession in Fact, or in Law, if the French tenements were never found of seised in the Husband, during the Covelure; if the Baron be not yet dead; if either of these things be in the case, the Wife shall not be endowed. And the Exception, That she was not married, is called *Concubinage*. For all which, see the *Examples*, *Plow. 373.* Co. 10. 49. *Dyer*

Concubinage; what.

If a Tenant in Special Tail, (i. e.) to him and his wife, and the Heirs of her Body begotten by him, and she die, and he take another wife, and die; this second wife shall have her Dower out of this Land, 6 H. 4. 88. 38. *Dyer*

If the Husband held his Land in Joyntenancy with another, and die, his wife shall have no Dower of this Land, *Co. 3. 27. Littl. Sess. 43.*

So if a Tenant in General Tail make a Feoffment, and take back an Estate to him and his wife, and the Heirs of their two Bodies, and they have issue, and the wife dieth, and he taketh another wife, and dieth; in this case the wife shall not be endowed, *Dyer 41. 41 Ed. 3. 30.*

SeB. 14.

If a Tenant in Tail discontinue in Fee, and after take a wife, and then the Discontinuer maketh Feoffment in Fee to the Discontinuer, or is disseised by the Discontinuer and dieth; in this case the wife of the Tenant in Tail shall not have Dower, *F. N. B. 149. Dyer 41.*

If one make a Gift in Tail, rendering Rent to him and his Heirs, and after take a wife and die, and after his death the Tenant in Tail, dieth without Issue, and the Land doth Revert; in this case the wife shall not have Dower either of the Rent, for that is determined; or of the Land, for her Husband was not seised of it, during the Coverture.

And so it is, if the Gift in Tail be on Condition, and after the Donors death, the Condition is broken; neither should she have had Dower of the Rent, if the Estate had continued. *Park. Sess. 317. Co. upon Littl. 3 part. fol. 32.*

If a man make a Lease for life, rendering Rent, and after take a wife, and die, and after the Lessee for life die; in this case the wife shall have no Dower, either of the Land, or of the Rent: So neither could she have had, if the Tenant for life had lived Dower of the Rent or Reversion, *Co. 3. 96.*

If a man Lease for life, rendering Rent, and after take a wife, and die; his wife shall not be endowed of this Rent, neither shall she ever have any Dower out of the Land, if the Tenant for life do not die, during her life, *Bro. 372.*

SeB. 15.

If one be disseised, and after take a wife, and die before Entry, his wife shall not be endowed of that Land.

So if one die seised, and a stranger abate, and the Heir die before his re-entry, his wife shall not be endowed.

So if a Tenant cease in doing his Services, or commit Waste, and the Lord die before he recover the Land; his wife shall not be endowed of this Land.

So upon a Condition broken, if the Husband die before he have entered, his wife shall not have any Dower of this Land.

So if one Exchange his Land with another, for other Land, and then take a wife, and die before any Entry made into the Land, taken by him in Exchange; here the wife shall not have Dower of this Land.

So if a man have recovered Land in any Real Action, and before any Entry at Execution he die; here his wife shall never be endowed of this Land, *Bro. 115. Littl. Sess. 55. Co. 2. 59. 56. Park. Sess. 366, 367. Hen. 7. 17. Co. 6. 24. 21 Ed. 4. 86.*

If the Husband be Tenant for life, the Remainder for life to another, the Remainder in Fee to the Husband, and he die; here in this case the wife shall not have Dower, for the Franchisement and Inheritance is divided by the Intervient Estate for life, *Co. 1. 112.*

If a Lease be made to one and his Heirs, during the life of another, and this Lessee die; his wife shall not be endowed upon such an Estate of her Husband, for this is no greater Estate, than an Estate for life.

So the wife of a Lessee for life or years, though a thousand years, shall not be endowed, *Plow. 556. Co. 10. 91.*

If Lands be conveyed to A. and B. and the Heirs of A. and A. take a wife, and die, his wife shall not have any Dower out of this Land, *Bro. 130. 207.*

If the Husbands Estate be such, as by no possibility, the Issue begotten by him on his wife, may inherit in Heir to them; in this case, the wife shall not have Dower: As if one give Lands to one, and the Heirs he shall beget on his present wife, and she die and he take another wife; she shall not have Dower of this Land, *Littl. Sess. 53.*

The

The Wife of a Copiholder in Fee, or in Tail, shall not have Dower, unless it be by a Special Custom of the place, *Co. 4. 21.*

If a Copihold become void after the Coverture, and fall into the Lords, her Husbands hands; and he grant a new Estate, according to the Custom of his Manor; in this case the wife shall have no Dower out of this Copihold; and this because of the Custom, which is Paramount, her Title, *Co. 4. 24.*

See 16.

If one Exchange Lands before the Coverture, and after his Land given, is recovered; and he recovereth over (as he may) his own Land again; in this case the wife shall have no Dower out of the Land recovered from her Husband. So upon a Recovery *per ratas*, between Parteners, *Park. fol. 309.*

If an Heir after Office found, enter and intrude upon the possession of the King, and after die before he sue Livery; in this case the wife shall not have Dower. *Co. lib. Inf. 1. part. fol. 30.* but the Husband of an Heir Female, in this case shall be Tenant by the Courtesie, *F. N. B. 149. Pr. Reg. c. 22.*

If a Man have two Wives, or a Woman two Husbands, the second wife shall not have Dower, in the first case; nor the wife of the second Husband, in the last case: For *non valent nuptia* the second marriage is not good, but void *ab initio*; but *contra* when there was onely a Precontract before; for then they are onely voidable, and therefore till they are avoided, the marriage is good, and the wife dowable, *Park. fol. 304. 305.*

See 17.

If there be Grand-father, Father, and Son, and the Grand-father be seised in Fee, and take a wife and die, and the Father enter, and take a wife and die, and the Son marry his Grand-mother of a third part; the wife of the Father shall never have any Dower out of this third part which the Grand-mother hath. *Contra* if the Grand-father had made a Feoffment of the Land to the Father. And if in this case the wife of the Father be first endowed of the whole, and after the Grand-mother sue the Mother, and recover of her when the Grand-mother dies, the Mother may enter again, and retain that she had before, *Dow de dote post non debet. Co. lib. Inf. 1. part. fol. 314. Park. fol. 315, 316. F. N. B. 149. Co. 4. 121.*

If a Man have a Title of Action to recover any Land, and after he enter and Disseise the *Tenans*, and die seised, and his Heir enter; in this case his wife shall not have Dower, because the Heir is remitted, and the Estate the Baron had, is determined, *F. N. B. 149.*

If a Joyntenant make a Feoffment of his part, and die; his wife shall not have Dower out of it, *F. N. B. 150.*

If the Husband or Wife be not nine years old at the time of his death, the wife shall have no Dower, *Dyrr. 313. Litt. fol. 36. F. N. B. 149.*

If there shall be no good marriage in the Case, the wife shall have no Dower; and if she demand it, this Plea may be given, *Non quia accipit in loyal Matrimonio*: And this was used to be tried by the Certificate of the Bishop, *Co. 49. Dyrr. 313. 314.*

If the Wife be an Alien Born, and not made Denizen by Parliament, it seems she shall have no Dower. So if the Husband be an Alien, *Co. lib. Inf. 1. part. fol. 314.*

If Lands be given to two men, and the Heirs of their two Bodies begotten, and one of them take a wife, and die; she shall not be endowed, *Co. lib. Inf. 1. part. fol. 30.*

If the Heir of the Kings Treasures shall die of him by Knights Service in capite, after Office found, intrude; the wife shall not be endowed, *Co. upon Litt. fol. 30.*

If Lands be to the Husband and Wife and the Heirs of their Bodies, and he have issue; and then she die; and he have another wife, and then he make a Feoffment, and take back an Estate in Fee, and die; the wife shall not have Dower of this, *Co. lib. Inf. 1. part. fol. 30.*

If a Man have an Estate for life; the Remainder to another in Tail; the

Remainder to his own right Heir; in this case his wife shall have no Dower, 40 Ed. 3. 15.

If a Tenant for his own life make a Lease to him in Reversion, or Remainder in Fee or Fee-tail for the life of him in Reversion or Remainder, Now he is not by this so seised of the Freehold and Inheritance, as to make his wife dowerable, *See Dower* 95. *Co. lib. Inst. 1 part, fol. 43.*

Sett. 18.
23. Of what things the wife shall have Dower, or not.

The Wife shall have Dower almost of all things of profit, of which the Husband may have an Inheritance, that by possibility may come to the issue between them. And therefore she shall be endowed of Messuages, Houses, Lands, Meadows, Pastures, Rent, Commons, Advowsons, Reversions, Seigniories, Towns, Iles, Woods, Old Mines of Coals, Predial Tithes, Villains, Estovers that are certain, Wind-Mills, Water-Mills, Offices, Chambers, Rectories, Fairs, Markes, Velvete of the Land or Ground, *Perk. sett. 3.*

The Wife of a Donor shall be endowed of a Rent, reserved upon the Gift in Tail. See more above. *Perk. sett. 348. Co. super Littl. fol. 144. F. N. B. 148, 149, 150. Plow. 40.*

But of such things as are of no value or certainty, the wife shall not have Dower, as Common, and Estovers without number, Annuity, Homage, nor of matters of pleasure onely, nor of a Castle, nor a House that is *Caput Baronie* or *Comitatus*. If they be for the defence and honor of the Kingdom, else she may be endowed of them, *Co. lib. Inst. 1 part. 31. 9 H. 7. 4. Perk. Sett. 342.*

The Wife shall not be endowed of a Rent reserved by the Baron, on a Lease for years or life. See more *Supra*, *Perk. sett. 348.*

The Husband having onely a Seisin for an instant, as *Cy que Use*, and where a Joyntenant makes a Feoffment, the wife shall not be endowed of this, *Co. lib. Inst. 1 part. fol. 31, 32.*

If the Freehold of Rents, Common, &c. be suspended and so continue, during the Coverture, she shall not be endowed of them; but a Release after the Coverture will not bar the wife. *Sett. 89.*

Sett. 19.
14. Assignment of Dower.

Where a Woman hath title to have Dower, in some cases there is no need of any Assignment of it to her, but she may enter and take it without Assignment. In most cases, Assignment must be made to her, and she cannot take it without Assignment; and this is sometimes before an Action brought, and sometimes after Action brought, and sometimes by the Heir, sometimes by the Alienor or Purchaser, sometimes by the King, sometimes by the Gardein, sometimes by a Disseisor or Abator, and sometimes by a Sheriff or Escheator. And this hath favor in Law, and therefore if the Heir assigned Dower to the Feme of the Ancestor, where she is not dowerable, yet she shall hold in Dower. See for *Assignment of Dower, the Woman Lawyer*, 243.

In case of Dower *De lapide Brach*, the Wife may assign her Dower to herself by Metes and Bounds before her Neighbors, *ut supra*, *Littl. sett. 43.*

In all cases where the Certainty appeareth, what Lands or Tenements the wife shall have for her Dower, there the wife may enter after the death of her husband, without any Assignment to her. As where the wife is to have all her husband's Lands, by some Custom; and where she is endowed *ex assensu patris*, or *Ad personam ecclesie*, vide *supra*. *Littl. sett. 43.*

If she have a Judgment, and the Sheriff offer her the thirds, by Metes and Bounds, and she then refuse; yet she may afterwards enter her self, and take it when she will, *Dyer 178.*

In all such cases wherein the Certainty doth not appear, what the wife is to have for her Dower. As when she is to have a Mowery by the Custom, or a third part by the Common Law.

In such cases her Dower must be assigned to her before she can enter into it, and if she enters before, and after sue for her Dower, this may for that time be pleaded in Bar.

Sett. 19.
14. Assignment of Dower.
In what case the wife may assign Dower to her self, or enter without Assignment, or not.

Bar to her, that she hath entred into part of the Land, which will be a Bar, so long as she holdeth the Possession, *List. sect. 43. Co. lib. Inst. 1 part. fol. 22. 6. Dyer 36.*

If the Wife have obtained a Judgment to recover her Dower, yet she may not enter, and take it her self, but must wait till Execution, *Plow 529.*

If a Feme disseise the Terre-Tenant, she cannot endow her self by way of Retainer, *Dyer 343.*

If one seised of three shillings Rent, charge in Fee, and take a wife and die, she cannot take this Rent, nor Distrain for it before Assignment. And if she recover it in a Writ of Dower, yet she cannot distrain before Execution.

But in other cases where one demands a thing in Certain, Land, or Rent, the Demandant after Judgment, may enter or distrain before any Seisin, delivered him by the Sheriff, upon an *Habere facias Seisnam*, 10 Ed. 3. 12. *Park. sect. 416. Co. lib. Inst. 1 part. fol. 34.*

Where the Wife of a Tenant in Common, demands a third part of a Moyety, yet after Judgment she cannot enter until the Sheriff deliver her a third part, though the Delivery of the Sheriff do not alter the case.

To make a perfect Assignment of Dower, these things are required.

1. Regularly the Assignment must be Certain.

2. It must be either of some part of the Land, whereof she is dowable, or of a Rent, or some other profit issuing out of the same, either before Judgment or after.

3. It must be absolute, not subject to Condition or Limitation.

4. It must be made by him that is Tenant of the Land.

5. If it be by a Disseisor, it must be without Covin.

6. And it must not be prejudicial to the Disseisee.

7. It must be by him, against whom the Writ may be brought.

8. The Guardian in Chivalry may do it, so the Heir before the Guardian enter; as in the cases beneath, *Co. lib. Inst. 1 part. fol. 34. 35.*

If the Father endow the Wife of his Son and Heir at marriage, this is Assignment is enough, as before. See *Dower as assensu patris*. And this is a good Assignment without any other.

And if the Heir of the Husband assign the Woman her Dower (as he may) by a Deed in the Countrey, and she accept of it, this is good, and will bar her from demanding any Dower by Writ, *Co. 3. 27. Park. sect. 493.*

If there be a Lord and Woman Tenant, and they intermarry, and he die, she may endow her self by a third part of the Services, by way of Retainer, *Park. sect. 303.*

417. If a Woman have a Right of Dower to Land, that is in the hands of two or three

Joynrenters, and one of them endow her by Assignment of part of the Land, it self for her Dower, this will binde the rest. But if it be of a Rent out of the

Land, it will not binde the rest. *Park. sect. 396. Co. 3. 61.*

If a Disseisor or Abator, do assign Dower to the wife that hath Title of Dower, and it be not by Covin (as in the case beneath) it is good and lawful, and will binde

the party that hath right. But then it must be of the Land it self, and not anything out of the Land, in lieu of it, 44 Edw. 3. 46. *Co. 3. 78. Co. lib. Inst. 1 part. fol. 34.*

If a Man seised of Land in the right of his wife, or jointly with his wife, assign a third part to a woman, that hath right of Dower, this is a good and lawful

Assignment, and will binde his wife after his death, *Park. sect. 399. Co. 3. 61.*

If there be two or three several Feoffees of Land, to which a woman hath Title of Dower, and one of them assign Dower for the whole Land, it is good, and she cannot demand Dower of the rest, *Park. sect. 78.*

The Guardian in Chivalry may assign Dower to a Woman, and it is good, and though the Woman have no right to Dower, yet it seems to be good till it be avoided:

See 20.
What shall be
said a good
Assignment of
Dower.
In respect of
the person that
doth assign it.

See 20.
What shall be
said a good
Assignment of
Dower.
In respect of
the person that
doth assign it.

ed: And he may assign a Rent out of the Lands he hath in Ward in Recompence, and it is good, *Fitz. Dower* 75. 155. *Washb.* 2.

It seems Assignment of Dower by any one that hath a Freehold, against whom an Action of Dower may be brought, is good; and with the Wives acceptance will bar her; and therefore if it be done by a Tenant for life, it seems to be good, *Perk. Sess.* 404.

If the King have the Wardship of the Land, he may endow the Wife by Assignment, upon or without a Petition, in *Chancery*; and if he do so before she reach the full age of the Heir; it is good and lawful, and will binde the Heir, *1 Ed. 4. c. 11. Ca. 16. Dyer* 228.

If the Husband make a Feoffment of divers Parcels to divers persons, and die, and leave some to descend, and the Heir endow the wife of some of the Lands descended, in full satisfaction of all she is to have out of all the Land; this is a good Assignment for all the rest of the Lands, and the Feoffees may take advantage of it, *Ca. 116. Just. 1 part. fol. 351.*

The Sheriff or Coroner upon a Writ and Authority given, and sent to them, may assign Dower; and if they do so, it is good, and will binde all parties, *Perk. Sess.* 414.

If the Wife be married again to another Husband, and Assignment be made to him and his wife, and accept it; it seems this is good, and shall binde the wife. *Bar. Quart. Fitz. Dower.* 35 *Bail.* *Dower* 177. 38 *Ed. 4. Dower* 12 *term.*

An Heir, or any other that hath a Sole, and lawful right to Land; out of which a Woman may have Dower may endow her of a Rent, Common, or Profit issuing out of the same Land, and if she accept it, it will bar her of any other Dower, *Perk. Sess.* 405.

But the Assignment of Parcel of the same thing, is the most proper Assignment; and that any one may do that may assign, and it matters not whether she have a third part, for if she accept it, it is good enough, *Washb.* 2.

So neither is it material what part of the Capital House, or for if she accept any other part, it is sufficient, *Washb.* 2.

So if she accept a Chamber, it is good, *Dyer* 362. *Washb.* 2.

If a man seized of two Acres in one County, the one of one Acre with Warranty, and die, and his wife is endowed by the Heir, out of the other Acre, for the whole; now this is a good Assignment to bar her of any Dower in the other Acre, *Washb.* 2.

So if the Heir make a Lease of part, and endow her for the whole out of that, *Washb.* 2.

For the most part, it must be assigned by Mors and Bouds; and when it is so, it is a good Assignment, *Perk. Sess.* 411.

If the Wife be endowed by Assignment of the third part of a Mill or a Bailiwick, it seems this is good; but the best Assignment of a Mill, or the like, is the whole every third month; and of Fishes, the third Cock; and of an Adowson, the third Presentment of a Villain; the endowment shall be the third day, week, or months work; of a Dove-house or Fishing, the third part of the year; and of divers other Things, *Perk. Sess.* 415. *Good.* 26. 35 *How.* 7. *Ca. 116. Just. 1 part.*

Any Assignment of Dower, may be good without writing, or Livery of Seisin, *Ca. 116. Just. 1 part. fol. 355.*

If it be with a Condition annexed, it is good (as it seems) but the Condition void; *By two Judges.* *Mish.* 97. 38 *Ed. 4.*

If a man be seized of the Land, of which a wife hath right to have Dower, and the wife, or she and another discontinue the Tenure, and then the wife is assigned her Dower by one that comes to the Land from her, or from her and the other Disfeisor; this is no good Assignment, but the Tenure Tenant may avoid it, *Perk. Sess.* 404. *Ca. 9. 16.*

Assignment of Dower by a Gardain is so good to one that hath Title, and not good, *Perk. Sess.* 404.

* *Sess.* 21.
In respect of
the person to
whom the
Assignment is
made.
In respect of
the thing
assigned.

In respect of
the manner of
the Assign-
ment.

ca. 116. 2.
ed. Just. 1. 1. 1.
boog. 1. 1. 1.
30. 1. 1. 1. 1. 1.
1. 1. 1. 1. 1. 1.
1. 1. 1. 1. 1. 1.
1. 1. 1. 1. 1. 1.

Sess. 12.
15. What shall
be said to be
no good Af-
signment or
Dower.
In respect of
the person that
doth it.

So an Aſſignment by a Leſſee for years, Tenant by Statute or Elegit, *Perk. ſett.* 404. *Co. 9. 16.*

If the Husband make ſeveral Feoffments of ſeveral Parcels, and die, and one Feoffee aſſign Dower to the wife, of Parcel of Land in ſatisfaction of all her Dower in all the Lands of the other Feoffees; this will not bar her of her Dower in the reſt, neither may they plead it in Bar to her: But if the Heir aſſign Dower ſo, *contra*. See above, *Co. lib. Inſt. 1 part. fol. 35.*

If an Intruder or Diſſeiſor endow a Feme of a Rent, or profit out of the Land, it is not good, *Perk. ſett.* 349. *Co. 2. 67.*

In reſpect of the thing which is aſſigned.

So if one Joyntenant aſſign a Rent out of the Land, in which the Wife hath Title of Dower; this is no good Aſſignment to binde his Companions, neither may their Cattle be diſtrained for ſuch a Rent, *Perk. ſett.* 397.

If the Demand be of divers Manors, and the Sheriff one Manor to her, for her Dower; this is good. *12 Ed. 4. 1.*

If other Lands be aſſigned to her in recompence of her Dower, or a Rent iſſuing out of other Land; this is no good Aſſignment, neither will it binde her, though ſhe accept it. But of a Rent out of the ſame Land *contra*; and that Rent may be aſſigned by word; and if it be after Judgement, in a *Scire facias*, it may be pleaded, *Perk. ſett.* 407.

In reſpect of the manner of the Aſſignment.

If a Woman that hath Title of Dower, cauſe the *Tenre* Tenant to be Diſſeiſed of purpoſe, that he may endow her either upon an Action brought, or by Agreement; this is no good Aſſignment made by him, thus by *Covin. Non facias malum ut inde fiat bonum*. *Dyer* 266. *Perk. ſett.* 410. *Co. 6. 58. 3. 78.*

If the Husband were Tenant in Common, the Aſſignment muſt not be by Metes and Bounds; for if it be, it is not good: But the Woman muſt hold in Common with the other Tenants in Common.

So if ſhe be endowed of Land that doth belong to Coparceners: But if they make a Partition firſt, then the Aſſignment may be, *Per metes & bundas*, *Perk. ſett.* 411; 412.

If an Heir enter and aſſign to his Mother a third part, to hold with him in Common; this is not a good manner of Aſſignment, *Perk. ſett.* 413.

So if a Sheriff do aſſign Dower, and do not do it in Severalty, *Per metes & bundas*; it is not good, if it may ſo be done, *Perk. ſett.* 414.

If the Husband be attainted of High, or of Petit Treſon (as it ſeems) his wife ſhall loſe her Dower; and though he had made a Feoffment of it to a ſtranger, before the Faſt done, yet ſhe is barred, and cannot recover her Dower of it, *3 Ed. 6. 11. Staunf. lib. 3. 33.*

ſett. 23.
16. Where the Wife ſhall be barred of her Dower perpetually. By the Means of the Husband.

If the Husband be attainted of Murder or Felony, and the Land Eſcheat to the Lord or King; the wife is perpetually barred of her Dower: But this it ſeems is altered by the Statute of *1 Ed. 6. 13.* in the caſe of Treſon; for in that caſe ſhe loſeth her Dower, *Co. upon Linl. fol. 31. Little ſett.* 55. *Perk. ſett.* 387. *3 Ed. 6. 12.*

If the Baron have cauſe to recover Land for Waſte or Ceſſer, and doth not; but dieth before it be recovered; by this delay of his, the wife is perpetually barred.

So if the Husband have Land, and is impleaded for it, and he voucheth, and the Demandant recovereth againſt him, and he hath Judgement to recover over, and die before Execution; the wife in this caſe is barred of her Dower.

So if he do not enter when he may; as when he is Diſſeiſed, or a ſtranger doth abate upon him after his Fathers death. See *Supra* *1 Hen. 7. cap. 17. 21 Ed. 4. 60.*

If a Rent be granted to one in Fee, and the Grantee will not diſſein, but brings an Action againſt the Grantor, and recovers it, hereby the wife is perpetually barred (as it ſeems) of this Dower. *Perk.* 373.

If the Husband alone levy a Fine, and die, and ſhe do nothing, her Action, nor make her Claim in five years after his death; hereby ſhe is barred of her Dower in that Land for ever, *Co. 2. 93. 8. 100. Dyer* 124. 72.

By the Means of the Wife her ſelf.

If she depart from her Husband and live with another man, in *Adultery*, and be not reconciled unto him of her own accord before his death, without compulsion of the Church, she hath lost her Dower for ever. *Sponsa virum mulier fugiens & adulterii facta, Dote sua caret, nisi sponso sponse retracta.* And this seems to be cause of Forfeiture of Dower, though she do not dwell with the Adulterer, *Co. lib. Inst. 1 part. 32. Perk. Sect. 354. F. N. B. 150. Dyer 106. Westm. 2. chap. 35.*

If she after her Husbands death will enter upon the Heir, and make a Froffment of the Land whereof she is to be endowed, *11 H. 7. 20.*

If the Husband lie dying in the same House, wherein the Wife is, and hath need of her, and desireth her, and she doth wilfully refuse to come to him; it seems reasonable she should lose her Dower by this. But *Quere. Perk. Sect. 364.*

SeB. 24.

If she detain the Heir that is a ward, from the Gardein; this will bar her of all the kindes of Dower, so long as she doth so detain him, *2 H. 7. 6. Fitz Dower 174. 187.*

So if the wife be an Heretick, and will not receive the Christian Faith, *Co. lib. Inst. 1 part. 332.*

So if she consent to a Ravisher after he had ravished her; in all these cases she loseth her Dower. *6 Rich. 2. 61.*

By their mutual Act and Agreement.
By a Joynture.

If she had a Joynture made to her before marriage, and she is not evicted out of it, *27 H. 8. 10. Vide beneath Joynture, Co. 45. 59.*

And so also it is, if she had a Joynture made after marriage, and after her Husbands death she hath by any means accepted it; in these cases she shall never be received to demand Dower also; and in these cases it is not material what the quantity of the Lands made in Joynture be; if it be but an Acre, if it were intended a Joynture, it is sufficient Joynture, *Co. 2.*

If the Husband and Wife during the Coverture, levy a Fine, or suffer a Common Recovery of the Land; the wife is perpetually barred for any Dower in this Land, whereof the Fine or Recovery is, *6 & 10. 49. 12. 74.*

See Sect. 24.
If the Wife be evicted out of her Joynture, she shall be endowed according to the rate of Land of her Husbands, whereof she was Dowerable. But such a Joynture being made after marriage, the Wife after her Husbands death may refuse it, and betake her to her Dower, unless the Joynture be made by Act of Parliament, *27 H. 8. 20.*

Where an Estate is made in possession, or use to Husband and Wife, and his Heirs, or the Heirs of their two Bodies, or to them for their lives, or for the Wives life for her Joynture; in these cases she shall not have any Dower, unless she be lawfully evicted, then she shall be endowed according to the rate of Land of her Husbands, whereof she was Dowerable. But such a Joynture being made after marriage, the Wife after her Husbands death may refuse it, and betake her to her Dower, unless the Joynture be made by Act of Parliament, *27 H. 8. 20.*

If she were endowed *ad ostium ecclesie*, or *ex assensu patris*, and after the Husbands death she accepts it; by this she is barred of Dower. *Litt. Sect. Dower.*

If she have a Joynture made her before marriage, and after the Husband and she do levy a Fine, or suffer a Recovery, and grant it all away, and the Husband take back all either of this Land again to him and his Heirs, or he have other Land, she shall not have any Dower of any of these Lands, but is barred. By three Counsellors opinion.

By Act of Law:

If there be a perpetual Divorce made by Law between them, she is perpetually barred of Dower. *Co. lib. Inst. 1 part. fol. 32. Perk. 319. N. B. 7.*

If the Husband be the Kings Villain, she shall not be endowed, *contra* of the Villain of a common person; if she be entitled to her Dower before the Entry of the Lord upon the Villain. *Co. lib. Inst. 1 part. fol. 31.*

SeB. 25:
Where the Wife shall not be barred of Dower, only by the Act or Default of the Husband.

If the Baron be in Religion, the Wife shall have her Dower, notwithstanding after his death, and is not barred of it. But she shall have no Dower till his natural death.

So if the Baron be convicted of Felony, Homicide, Praemunire, or the like, if it be a Felony of the Common Law, or for an Offence made Felony by Statute Law, unless the Statute do except this, as commonly it doth. See *Perk. Sect. 307. F. N. B. 150.*

If

If the Husband do commit Felony, and after purchase a *Charter of Pardon*; now she is not barred of her Dower by this, but of all such Inheritance as he shall have after the purchase of his Charter; it seems his wife shall be endowed. See *Womans Lawyer*, f. 149, 150, 151, 152, 153.

If the Baron after the Coverture make a Feoffment of his Land, and after commit Felony; in this case the wife is not barred against the Alienee, neither shall she lose her Dower, *Little. Sess.* 55. *F.N.B.* 150. Nor if the Baron kill himself, *Flow.* 262.

In such Felonies as are made so by Acts of Parliament, wherein the Wives Dower is saved, if the Husband do any such Felony, his wife shall not lose her Dower by it: So it seems of Felony by the Common Law, committed at any time; that it will not bar the wife of her Dower, *Dyer* 263. 97. 1 *Ed.6.* 11.

If the Baron cease, or alien in Mortmain, and the Lord enter; hereby the wife is not barred of her Dower, but she shall have it as before, *Perk. Sess.* 308, 309.

If the Baron be out-lawed by Trespass, this is no bar to the wife for her Dower, *Perk. Sess.* 388. So if he be out-lawed in Felony, *Co. lib. Inst.* 1 part. fol. 31.

The wife shall not be barred of her Dower, by the Laches of her husband in pleading, unless it be in some special cases, *Perk.* f. 73, 74, 75.

If she being *de non sane memorie* kill her husband, or another man; she shall not be barred of her Dower by this, *Perk. Sess.* 365.

If she do not, or will not go to her husband in another County, where he lieth wounded, and he die of that wound; it seems she shall not lose her Dower for this, *Perk. Sess.* 364.

If she Elope, and continue in Avowtry, in the Lands or Manors of her husband: As when her husband is at one of his Houses or Manor, she go to the other; or if after her Elopement, she be reconciled to her husband by his good will, or lie with him in Bed, though they never cohabit; in these cases she shall not be barred of her Dower, *F.N.B.* 150.

If she take a Joynture after marriage, this will not bar her of her Dower, if she waive it after her husbands death, (as she may) *Co.* 4. 2.

If a Joynture were made to her after marriage, and during the Coverture, she and her Husband levy a Fine, or suffer a Recovery of it; yet she is not hereby barred to demand her Dower in the residue of his Lands, *Co.* 4. 2. *Dyer* 358. *Co.* 2. 27. *Trin.* 9 *Jac. B. R.*

If a Free-man take a Neiff to wife, she shall be endowed, *Co. lib. Inst.* 1 part. fol. 31:

The wife of an Idiot, *Non comp' mentis*, shall be endowed, *Co. lib. Inst.* 1 part. fol. 31.

When a Divorce is onely *a mensa & thoro*, as for Adultery, or the like, and not *a vinculo matrimonii*; there the wife shall be endowed. *Co. lib. Inst.* 1 part. fol. 32.

If she have entred upon any part of the Land, out of which she doth demand Dower, and doth hold the Possession of it; this is a bar to her for her Dower, so long as she doth hold the Possession of it, unless it be in the case of *Quarantine hor.*, which see *Infra*, *Dyer* 76.

If the Woman detain the Charters and Evidences that belong to the Heir, and concern the Title of his Land; this will bar her of Dower, for so much as the Charters doth concern, so long as she doth detain them, and he may plead Detainment *Des Charters*. But this Plea and Bar, is onely given to the Heir, and not to any other, though he be Tenant of the Land, and the Charters were delivered to him. See *Infra*. *Co.* 9. 17. *Dyer* 250. 127.

If she detain the Body of the Heir from the Gardein in Chivalry, she shall be barred of Dower, so long as she doth detain him, 1 *H.* 7. 6. *Co.* 9. 19.

If she take a Lease for years or life, of the Land whereof she is to be endowed after her husbands death, she is barred during that time, to ask any Dower out of that Land, *Perk.* 350. *F. N. B.* 149.

By the Means
of the Wife
herself.
*Non sane mem-
orie.*

Elopement.

By their Mu-
tual Agree-
ments

By the Act of
Law.

17. In what
case the Wife
shall be barred
of her Dower
for a time on-
ly, or not.
Sess. 27.
Detainment of
Charters.

But Detainment of Charters is no Plea for the Heir, neither will it bar the Woman, in these cases following.

First, Where the Heir doth come to the Land by Purchase, and not by Discent.

Secondly, Where the Heir himself delivered the Charters to the Woman:

Thirdly, Where the Heir is immediately, and not immediately vouched by the Tenant in the Writ of Dower.

Fourthly, Where the Heir doth come in as Vouchee, having no Land in the County where the Dower is demanded.

Fifthly, Where the Heir comes in to the Sute onely, as Tenant by Receipt, *Co. 5. 75. 7. 9. Dyer 230. 251. 33 Hen. 6. 15. 2 Hen. 7. 6. Perk. Sess. 355. &c.*

Sess. 27.

So if she detain Charters from the Heir that do not concern the Land, in which she demand Dower, *Perk. 356.*

Quarentine, what.

If she take her Privilege and Liberty of Quarentine, (*i. e.*) where her Husband died seised of any Manor or Mansion-house, whereof she is to be endowed; that she may abide in that House forty days after his death, and live of the store and profits thereof, which benefit the Law doth give her.

Quarentina Habenda, what.

If the House be not a Castle, and she marry not within the time; and if the Heir evict her within the time; she may have a Writ called *De Quarentina habenda*. And within this time the Heir ought to assign to her Dower. See *Womans Lawyer 242. Co. 2 part. Inst. 17.*

18. Writ of Dower, what.

It is a Writ and lieth where the Woman hath right to have Dower in her Husbonds Lands, and cannot have it; then she may have this Writ to recover it. And this is of two sorts.

The kindes of it.

One whereof is *Unde nihil habet*, when she hath received no part of her Dower.

Writ of Dower Unde nihil habet, Writ of Right of Dower, what.

And the other is called the Writ of Right of Dower, and lieth where she hath recovered part of her Dower already in one place; and she is to recover more in that place, then she may have this Writ for the recovery of it.

And in these cases, if the Husband did die seised, she shall recover Damages from his death.

But if any Alienation or Estate were made, during the Coverture, so that he die not seised, she shall not recover Damages. *Terms of the Law. Dower.*

In what case this Writ lieth, or not.

In all cases where the Wife is to have Dower, or hath right to Dower; there she may have this Writ to recover Dower.

And where she hath right to Dower, see before.

She may have this Writ for Dower, *Ad osium Ecclesie, Ex assensu patris*, and for Dower by the Custom, as well as for any other Dower. *Co. lib. Inst. 1 part, fol. 35.*

Sess. 28. 19. Against whom this Writ may be had, or not.

This Writ lieth, and may be brought against any of them that have power to assign Dower (for which see before) excepting onely the King, against whom no Action will lie: But to him she must sue by Petition, as an Heir, an Alienee, a Gardein, Disseisor, or Abator, &c. against any of these this Writ lieth; and during the minority of an Heir, as long as he is in the Kings Custody she must sue to him by Petition in *Chancery*. And after he hath committed him, she may sue the Patentee by this Writ, or another Gardein in Chivalry; and when the Heir is of age, she must sue him himself.

And if divers have some of the Land, the Heir and others, she may sue any one of them: But if she sue a Purchasor, she shall recover but a third part of his own Land; whereas, if she sue the Heir, she shall recover a third part of the whole.

And it seems this Writ doth lie against the Committee; of the King, of a Wardship and Ward, and Executors of a Gardein in Chivalry, See the Statute of *1 H. 7. 17.*

But

But this Writ doth not lie against the Heir as long as he is within age, and in the Kings custody; and therefore if any woman bring this Writ against him in this case, the Heir may have a Writ called *Circumspexi Agatis*, which is in the nature of a Prohibition to forbid the Judges to proceed any further against the Heir at the Common Law, Co. 9. 16. 4 H. 7.

Agg.
Infant.
Circumspexi
Agatis, what.

It lieth not against a Gardein in Chivalry, after the Heir is of full age, though the Gardein hold the Land over for a Forfeiture of marriage: Neither doth it lie against the Heir, during his Minority and Wardship, but against the Gardein, Co. 9. 16. Plow. 141.

It lieth not against a Gardein in Socage, Lessee for years, nor a Lessee for years of a Gardein in Chivalry, nor against a Tenant by Statute or Elegit, nor against a Gardein in Chivalry, till he have entred, and after his entry it lieth not against the Heir, Co. lib. Inf. 1 part. fol. 39. Co. 9. 16. Co. 6. 57. F. N. B. 147.

It is a good Plea for the Defendant to say she is endowed already by the same party, or some other for the Land that she doth now demand Dower of: And what else is a good Plea, or not, see before, where Dower is barred temporally or eternally, and where not, Co. 9. 16.

20. What matter is a good Plea to a writ of Dower, and who may plead it,

So to say that her Husband was never seised of any such Estate, as whereof the wife may have Dower, Dyer 41.

So to say she hath accepted a Rent out of the Land in recompence of her Dower, Dyer 19. These are good Pleas.

A Gardein in Chivalry may plead in Bar of Dower, Detainment, or Eloigning of the Body of the Ward; and this is a good Bar to the Woman, so long as she do detain: And if the Heir come in as Vouchee, he may plead the same Plea: But he cannot plead Detainment of Charters, Co. on Litt. fol. 39. Never lawfully married, is a good Plea, and was triable by the ordinary: So that the Husband is yet living, Co. lib. Inf. 1 part. fol. 39.

It is a competent livelihood of the Franck-tenement of the Husband, made and assured in consideration of marriage for the wife, to take effect forthwith after the Husbands death, to endure for her life at the least, if she by her own act do not forfeit or determine it before: And this is made sometimes before, and sometimes after marriage; if it be made before marriage, it will bar the Wife of Dower, but if it be made after marriage, the wife after her Husbands death, hath power either to waive it, and demand her Dower at Common Law, or to accept it; and thereby to be barred of her Dower at Common Law: But that Joynture made before marriage, that must be a Bar to the wife of Dower, must be such a Joynture, as within the words or meaning of the Statute of 27 H. 8. 10. Or else the Wife may have that, and demand Dower also: *See before, under the title of Joynture, see fol. 38, &c.*

328. 29.
21. Joynture, what.

A Joynture may be made of such things, as whereof a Woman may be endowed, and not of any other things.

22. Of what things a Joynture may be made, or not: What shall be said a good Joynture before marriage to Bar Dower.

If an Estate be made to the wife before marriage, in either of the forms hereafter following, it shall be adjudged within the Statute, and be a Bar of Dower, as to the Husband and Wife, and Heirs of their two Bodies begotten; or to the Husband and Wife, and their Heirs, or to the Husband and Wife, and Heirs of one of them, or to the Husband and Wife for their lives, or to the Husband and Wife, for the term of the life of the Wife, or to the Husband for life, the Remainder to the wife for life, or for life upon condition to perform his Will, or *dum vixerit sua*, or to the wife in Fee-simple, or in Fee-tail, or to the Husband and Wife, and the Heirs Male of their two Bodies.

And to all such like Estates as beneficial to the Wife, as the least of all these. Co. 4. 2. 27 Hen. 8. 10. Dym 316. Co. 3. 26. & 7. 46. Dyer 96. 218. 317. Plow. 307.

So that the making of a Joynture good by this Statute of 27 H. 8. these things are requisite.

1. The Joynture by the first Limitation, must take effect for her life, in possession or profit, presently after her Husbands death.
2. It must be for her life, at least.
3. It must be made to her self, and not to another.
4. It must be made in satisfaction of the whole, and not a part of her Dower.
5. It must be expressed or averred to be in satisfaction of her Dower, Co. upon Little. 1 part. 35.

But if the Estate be not so made in his first Creation, as the wife may take immediately after her husband, though after it fall out so; yet this is not a Joynture within the Statute to Bar Dower: As if an Estate were made to the Baron for life, the Remainder to another for life, the Remainder to the wife for life; and after it falleth out that he in Remainder for life, die before the husband: So that now by this matter *ex post facto* she shall take immediately after her husband, yet this is not a Joynture within the Statute. *Quod ab initio non valet, in tractu temporis non convalescat; & quæ mala sunt inchoata principio, vix essent bono peragantur exitu.* Co. 4. 2. & 4. 3.

If Lands be conveyed to be a Womans before marriage, for part of her Joynture; and after more Land is conveyed after marriage, in full satisfaction of her Joynture; this is no Bar of Dower for Incertainty: And therefore if she refuse that conveyed after marriage, she may have her Dower in all, saving that conveyed before marriage, which she may also keep.

And if an Estate be made to the Wife, for one or more lives of others, or for one thousand years, if she live so long, or for a thousand years; these Estates are not within the Statute, Co. lib. Inst. 1 part. fol. 36.

If an Estate be made to others in Fee, for her life, upon trust for her benefit, by her assent, and express in full satisfaction of her Dower; this will not Bar her, Co. Idem.

If one Covenant to stand seised to the use of himself in Tail, and after of his wife for life; this is not a Joynture within the Statute, *Pafche*; 16 Jac. B. R. *Wood case*.

Señ. 30.
What shall be
said a Joynture
after marriage
to Bar Dower,
or not.

Such a Joynture as will be a Bar of Dower, being made before marriage, will be a Bar of Dower, if it be made after marriage; so as the wife do accept it and agree to it, after her husbands death: As in the examples before, if such a Form of a Joynture be made after marriage, and accepted after the husbands death by the wife, it will be a Bar of Dower, Co. 4. 4.

If the Husband Devise Land to his Wife for ever in Tail, or for life, for her Joynture, in satisfaction of Dower, and she accept it after his death, this will be a Bar of Dower, Co. 4. 4. *Dyer* 220.

But if one seised in Fee of Socage Land, and in Tail of Capite Land, Devise by his Will a third part of his Lands and Tenements to his wife in recompence of her Dower, and die, and she enter into the third part of the Fee simple Lands only; by this she is barred of having any more Dower, *Dyer* 210. 20.

Averment.

If one Devise Lands by Will to his Wife generally, this will not Bar her of Dower, neither can it be averred to be intended for a Joynture: (but upon a Deed of Lands granted in general, such an Averment will lie) unless the Will express so, Co. 4. Broo. 421.

If a Man makes his Wife a Joynture after marriage, and after in his Will devise, that his wife shall have a third part of all his Land with her Joynture; in this case she will have a third part of the whole as a Legacy, and then if she will wave her Joynture, she may have a third part out of all the Residue for her Dower.

Dyer 61.

If the Husband make a Lease of Lands to his Friends for any number of years, in trust for his wife and children, that she shall have a hundred pound a year out of it, or in any such manner; in this case she may have her Dower out of this Land, and yet have this Provision also. *Bridgman Justice.*

If an Estate be made to the Husband in Tail, the Remainder to the wife for life, the Remainder to others; this is no such Joynture, as with her Acceptance within the Statute will bar her of Dower; though the Husband die without issue, yet this will not help, but the wife may have Dower in his other Land. But if an Estate be made to the husband and wife for their lives, *contra*. By three Justices in *Sherleys case*, *M. 12 Jac. B. R.*

If her Joynture, after marriage, be made to her by Act of Parliament, she cannot wave it. *27 H. 8. 10. Crompt. Sett. 41.*

And note that in all the cases above, where the Joynture is not within the Statute, the wife shall have that Estate, and her Dower also, by *Co. lib. Inst. 1 part. fol. 36.*

If the wife be endowed, and after be evicted out of her Dower, she shall be re-endowed again, in these cases following, *viz.*

If she be endowed of the immediate Estate of the Heir of her Husband, and be after impeaded and evicted, she may vouch the Heir, and be newly endowed of the rest of the Land she hath from her husband, as if the Ancestor had two Acres by a good Title, and one by a bad; and the wife is endowed of the bad Title Acre, and she is sued for it, and lose it: Now she shall recover her Thirds out of the other two Acres.

And so if she were endowed by the Heir of the Father, and after she be impeaded, and pray in aid of him, and he make default, and she lose the Land, she shall be newly endowed.

So if a Tenant in Tail discontinue, and the Discontinue die, and the wife recover Dower against his issue, after the Issue in Tail brings a Formedon against the wife, and she vouch the same, and that is lost; in this case she shall be re-endowed of the rest, till it be recovered also by the Issue in Tail, *Park. Sett. 410.*

If there be Great Grand-father, Grand-father, Father and Son, and the Great Grand-father being seised of Land in Fee, and having a wife, doth give it by Deed to the Grand-father in Tail, and he die, and the Father endow his wife after the Father and Great Grand-father die; the Great Grand-mother brings Dower against the wife of the Grand-father, and recovers: Now in this case it seems the Grand-mother shall be re-endowed of as much as she lost. But *contra* if it were in case of Discent. As *Supra*. See *Crompt. Jurisd. fol. 43. Co. 4. 122.*

But if the Heir have no Land in the same County where her Dower doth lie, it seems she shall not be re-endowed by him after Eviction. *Co. 9. 19. & 4. 122.*

If she be endowed by the Alienee of the Husband, or of the Heir, and she be afterwards evicted, she shall never be re-endowed against either of them, unless it be in case, where her Judgment for her Dower were Conditional, upon the Voucher of the Heir (as the manner is) and after the Judgment is avoided by a Writ of Disceit, and hereby the Heir being Voucher, restored to his Land. *Yarm. Part. Sett. 421.*

11. c.

But

Sett. 31.

23. In what case upon the Eviction of the Wife, she shall be endowed again, or not. Re-endowment.

But if she sue the Feoffee of the Husband, and he vouch the Heir in what County soever she shall be endowed of the Heir, to that end, That if she lose, she may be newly endowed, which she could not, if she were not endowed by the Feoffee of her Husband. *Coke, Justice in Treckmorton's case.*

Self. 32.
24. To whom the wife shall be Attendant, and by what Services.

The Wife most commonly shall be Attendant to the Heir in Reversion, and not to the Lord; and she shall Bar a third part of the Services: But if she be endowed by the Gardein in Chivalry, she shall be Attendant to him during the Minority of the Heir for a third part of the Services.

And if she be endowed by a Disseisor, she may be Attendant to him till the Disseisor have the Land again.

And if the Heir grant away the Reversion, and she Attorn to the Grantee, then she shall be Attendant to him.

And if her Husband die without Issue, or Heir, being Tenant in Tail, or in Fee, she shall hold of the Donor or Lord, by the third part of the Services.

But if the Lord purchase the Tenancy, and after the Wife is endowed, she shall hold it discharged of any Services, *Perk. Self. 424, &c. Co. 8. 36. 9. 135. Ca. super Littl. 341. 34 Aff. 1.*

If the Husband hold of *7. S.* by three pence, and he hold over by twenty pence Rent, and *7. S.* Release to the Husband, so that now he doth hold by twenty pence, the Wife being endowed of this Land shall hold it by the third part of three pence; for she shall be endowed of the best. *Fitz. Dower, 131.*

Self. 33.
25. Advowson of Dower, when.

It is a Writ lying where an Heir within age, or Gardein doth endow a Woman, that is dowable of more than she should have; then the Heir at his full age may sue the Woman again, and shew this, and get her endowed again more equally, and Re-situation made.

And if the Heir within age, enter and assign before the Gardein enter (as he may) the Heir at his full age may have this Writ, or the Gardein after his Entry, but not the Assignee of the Gardein; and this Writ lieth upon an Assignment in Chancery. *Co. lib. Inf. 1 part. f. 39. West. 2. 7. See for Dower, Statutes, Merton. 1. Westm. 1. 48. 2. 4. 3. Ed. 6. 13. 3. Ed. 6. 12.*

Tenant by the Courtesie, what.

Tenant by the Courtesie, is where a man taketh a wife, seised in Fee-simple, or Fee-tail, General or Special, and hath Issue by his Wife, Male or Female, and the Child be living or dead, if the Wife die, the Husband shall hold this Land, during his life by the Courtesie of the Law of England; and then is he Tenant by the Courtesie. *Term. Ley 118.*

Self. 34:
25. Of what things the Husband shall be Tenant by the Courtesie, or not. In what case the Husband shall be Tenant by the Courtesie, or not.

And the Husband shall be Tenant by the Courtesie of Lands or Tenements in Demerit, and of Commons, Advowsons, and the like; also of Honours and Offices (as it seems) and of a Castle and Commonfens number. *De Excegnitione, Eng. lib. Law 170 fol. 79. Co. lib. Inf. 1 part. fol. 29, 30.*

In all cases where the Issue of a Woman (Inheretrix of Lands) begotten by her Husband, might by possibility inherit that Land as Heir to the Wife of her Estate there, the Husband shall be Tenant by the Courtesie, yea; though the Wife had Issue inheritable to the Land by a former Husband, *Littl. self. 52. Co. 4. 61. 834.*

But then these things must be in the case.

1. The Birth must be a Child, not a Monster; but though it have some deformity, or defect in the Hand, or Foot; if it have Human shape it sufficeth.

2. It must be born living, not dead.
3. It must be born before, not after the Mothers death.
4. The wife must have an Actual Seisin of the thing, whereof he would be Tenant by the Courtesie before her death, if it be to be had, as in these cases:

If a Man have issue by a Woman Inheretrix, that hath issue by a former Husband, and the last issue be dead; or if the Inheritance descend to the wife, after the issue born, or after the issue is dead, or the Estate-tail determine by the death of the Woman Tenant in Tail, without issue; yet in these cases the Husband shall be Tenant by the Courtesie, *Co. 8. 34. Littl. 35. 52. Dyer 25. 95. Co. lib. Inst. 1 part. fol. 29.*

If a Woman have a Rent or Advowson in Fee, and die before any day of payment, or Avoidance come; yet the Husband shall be Tenant by the Courtesie, for here he could not have Seisin, *Co. 192. Keth. 104.*

Str. 35.

But if the Inheritance whereof the wife is seised, be such, as by no possibility, the Issue between them may inherit the Estate the wife had, as Heir to the wife, or the child be a Monster, or born dead, or born after the Mothers death, as if it be ripped out of the Mothers Belly, or the wife have no actual Seisin, or the wife have onely a Right, or the Estate is in suspense at her death, he shall not be Tenant by the Courtesie.

And yet if the Suspension of a Seigniorie, Rent, or Common, be but for years; as if a Tenant make a Lease for years of the Tenancy to the Seigniorie, who taketh a husband and hath Issue, and the wife dieth; now he shall be Tenant by the Courtesie, *Co. lib. Inst. 1 part. 29.*

And therefore in all these cases following, the husband shall not be Tenant by the Courtesie: As if the Intail be on the Heirs Males, and they have onely Heirs Females; or the wife be disseised, and she die before any re-entry made; or a Wife-Lady, and a man her Tenant, and they inter-marry, and they have issue, and the wife die, the husband shall not be Tenant by the Courtesie of the Seigniorie; or if the Ancestor die seised of the Land, and before the Woman enter, she die; or if he be attainted of Felony, and after get a Pardon, and after his wife dieth; or the wife have onely a bare Title, Use, or Reversion, or Remainder, Expectant on a Freehold; in all these cases he shall not be Tenant by the Courtesie, *Co. 4. 81. 8. 34. Perk. sect. 457, 458, 459. Co. 1. 98. 3 H. 7. 5. Co. lib. Inst. 1 part. fol. 29. 40, 338. Co. lib. Inst. fol. 29.*

An Occupant or Occupancy is either General or Special; the General Occupancy, is where an Estate is made or granted of Lands or Tenements to *J. S.* (or to *J. S.* his Executors or Assigns) during the life of any other person or persons, and he that hath this Estate dieth, during the life or lives; in this case, now he that can first get into the possession, by Entry into these Lands or Tenements, so granted after the death of the Tenant, he shall have it during the same life or lives, and then he is said to be a General Occupant, and his Estate a General Occupancy. So that in this case the Law is, *Capiat qui capere potest.*

26. Occupant or Occupancy, what. The kinds.

The nature of it.

And this Estate, he that gaineth it, he may grant away to another, and if he do not so but die, and leave it so, then it will be in the same case as before, and so as oft as it so hapneth; but otherwise it is of such a Grant of Rent, Common, or such like thing.

The Special Occupancy and Occupant, is where Lands or Tenements are granted to *J. S.* and his Heirs, during the life of any other person or persons; in this case, if he that hath this Estate, dieth, the Heir shall have it, and no other person can gain it by Entry, as in the first case; and this is called a Franck-tenement Descendible.

Franck tenement Descendible, what.

So that it doth much concern all them that take Estates for others lives, to have the Estate limited to them, and their Heirs.

And both these kinde of Estates are in the nature and quality of other Estates for lives;

Caveat Emptor.

lives; for neither he to whom it is made, his Heir, nor the Occupant, shall have aid: This Heir shall not be charged by a Specialty, whereby this Tenant doth binde him, and his Heirs; he is punishable for Waste or Forfeiture, and liable to pay Rent, and perform the Service of the Tenant, as another Tenant for life is; the wife shall not be endowed, the husband shall not be Tenant by the Courtesie, and the Occupant is bound to pay the Rents, and perform the Covenants annexed to the Estate, as another Tenant for life is bound.

Fera natura.

Property.

Self. 36.
Of what
things it may
be, or not.
Rent, Common,
&c.

Copihold.

And the right that men have to Beasts and Birds that are *Fera natura*, is but a kinde of Occupancy, whiles they keep them they are their own, though they have no Property in them; and when they are gone, they are any mans that can catch them. See *Property. Co. 10. 98. on Littl. 41. Littl. Self. 167. 41. 339. 388. Dyer 264.*

A Special Occupancy may be of a Rent, Annuity, Advowson, Common, or the like thing that lieth in Grant. But a general Occupancy (as it seems) can be of nothing but of Houses, Lands, and such like things. And therefore if a Rent, Common, or the like thing be granted to *J. S.* during the life of any other person or persons, and *J. S.* die, during the life or lives of that person or persons, or those persons; in these cases, it seems the Rent doth cease, and the Common cannot now be enjoyed by any other person or persons, the first Grantee being dead, *Littl. 168. Plow. 556. Co. upon Littl. part. 41.* Nor can an Occupancy be of a Copihold. And therefore if a Tenant for his own life, of Copihold-Land, Surrender his Land to the Lord, to the use of *A. B.* and the Lord admit *A.* for the life of *A.* This is a Surrender of all his Estate, and when *A.* dieth, the Estate is ended, and the Copiholder shall not have it again, *Co. 1. 41. Mich. 7 Car. Agreed by all the Judges in the Exchequer Chamber.*

27. Where a man shall be said to be an Occupant, and adjudged to be in as of an Estate in Occupancy, or not.

For Answer to this Question, these things are to be known.

1. If one make a Lease to *J. S.* (without more words, or to *J. S.* his Executors and Assigns,) during the life of any other person or persons; this after the death of *J. S.* will be an Occupancy; and if in this, and such like cases, the first Lessee for life make a Lease for years, or at Will to a stranger; and this second Lessee is in Possession, and the Lessee for life die, the Lease for years, or at Will, not ended; it seems this Lessee for years, or at Will, shall be the Occupant, albeit he never claim as Occupant. But if in this case the Lessee for years, or at Will, be out of Possession, and the Heir, Executor, or Administrator of the first Lessee, can first get into Possession, he may be the Occupant. So if one Disseise the Tenant for anothers life, and the same Tenant die before his Entry; the Disseisor will be the Occupant. So if he in Remainder for life Disseise the Tenant for life, and then the Tenant for life dieth, he in Remainder shall have it, and the wrong is purged, *Hill. 38 Eliz. B. R. Ross case. M. 17 Jac. B. R. Wherrywoods case. 38 H. 6. 28. Plow. 38. 558. Fitz. Bar. 303. Co. 10. 98. Dyer 321.*

2. If Tenant by the Courtesie, or Tenant in Dower grant his Estate to *J. S.* and *J. S.* die; in this case there will be no Occupancy, and therefore it seems these Tenants shall have it again, for they are Tenants to the Lord notwithstanding the Grant, Adjudg, *Stanhops case. Mich. 17 Jac. B. R.* So if Tenant in Tail Grant *totum status suum. (i. e.)* all his Estate, *Mich. 17 Jac. B. R.* But *Quere.*

3. If a Tenant for anothers life, Grant away his Estate for life to *J. S.* and say not to him and his Heirs; this after the death of the Grantee, will be a general Occupancy: And the like is said of Tenant in Dower, and by the Courtesie, *Plow. 556. 28. Fitz. Bar. 303.*

4. If one seised in Fee of Land, or seised of it for his own life, or the life of another, and he grant it to *J. S.* and his Heirs for his life: this is not a General Occupancy, but a Special Occupancy. So if a Lease be to *J. S.* and his Assigns, for the life of *J. D.* and *J. S.* assign it to *K. L.* and his Heirs for the life of *J. D.* this is a Special; and by this the mischief of the General Occupancy is avoided, *Co. 10. 98. Dyer 321. Bakers case. Hill. 37 Eliz. Co. B.*

5. If

5. If a Tenant in Tail bargain and sell his Land by Indented Deed to another and his Heirs, the Bargainee hath but a Franck-tenement descendible to his Heirs, determinable on the death of the Tenant in Tail; this is not an Occupancy, nor after that nature; for the Wife of the Bargainee will be endowed, as long as the Estate doth continue, and the Bargainee cannot be punished for Waste or Forfeiture, *Co. 10. 98.*

6. No Occupancy shall be against the King, neither shall Entry before him; prejudice him, *Co. on Littl. 41.*

7. Every Entry or coming upon the Land after the death of the Tenant, will not give a man this Estate as an Occupant, but it must be a purposed Entry: And therefore if a man follow his Hawk or Hounds over the Ground; by this he is not an Occupant, *Udall's case, 32 Eliz. B. R. Adjudged.*

8. An Executor cannot be a Special Occupant, but he that first enters, though he never Claim the Land, shall be the Occupant: And therefore if Lessee for three other lives, make a Lease for years, and then die; the Lessee for years is the Occupant, and the Lease for years is drowned. By Baron Thorpe at Gloucester Assizes, 1654.

9. The way to prevent the mischief of a General Occupancy is to take in the word Heirs, or for the Tenant that hath an Estate of Land lyable to this mischief, to grant it away, and make Livery upon it, or bargain and sell it by Deed indented and inrolled, or to Covenant to stand seised of it to the use of his Wife, or some of his Blood, or to make a Lease for years of it determinable upon the lives, by which the Estate is held.

An Estate for years is, where one holdeth Lands or Tenements for a time, or number of years in Certain. And this is one of the left and lowest kinde of Estates; (for this though it be a Lease for one thousand years) yet is it (in Judgment of Law) but a Real Chattel that shall go to the Executor or Administrator, and may be forfeited upon an Outlawry in any Action, as a mans Goods and Chattels may be; and this may be made without Deed. And yet this in many things is like to a Lease for life; for he that hath this Estate, shall have House-boot, Fire-boot, Plough-boot, &c. (for which see *Houf-boot.*) He may charge or grant it, during his Term, and no longer; he may not make Waste in it, or make any Estate of the Land he so holdeth for longer time, then he hath in it; and if he do make any Estate of Freehold of it, and it be executed by Livery of Seisin, it is a Forfeiture of the Estate. No Wife in this case shall have Dower, nor Husband be Tenant by the Courtesie, 14 Hen. 7. chap. 3. *Finches Lay* 44. *Littl. Sess.* 38. *Co.* upon *Littl.* 46.

Sess. 37.
28. Estates for years, what, The nature of it.

Houf-boot.

For this, take these things:

1. A Lease for life or years, may be made with, or without a Deed, or by way of Fine, Record, Bargain, and Sale, or Covenant to stand seised to Uses upon good consideration of marriage, and the like.

2. If one by writing, make a Lease of Land for years in the Premises, *Habendum* to the Lessee, and his Heirs; this, if Livery and Seisin be made upon it is a Fee-simple. But if it be, To him and his Heirs for a certain number of years, and no Livery of Seisin made; this is but a Lease for yeares, *Co. 2. 24. 34 H. 6. 17.*

3. A. by Articles in writing, covenanted and agreed to and with B. that he should occupy and enjoy White-acre for seven years; this is a good Lease for seven years, *Adjudge, Hubbard, Rep. 49. 5 Hen. 7. 2. 21 Hen. 6. 37. Dyer 150.*

4. If one grant a Rent of twenty pound a year, until one hundred pound be paid; this is a Lease for five years of the Rent. But if it be of a Manor of the value of twenty pound a year, that such a Lease were made of in this manner; this were a Lease for life of the Lessee, determinable upon the payment of the money, *Co.* upon *Littl.* 42.

What shall be said to be a Lease for years, or not.

5. If one grant the next Advowson of a Church to J. S. and his Heirs; this is

Y y

but

but in the nature of a Chattel, 34 H. 6. 27. But see much more of this thing in my Book of *Common Assurances*, fol. 110, 111. and Chap. 14. fol. 267:

Estate at Will,
what.

The kindes.

An Estate at Will, is either by Custom, and so are all Copihold Estates; for which see *Copihold*, or by *Common Law*: And this is where a Lease is made, during pleasure. And this is either at the will of the Lessor; and this is most Common: Or at the will of the Lessee, or during the pleasure of the Lessor and Lessee both together: As when it is made at will indefinitely, and say not of the Lessor or Lessee. And so are all Leases at Will, though it be exprest onely to be at the Will of one of them, yet the other is implied.

The nature of
it.

And this is the least and lowest kinde of Estate that can be made, yet the Lessee may enter upon, or have Action against a stranger that doth enter upon him. It is a Chattel also that will go to the Executor or Administrator, if the Lease be not determined, (as commonly it is by the death of the party;) but if he have a Copihold Manor, he may make Estates according to the Custom. But this Estate is neither grantable over, nor chargable; yet if the Lessee sow the Land, and die, his Executors shall reap the Corn: And the Lessee here, must take heed he do not make voluntary Waste; for this is punishable: And yet it seems he may take the Shrouds of the Trees. This Estate may be made, rendering Rent or Service.

Election.

And for this the Lessor may distrain as long as the Lease doth continue; and when it is determined, have an Action of Debt for it. And during the Lease, he may distrain or bring Action of Debt at his Election. And this differeth from the Estate of the Tenant by Sufferance, for he holdeth always by wrong; but Tenant at Will holdeth always by right. If the Lessor enter and determine the Will, he shall not hurt the Lessee, for he shall have the Corn, and time to take his Goods, Co. upon *Littl.* 56. 551. 57. 270. 14 H. 8. 17. *Littl.* 14. 72. 27 H. 6. 3. 21 Ed. 4. 5. Co. 2. 24. 20 H. 6. 30.

Sec. 38.
29. What shall
be said an E-
state at Will,
or not.

If a Feoffment be made in Fee, Gift in Tail, or Lease for life, and no Livery of Seisin is made upon the Deed, to perfect the Estate; this is but an Estate at Will, Co. 2. 24.

So if a Lease be made for years, and it is not exprest for what number of years; this is a Lease at Will, 21 H. 7. 38.

So if one Lease a ground to J. S. for a year, and after by consent of the Lessor J. S. doth continue it for many years, as the course is; some would have this a Lease from year to year, at the first years Rent by Implication; but this (it seems) is nothing but a Tenancy at Will.

If one enter upon anothers Land, and occupy it, and Claim onely an Estate at Will; this is no Estate at Will, but a Disseisin.

So if a Bargain and Sale be made that is void, as if it be by a Corporation, and done by a wrong name, or the like; in these cases there is no Estate at Will made, but they are Disseisins, *Littl. sett.* 461. *Plow.* 537.

By what
means it is, or
may be deter-
mined, or not.

This Lease at Will, may be determined by his Will, at whose Will it was made: Or if it be made indefinitely at Will, and it say not at whose will, it is at both their Wills, and either of them may determine it.

But this may be determined by the Act of God; As where the Party by whose will the Lease is held, die; but otherwise it is, if onely one of them, if it be at the will of two, die; or by the Act of the Law, when the Law doth make a Construction upon some Acts to be a Determination of the Will, as if the Lessee do make voluntary Waste; or the Lessor doth take the Cattle of the Lessee upon the ground for Rent, and impound them; by this the Will is determined. And yet if a Femsole make a Lease at Will, and after take a Husband; this doth not determine the Will. So if a Woman-sole be Tenant at Will, and take a Husband; the Lease at Will, is not determined by this. So (it seems) the Law is where two Joyntenants make a Lease at Will, and one die; the Lease at Will is not ended, but the Rent shall go to the Survivor. So if it be made to three, and one of them die, the Lease is not determined. And by the Act of the Parties themselves, it may be determined many ways; as by an Actual Countermand in writing, or by word, made by him, at whose Will the Estate is held: Or by his making of a Feoffment, or Lease to another of the

the same Land; or by the Entry of the Lessor upon the Lessee; or by the Lessee's leaving of the possession; these and other things will determine the Estate. But when the Determination is, be it by what means it will, no prejudice shall be to either Party; for if the Lessee sow the Land, he shall not be prevented of the reaping of it, unless he turn out himself by his Determination of the Will. And if there be a Rent reserved, the other Party cannot determine the Lease a little before the Rent day, to prevent him of his Rent. See for all these things, *Co. upon Littl.* 55, 56, 57. 11. 18. 2. 35, 55, 59. *Kelm.* 65. 162. 9 *H.* 7. 24. 13 *H.* 8. 25. *Co.* 8. 17. 21. 6. 35. *Dyer* 62. 4 *Hen.* 6. 11. 21 *Hen.* 6. 37. 11 *Aff.* 14. 8 *Edw.* 3. 63. 8 *Aff.* 28.

An Estate at Sufferance (if it be any Estate at all) is (strictly taken) where a man's Entry into Land was once lawful, or by Authority, or he had an Estate, which is now ended, and yet he doth continue in the Possession of the Land: As where one is Lessee for years, and the years are expired, or Lessee for another's life, who is dead, and yet the Lessee keeps in Possession, and keeps out him that hath next right; in this case, if it be an Estate, it is an unlawful one. And the Party in Reversion or Remainder kept out, may have against him that is in Possession, the Writ called *Ad terminum qui prateriit*. And yet if the Lessor, or he in Reversion, have once entered upon the Lessee, then he may not have this Writ, but must have some other Remedy; nor will this Writ lie after the death of Tenant in Dower, or by the Court's lease. But if such a Tenant hold himself in the Land, after his Term ended, unless it be against the Lessors will, he is no wrong doer, till the Lessor have made his Entry. But for all this, see *Co. upon Littl.* 270, 271. 7 *Ed.* 4. 6. 11 *Aff.* 14. 21 *H.* 7. 38. 22 *Ed.* 4. 38. 14 *H.* 8. 11. 37 *Aff.* 8. *Brownl. Rep.* 338. 30.

This Tenant by Sufferance (more largely) is any one that entrencheth into, and taketh the profits of my Lands by my Sufferance: For which see *Plow.* 537, 538. *Co.* 4. 24. *Dyer* 28. 57. 62. 328. *Co. upon Littl.* 270, 271.

Quare ejecit infra terminum, is a Writ lying where a man maketh a Lease for years; and after the Lease made, and before it be expired, he himself putteth out the Lessee; or he maketh a Feoffment, or Lease to another, and the Lessee or Feoffee doth put out the Termor; in this case he may have this Writ against him, that so putteth him out, and therein shall recover his Term, and his Damages: *Westm.* 2. ch. 24. *F. N. B.* 197.

This Writ of *Ejectione Firme*, is now become one of the most common Actions in Use, and is used frequently for Tryal of Titles, and is the common roade that men go to the Recovery of the Possession of those Lands wherein, or whereto they have a Right or Title, the which they do in this method. They first enter upon the Land, and then they make a short Lease of it to some Friend, and this they Seal and Deliver to him upon the Land, and then he enters, and being put out, brings this Action, and thereby recovers his Lease, and the Possession of the Land. To this Action (being of every days use) we shall therefore speak somewhat largely, and especially to these things. 1. The Entry of the Lessor that hath the Right. 2. The Lease made by him for the Tryal of the Title. 3. The Entry of the Lessee. 4. The Entry upon him and his Ouster and Ejectionment. 5. The Proces or Pleading in the Action or Suit.

As touching the Entry of the Lessor that hath right to the Land, there are two things considerable; First, Whether he hath any Right or Title to the Land at all: For if it appear the Defendant to have Right to the Land, the Plaintiffs Action will fail. But this is a point too large and general to be discussed here: And yet take here these few things by the way; 1. That a man may have a Right or Title to that Land whereof, and wherein he hath not the possession or property. 2. Right is where Land is taken wrongfully from another by Disseisin, or the like, the Challenge or Claim of him from whom it is taken, is called a Right. 3. There is a Right of Action, which is when there is no Remedy left but an Action to recover the Land, and there is a Right of Entry, when the party claiming, may for his Relief, either enter into the Land, or have an Action to recover it; and there is a Title of Entry, which is where no wrong is done, and yet one hath a lawful course to enter upon the Land which another hath, but hath no Action to recover it: As where Entry is given to a man for a

See 39.
Estate at Sufferance, what.

Ad terminum qui prateriit, what.

Quare Ejecit infra terminum, what.

Ejectione Firme, what.

condition broken, upon an Elcheat, the dying of a Tenant without Heir; in all which cases he must make his entry before he can bring any Action; *Plow. 358. 255. Finchley 105. Co. 10. 48. 8. 153. 4.* The property and title of Land is made and may be gained either by entry, as in case of occupation, where Land is granted to *L. S. per ann. vic.* and *L. S. die*, in this case he that gets first in possession shall have the Estate. By descent where a man hath Land of Inheritance, and dieth not disposing of it. By Elcheat where the Owner dieth seised, without any Heir, which may be because he is a Bastard, or because he is attainted of Treason or Felony. By Conveyance, and so the property of Land is transferred, and so it is passed by ten manner of waies, or by ten kinde of Conveyances, Fine, Recovery, Feoffment, Grant, Bargain and Sale, Lease, Exchange, Surrender, Release or Confirmation. Of all which see my *Book of Common Assurances at large*. A man may come by a property of Land by an Execution also, as by an Elegit or Extent, of which see in *Execution*. And just, *Dodridge 2. part. f. 28. Co. upon Litt. 10. 2.* If he ever had a right of entry into the Land, the next thing considerable is, whether it do continue and be not taken away: for one may have a right of Action and no right of Entry to recover his Land, and he that will maintaine this Action must make himself a title under the Lessor that had a right of entry into the Land when he made the Lease, for he that makes the Lease must have a power and right of entry at the time of the Lease made, otherwise neither the entry nor the Lease will be good. We shall therefore insist a while upon this point, to shew when a Descent will take away an Entry. For the opening whereof let these things be observed.

When an entry
is gone by a
descent or not.
See 2.

1. That the Law doth much regard descents, which seem to adde some strength to the Title. And therefore if one wrongfully enter upon the possession of my Land, as being a Disseisor, Abator, or Intruder, and put me out of my Freehold and Inheritance by Disseisin, Abatement, &c. he may hold it against all men but me, and if I suffer him in quiet possession five years after his entry, without entry or continuall claim, and then he die in possession and this Land descend to his Heir, by this means he hath gained the right of possession against me, and I have lost my right of entry; and have no remedy left me by which to recover the Land; but by a feall Action, Writ of entry, Assise, or the like. And this Action if I bring not in the time appointed by the Statutes of Limitation, I shall lose also, and consequently my right to the Land it self, having no means to recover it, and so be without remedy, *Litt. lib. 1. Chap. 6. Plow. 47. Finchley 120. D. & St. 24. 32 H. 8. 33.*

If I be seised of Land in Fee, and disseised by another, and he continue in possession five years without entry or claim, and then die, and his Heir enter; in this case my entry is gone, and I am put to my Writ of entry *Sur Disseisin* for my remedy, *Litt. Sect. 385.* So if the Disseisor give the Land in taylor, and the Tenant in taylor die seised, having issue, and it descend to his issue, *Litt. Sect. 386.* So if I be Feoffee in Fee, or Donee in taylor, and be disseised, and the Disseisor die seised, *Litt. 392.* So if a Feme sole be Disseised, and after take a Husband, and the Disseisor die seised during the coverture; the entry of the wife is gone, and she is put to her Writ, *Litt. 404.*

If one be disseised of Land, and the Disseisor give the same Land to another in taylor, and the Tenant in taylor hath issue and die seised of that Estate, and the issue enter; in this case the entry of the Disseisee is gone, and he is put to his Action if he will have remedy, *Litt. chap. 386.*

If a Feoffee in Fee, or a Donee in taylor be upon condition, and he is Disseised, and the Disseisor die seised, the Feoffee or Donee hath lost his entry and is put to his Action, *Litt. 392.* If a Feme Disseisor marry a husband and have issue and after the wife die seised, and after the husband die, and then the Heir enter, it seems the Disseisor is barred of entry, *9 H. 7. 33. H. 6.*

If an Infant Disseise another, and Alien the land, and the Alienee die seised, his Heir within age; the Disseisee is barred of his entry, but if the Disseisor within age enter upon the Heir, as he may, then may the Disseisee enter upon the Infant because the descent is defeated, *Litt. 407, 408.* If one Disseise another, and make a Feoffment upon condition, and the Feoffee die seised, the entry of the Disseisee is gone:

gone: but if the Disfeisor enter for the condition broken, then he may enter upon him, *List. 409.*

If one Disfeise a man and Ouste his lessee for years at once, and die seised, the Disfeisee cannot enter, but is put to his Action; but the Lessee for years may enter. But if it were a Disfeison of a Tenant for life, *Contra. List. 411.* If a Daughter be Disfeised, and after there is a dying seised, and then the Son is born; this Descent will barre him of his entry, *Broo. 450.* If a Disfeisor make a Lease for years, and after die seised, this will barre the Disfeisee of his entry *Broo. 453.* If an Infant make a Feoffment, and after his full age the Feoffee die seised; or a Lessee for life Alien, and the Alienee die seised; or a Devise be of Land on condition, and the Heir of the Devisor enter and die seised; in these cases the entry is gone, and they are put to their Action, *21 H. 6. 7. List. 96: 9 H. 6: 25.* If one bargain and sell his Land, and the Bargainee enter, and after the Bargainor enter upon him and die seised, the entry of the Bargainee is gone.

If an Abator or Intruder, or one that hath but title that may have an Action, die seised, this descent taketh away entry, *List. Disceints Plow. 47. List. 96: 1 Cow. super List. 238.* If the Ancestor do not die seised in Fee, or Fee-tayle, but term of life only, this will not take away entry, *List. Cap. 387. Finchessley. F. 120.* If one be disfeised of a Reversion or Remainder only, and die so seised, and it descend to his Heir, this will not barre him that hath right of his entry, *List. cap. 388. 390.* If there be Lord and Tenant, and the Tenant be disfeised, and he Alien in Fee, and the Alienee die without Heir, and the Lord enter as in his Ekcheate, here the Disfeisee is not barred of his Entry, but may enter upon the Lord, for here is no descent to the Heir, *Finchessley. f. 120.* If one be seised of Land in Fee, or in Fee-tayle upon condition, and the condition be broken, and the Feoffee or Donee die seised, yet this doth not take away the entry of the Feoffor or Donor, but he may enter upon the Heir. So if the Feoffee or Donee on Condition be disfeised, and before or after the condition broken the Disfeisee die seised; yet the entry of the Feoffor or Donor is not gone, but he may enter upon him, *List. 391. 22 H. 6. 11.* If a Disfeisor die seised, and after his Heir endow the Wife of the Disfeisor of a third part, and she enter into it; now the Disfeisee after the endowment is not barred of his entry into the third part, but may enter upon the Wife, *List. 393.* If a Disfeisor infeoff his Father, and he die seised, and the Land descend upon him, the Disfeisee may enter upon him, notwithstanding this descent, *List. 395.* If any of the younger sons enter by abatement after the Fathers death, and have issue, and die seised, or his issue die seised, this will not barre the eldest son of his entry. So if one daughter enter upon all the Land descended, and die seised of it: but if after the eldest son have entred, or all the daughters have entred, one of the younger sons, or one of the daughters disfeise the other and die seised *Contra. List. 397. Plow. 306.* If an Infant have cause of entry and the Descent happen while he is within age; this will not barre him of his entry. So if the right of entry happen to a Feme covert whiles she is so; and the dying seised be before she is sole; her entry is not lost. So if the cause of entry and descent happen whiles a man is *de non sane memory*, yet the Heir of such man so disfeised may enter. So if the Disfeisee be in prison, or out of the Realm at the time of the disfeison, and dying seised, their entry is preserved for them, *List. 402. 403. 405. 21. H. 6: 17 List. 437.* If a Disfeisor enter into religion, whereby his Land comes to his Heir, this will not barre the Disfeisee of his entry upon his Heir, *List. 410.* If a Tenant for life be, the remainder to the right Heirs of *I. S.* and the Tenant for life is disfeised, and a descent is cast, and after *I. S.* die and after the Tenant for life die; in this case the entry of the Heir of *I. S.* is not gone, but he may enter, for his remainder was in *Custodia Legis*, *Coo. 1. 134.* If one had intruded upon the King, and after the King grant away the Land, and before entry or seisure by the Patentee the intruder doth die seised, this will not barre the entry of the Patentee, *Dyer. 266.* Out of all which it appeareth that if one man do wrongfully enter upon another mans possession, and put the right Owner of the Freehold and Inheritance from it, he doth thereby get the Freehold and Inheritance by Disfeison, and he may hold it against all men but the Disfeisee. And if such a Disfeisor or Abator

having

having the possession five years after the Disseisin or abatement, die in possession and the Land descend to his Heir, by this the Heir hath gained the possession of the Land against him that hath right untill he can recover it by a fix real Action. And if this be not brought within 60 years after the Disseisin or abatement, the right Owner doth lose his right for ever. But then that descent which taketh away entry, must be a descent and not a succession; as if a Corporation disseise me, and there be twenty successions, this will not hurt me. And this descent must be such as hath in it these things.

1 It must be a dying seised of an Estate in Fee-simple or Fee tayle, and not for life only.

2 It must be a dying seised of the possession and Franktenement also; and not of a Reversion or Remainder only. 3 He that dieth seised, and he that hath right of entry do claim by severall Titles, and not by the same Title.

4 The Disseisin and descent must be in time of peace, for if it be in time of war, it doth not prejudice to him that hath right.

5 The Disseisor or Abator must have the quiet possession of the Land five years before the descent without any entry or continuall claim, made by him that hath the right of entry or title.

6 He that hath the right of entry is of full age *infra quatuor Maria*, of sound memory, out of prison, and sole; for if the party be within age, beyond sea, *non Compos mentis* in prison, or a Feme covert at the time of his descent, it will not Bar.

7 But herein the whole time from the Disseisin to the descent cast is considerable; for if the person be not privileged at all times, the descent binds: As if a Feme covert be Disseised, and the husband dieth, and she take a new husband, and then the descent is cast: or one *ultra mare* is disseised, and he return into England, and then goeth beyond sea again, and then a descent is cast, in these cases the descent will bar the entry because of the *interim*, 9 H. 7. 24. Dyer. 143. Ca. upon *Lit. Descent. Stat. 32. H. 8. 33.*

If one have divers children, and the eldest being a Bastard doth enter after his fathers death, and quietly hold the Land without re-entry or claim all his life time, and hath issue, and dieth seised, and the issue enter, in this case the Action and Entry both of the *mulier* are gone, and he is without remedy.

So if one have two Daughters, one a Bastard, they divide, and the Bastard die seised of her part, and her issue enter, the other Daughter is without remedy. *Litt. sect. 401. 499. 300.*

An entry also may be gone by lapse of time, and therefore if the right or title of entry did first accrue to a person more then twenty years since, and he were at that time of full age, not a Feme covert, nor in prison, not beyond the seas, or *Non Compos mentis*; and if he were so, and have not made his entry within ten years after his full age, discoverture, coming, of sound mind, enlargement out of prison, coming into the Realm or death; the entry is gone and the party barred thereof for ever, 21. Jac. 16.

Now having shewed where this entry is given, we are to shew how it must be made, and when it is well made or not; for if it be not well made, this Action is not maintainable. And for the clearing of this point, take these rules and cases following.

1 This entry is to be made by the party that hath right.

2 It is a purposed going into or setting his foot upon the Land as upon his own Land, Co. upon *Litt. 143. Dyer. 337.*

3 This may be done by the party himself that hath right to enter, or by his Attorney by warrant from him, or by another to his use, and if it be done by Attorney he must have a good authority, and see he do duely pursue it, Co. on *Lit. 257. 258.*

4 The Lessor must have a right of entry; for if the right of entry be taken away the Lease is not good. And for this see the case before.

5 He or one of them at least that hath the right, or one for him must make the entry. But for the opening of this branch, these things must be known:

1 That

Entry good or not.

Sec. 3.
Entry of one gives advantage to another.

1 That one Joyntenant, Tenant in Common or Coparcener having right to enter may if he will, enter for all the rest.

2. If such a person enter generally, or for or in the name of himself and the rest, and the rest do not after disagree to it, this is a good entry for himself and the rest. And therefore if one have issue a son and daughter by one venter, and a son by another, and being seised of *Capite-Land* devise all to the youngest son, and die, and he enter into all, this entry shall avail the eldest son to put him in possession of the third part, *Adjudg. Swals Case. M. 14 Jac. Co. B.* But if he enter specially to his own use; as if two have right of Entry, and one of them enter, and make a Feoffment of all the Land with warranty; this Entry will not help the other. So if the other do after disagree to it, he shall have no advantage by it, *Lit. 160. Dyer. 53. 128. Co. upon Litt. 243. 3.* If the Tenant for life enter he in remainder may take advantage by it, *4 H. 7. 9. Dyer. 53. 4.* By the entry of the husband into that Land he claimeth in right of his wife, the Freehold and possession is in the wife, *Noy 97.* 5. When the entry is not lawfull, the Entry of one will not advantage another, *1 H. 6. 5. 8 H. 6. 16. 31 Aff. 33.*

4. The Entry into one part may be sufficient to gain the possession of the rest of the Land. But for the further opening of this branch these cases must be laid down;

Self. 4
Entry into
part gains the
possession of
the whole;

1. If a man have right to enter into Lands or Tenements in divers Villages within one County accrewed to him at one, or at several times, and he enter upon one part of it in one Village in the name of all the rest, to which he hath right to enter within all the Villages of that County; By this he hath gotten the possession of the whole, *Litt. Self. 417. Dyer. 337. 227. Co. upon Litt. 252. 9 H. 7. 25.* And yet some make a difference here, and grant this only where an Estate is to vest, as where the Freehold in Law is in one, as in an Heir by descent, and the possession is in no man, nor no Estate to be divested, that here only entry into part reduceth all into possession: And therefore, that if the Lord be to enter for a mortmain, or the Feoffor for a condition broken or the disseisee upon a Disseisin, and he enter upon part for all; that this is not sufficient to reduce all. But I take it the experience is otherwise, however therefore it is safest to enter upon every part of the Land, *Co. upon Litt. 15. 6. 252. 2.* If three several men severally disseise one of three Acres in one County, and he enter into one of them in the name of all the three Acres, this is good only for that he doth enter upon, and will not reduce them all in possession. And yet if these three Acres come after the Disseisin into one mans possession, there perhaps an Entry upon one may reduce all. But if one man disseise me of three Acres in one County at several times; My Entry into one of them in the name of all the rest will reduce them all, *14. & 15. Eliz. Earl of Arundels Case. Co. upon Litt. 15. 2. 9 H. 7. 25.* But for Land that lies in several Counties there must be Entries made in every County, *4 H. 7. 25. Litt. 417. 3.* If one man disseise me of three Acres, and make a Lease thereof to three persons for life, and I enter upon one of them in one mans possession in the name of all the rest, this will reduce that Acre only, and is not good for the rest. And if one disseise me of three Acres lying in three Villages in one County, and he levy a Fine of the Acre in one Village, and after I enter into one of the other Acres in the name of all the three Acres; this doth not reduce the Acre whereof the Fine was levied, without a special Entry into it. *Dyer. 337.* But if Leases were made for years of three Acres and gotten by Disseisin to several Tenants, and Entry into one in the name of the rest will recontinue, and reveist all the three Acres, *Co. upon Litt. 252.* And so *a fortiori*, where three Acres are in the possession of three men, and I having right to them enter into one of them in the name of them all, this will reduce all the three Acres: The course is in the cases where Entrie is needfull upon every parcel, as where Lessees claim by several Titles, &c. to enter upon every parcel, and leave a friend upon it to keep the possession, and then to seal the Lease upon the principal parcel where his last Entry is made, and then the Lessee doth enter upon all, and the men depart; for if he enter in one part only, and seal a Lease of the whole, this is not good for the rest, *M. 8. Jac. Curia.* But otherwise it is where Entry into a part is good for all, as where a disseisor hath made several Leases for years

Ouster.

years, there the Disfeisee doth enter into any part in the name of all, and seal a lease of all, and this is good for all. And if the lessees do continue in the possession, this is an Ouster upon which the Lessee may have an *Ejectione Firme*, *Curia Pasch 9 Jac. B. R. Lovess Case*. 4. If I enfeoffe one of one Acre of ground upon condition, and enfeoffe him of another Acre upon condition, both Acres in one County, and both conditions are broken; in this case an Entry into one Acre in the name of both is not good to reduce both. 5. The entry into parts must be in the name of all. For if one that is disfeised of two Acres in one County, enter generally into one of them without saying in the name of both; this will only reveist that Acre wherein the Entry is made, 5 *H. 7. 7. Co. super Litt. 252*. And therefore if Lands in one County be in the occupation of *A. B. and C.* and I have right to them, and I enter into one of them generally, and do not declare my intent to reduce all; it is said this is a good Entry only for that one Acre wherein I put my Foot, *Per Justice Hutson at Sarum Affises*, 22 *Jac.* If one restrain his own Entry, and make it special, and say that it shall be to that Acre only, wherein he puts his foot, in this case it reduceth the possession of no more but of that part, *Co. upon Litt. 15: 6*. If a Lease be made to *A.* and delivered to *B.* to the use of *A.* and *B.* enter to the use of *A.* and after is ousted, *A.* may bring this Action upon the Entry, *P. 44. Eliz. B. R. Purtil v. Bishop*.

Lease to try the Title.

Sect. 5.

And now having done with the matter of Entry of the Lessor, we are to speak of Leases; for to maintain this Action a good Lease must be shewed forth. For the opening of the learning thereof, take these Observations. 1. The Lease to try the Title must be well made, sealed and delivered as other Deeds and Leases are to be done. For this See my *Book of Common Assurances*, Chap. 4. & 14. 2. The Lease and Entry may be made by the party Lessor himself, if he be of full age, and not a *feme covert*, or by his Attorney by a Letter of Attorney thus. The Lessor may seal and sign the Lease, and seal and deliver a Letter of Attorney at the same time to some friend, and in this he must recite the Lease and give the Attorney power to enter in to the Land, and there to deliver the Lease to the Lessee as his Deed, and then the Attorney must do it in such sort as the Lessor himself is to do it, and he must not deliver it till he come to the Land. 3. The Lease must be delivered upon the Land; For if the Lessor seal and deliver the Lease before his Entry, it is void.

And for this cause, if a wife and *J. S.* be Jointenants in Fee, and being ousted they make a Lease to try the Title, and *J. S.* and the husband enter and deliver the Lease upon the Land, or the wife enter and before the ouster deliver the Lease out of the Land, this is not a good Lease by the wife. But if the husband and wife make a lease and Letter of Attorney to enter and deliver it upon the Land, this may be good, *Trin. 9. Jac. B. R. Burnel and Merediths Case*. A Copie-holder may make a Lease for a year without license to try the Title: So may a Tenant in common make a Lease of his part for this end. See more *Brownl. 1 part. 129*.

If a Lease be made of white Acre to *B.* from off the Land, and in the Lease is a Letter of Attorney to a stranger to deliver it as his Deed upon the Land, but the Lease is not delivered, this is not a good Authority, *B. R. 4. Car.* If *A.* Lease his Land to *B.* from off the Land, and seal and deliver it as his Deed off from the Land, *C.* being then in the Land, by Disfeisin, and after this the Attorney that hath power by another Deed to deliver it as his Deed upon the Land doth so, this is not a good Lease to maintain an *Ejectione firme*, *Curia B. R.*

Authoriti e Verball in writing.

A woman Covert, or an Infant, cannot make a Letter of Attorney to seal a Lease to try a Title, as a man of full age may do; but the husband alone may make a lease of his wives Land, *Per Just. Turner at Lent Affises*, 23 *Car.* And some hold that where a Letter of Attorney may be made, that this power may be given and executed by paroll without writing, *Just. Jones*, 5 *Car.* If the Declaration be of a Lease made by husband and wife, and it is made by Letter of Attorney from the husband and wife; this is not good. But if he declare in this case upon a Lease made only by the husband, it is good. *Brownl. 2 part. 248*.

If one that hath right to land enter & make a lease for years to one to try the Title; and

and the Tenant continue in possession, and then he that hath right doth enter and make another Lease to another, the first Lease continuing, and the ancient Tenant continuing in possession, the second Lessee cannot maintain this Action upon this Lease, *Curia Brownl: 1 part. 128. 129. 130. 134.*

3. The next thing is the Entry of the Lessee, for unless it be proved that the Lessee after the Lease made, did enter, this Action will not be maintainable; where in these things are to be known; 1. He must make such an Entry, as to gain the possession, for he cannot be ejected out of the possession of that wherein by Law he was never in the possession. 2. His possession must continue, and not be removed.

Entry of the
Lessee.
Entry, General
or Special.

Brownl. 1 part 130.

4. The next thing to be weighed is the ouster and Ejectment of the Lessee, for if it do not appear that the Defendant in the Action did oust and Eject the Lessee, this Action will fail. For this then observe these cases; 1. The ouster must be real and involuntary: for if one enter by license and agreement of the Lessee, and (as some say) of the Lessor; this is no Ejectment in which the Action will lie. 2. The ouster shall be taken largely against the Ejector: It is said therefore, that if A Lease two Acres to B, and C enter upon one of them, that this is an ouster out of both Acres, *Justice Hutton at Sarum Assises, 22 Jac. Quare of this.* 3. If a woman do enter and continue in possession, and after the husband cohabit with her, he is no Ejector, unless he agree to it; and therefore in this case the Action is to be brought against them both. But if the husband agree to it, the Action is to be brought against him alone. And yet a Lease was made to try a Title of a house, and the Lessee enter into it; and the wife of the party that is in possession oust him, and shut the door, and after the husband cometh and entreth in the house, and the Action was brought against the husband alone, and ruled to be good, *M. 44. 45. Eliz: B. R. Clement vers. Classy.* 4. The continuance of the same Tenant in possession that was in at the time of sealing of the Lease, is an Ejectment by him. 5. The Entry of a man upon the Land, or the putting in of a beast into the Land after the sealing and delivery of the Lease, is an Ejectment. 6. If a Lease be made to try the Title, and the servants of the former possessor enter with their Masters Carts to do their ordinary business, and the Action is brought against the Master, it is maintainable without proof of the Masters Commandment for this Entry, *P. 1. Car. B. R. Cally vers. Fish.* 7. A Tenant in common may by an actual Ejectment be an Ejector to, and sued by his companion: The thing in Lease was two houses, I S was in possession of one of them, and I D in the possession of the other, and the Lease was sealed in the house of I S and the Action was brought against I D only, the principal Ejector not sued, and the Plaintiff was forced to be non-sure, *Per Just. Aske at Summer Assises at Glo. 1650.* 8. A servant that doth dwell with the pretended owner is a sufficient Ejector, *Brownl, 1 part 143.*

Ejectment.
Self. 6.

5. The last thing is the Process and pleading; for, admitting a good power and form of Entry, a Lease duly made and executed, an Entry and Ejectment upon the Lease, yet there may be in the proceedings in the Action fatal errors. For this then take notice. 1. This writ lyeth not in every cause, or for any thing, for it lieth not upon a Lease of a stock of Cattel, nor upon a Lease of a Summ of money, *in modo decimandi*; nor of a water-course, *M. 6. Jac. B. R. Challoner, vers. Moor.* But it lieth of a Mannor, House, Land, Medow, Pasture, Tithe, or such like thing, *Co. 11. 25: It lieth de pomario. M: 43. 44. Eliz B. R. Wright vers. Wheatly.* So it lieth *de Coquina, Trin. 2. Jac. Co. B. So also de Cubiculo.* It lieth also of a Colemine, *P. 5. Jac. B. R. Comin, vers. Wheatly.* It lieth also of a Bailery, of *Salt Hill.* *6. Jac. B. R. Saunders Case.* It is not good for a Course of water, nor for Common of pasture nor a sheep gate. But it is good for 10 acres of pease. *Brownl: 1. part 129. 146. 142. 150.* 2. The writ must set forth the thing in certain for quantity and quality, as one Messuage, two Cottages. 7 Acres *ver. 4 Acr: prati. 5 Acr. pasture,* and so of Tithes. And it is not sufficient to say *de Tenemento,* or *de uno rapsorio,* or of Messuage and the Lands thereunto belonging, or of so much of a Messuage in the occupation of I S as doth stand upon the bank, &c. or of one close called D containing 3 Acres to a Messuage belonging, or the like, for this is un-

Pleading.
Self. 7.

certain. And yet an *Ejectione Firme* of a Gate-house one Acre parcel of a Mannor, a Moity, or a third part of a Mannor, or of a room of a house certainly described, is good. *Co. 11. 59. 25. Dyer 84. 305. F. N. B. 220. Finch. 107. Pasch. 17. Car. B. R. Trin. 17. Car.*

3. The Lease and the Declaration upon it must agree. If a *Feme Covert*, and *A* be Jointenants in Fee, and *A* and her husband, and the other Jointenant make a Lease for years by Deed indented, and the husband and *A* enter, and deliver Lease upon the Land, and the Lessee declare upon a Lease from them three, this is nought. *9 Jac. B. R. Curia.*

If the Lease be for ninety years, if three lives so long live, and the Declaration be upon a Lease for ninety years without limitation, this is nought, *Per Just. Turner at Lent Assises 23, Car.*

CHAP. LXXX.

Of an Estoppel.

1 Estoppel what.

The Kinds.



IT is where a man is concluded and barred, by some thing he hath said or done, to speak and make use of the truth for his own advantage: where a mans mouth is stoppt, and his hands bound that now he cannot say or doe, that which otherwise he might have said or done: And this may be in divers things, and by divers means: As in pleading, or in Deeds and writings under mens hands; when they shall assent to or confess any thing therein that is not true, or in their own disadvantage, now they are in many of these cases afterwards forbidden to say the contrary, if they have need for their advantage: so where a man hath election by law: to have one of two things, and he make his choyce of one of them; or to sue one of two persons and he sue one; or to have one of two remedies for the recovery of a thing and he make his choice: now in all these cases, he is concluded ever after to take, or demand, or use the other. And some of these Estoppells are by matter of Record. Some by matter in writing, and some of matter by fact; of which there are infinite examples: some of which see below. And see *Election*, and *Acceptance*, and in other titles where many cases of Estoppel will fall out. *Co. 2. 4. 3. 88. Plow. 397.*

2 Where it may be or not.

For Answer to this, take these things.

1. Note that by a bare supposall or unnecessary recitall, or by words or sayings of another partie, an Estoppel shall never be produced. *35 H. 6. 33. 3 H. 6. 15. 9 H. 6. 8.* for which see examples below. So when it appears in the very Deed that the Grantor had no power to grant, *Co. 1. 155. Dier. 244.* So when it enures by way of passing an Interest. *Co. 6. 15.* So when it is to cover-wickedness and defeat an Act of Parliament, *Co. 5. 64.* For Estoppells are odious in law. *Co. upon Litt. 365.* See divers rules for Estoppells in *Co. upon Litt. 352.*

By matter of Record.

2. A Record is of that high and excellent nature that the Law will not admit any deniall of that which is apparently within the Record. But that which the parties doe say and do there in the Law, doth give great heed unto. And therefore if the Daughter and right Heir will admit a Bastard of her Fathers

Fathers, or any other to sue a Livery out of the Kings hand with her; by this means the Bastard, or other, will get the one half of the Land, and the right Heir shall never be afterward received to say the Bastard is not Heir; because she hath allowed the contrary to be true by the Record.

So if two Joyntenants be that do hold *in capite*, and one Release to the other, and yet after they both Respite Homage together in the *Exchequer*: Now hereby the other Joyntenant hath gained his Moyety again of the Land, and the other Joyntenant shall not be received to say the contrary.

So if one plead the Kings pardon for his Alienation without Licence, and *rei veritatis* the Land is not held *in capite*; now he cannot afterwards say, that it is not held *in capite*, *Co. 7. 1. 8. 16. Plow. 396. Dyer 202. 33 H. 6. 7. Doct. & Stud. 33. Littl. Selt. 175. Broo. 306. Co. super Littl. 122. Cromp. Jurisd. 49: F. N. B. 97.*

3. If one acknowledge upon Record, to hold of his Lord by more services then he doth; he is barred to say after that he holdeth by less, though it be true:

So if one plead a Release or a Pardon to an offence, he shall not say after, he is not guilty of the offence, *Stamf. 555. 22 Edw. 4. 39. 9 Hen. 4: 8. 11 H. 4. 69.*

If a Tenant in Tail, Lease for life, and die, and the Tenant for life is impleaded, and he doth vouch the Issue in Tail, and he do enter into the Warranty generally; now the Issue is concluded and cannot afterward bring any Formedon to recover this Land. But if he had entred into the Warranty specially, *contra.* Tenant in Tail Warranty.

4. If the Husband do discontinue the Wives Land, and die, and after his death she brings a Writ of Dower, and doth recover against the Discontinuee; now by this she is concluded to demand the whole Land, as otherwise she might, *Co. 4: 5:* Dower.

5. If *A.* and *M.* his Wife, by the name of *A.* and *B.* levy a Fine, she shall not avoid it, and say against the Record, her name is not *B.* *F. N. B. 97.* Tenant in Tail Recovery.

If a Tenant in Tail suffer a Recovery that his Issues may avoid; yet he himself is concluded by it, and cannot demand the Land against his Recovery, *Co. 3. 3.*

1. 9.

6. If a Tenant in Tail make a Feoffment, or be disseised, and levy a Fine with Proclamations to a stranger, the Issues of the Tenant in Tail are barred for ever of the Land. Tenant in Tail Fine.

So if an Issue in Tail before his Right descended, in the life of his Ancestor, levy a Fine of the Land, whereof he hath possibility, and the Proclamation be passed; this will bar the Issues by Conclusion, *Co. 3. 944.*

If Lands be conveyed to a Woman in Tail, within the Statute of the eleventh of Henry the Seventh, and her Husband die, and their Issue levy a Fine to a stranger, and after the Woman discontinue within the Statute, and forfeit: Now the Issue by the Fine is estopped that he cannot enter; but perhaps the Conusee may: See more of these matters in Fines and Recoveries. And how a Lease by a Fine may be good by Estoppel, *Co. 4. 53. Plow. 434. 21 H. 7. 24. Co. 4. 71.*

7. If one bargain and sell Land to another, and before Inrollment levy a Fine of it to the Bargainee. Now the Bargainee must take by the Fine, and cannot take by the Deed inrolled.

8. If one in pleading doth confess the thing that he is charged with, or accused for; he is barred now of denial of it afterwards, although it be not true he hath confessed: As if one endited of Trespass, confess it, and after be sued in an Action of Trespass for the same Trespass; he is concluded now to plead not guilty by his Confession before. By Confession, or Nihil dicit.

9. If the Defendant after Appearance and Declaration, do not plead to the Action, or maintain his Plea, but maketh default, then Judgment shall be given against him; and this will be peremptory, and as great an Estoppel to him as a Confession.

But where one shall be estopped by matter of pleading, and where not: See the Books at large, *Dyer* 287. 21 *H.* 7. 24.

10. If a Plaintiff or Defendant be barred in any Sute upon a Demurrer, or Verdict; they are concluded to begin any new Sute, or to move again, but in special Cases, *Co.* 6. 7. 44.

Judgment.

11. If one have a Judgment for a thing already in a Court of Record, he is barred to begin a Sute again for the same thing, for which he hath a Judgment, *Co.* 6. 45. *Trin.* 3 *Jac.* *Brown & Wolston.*

So Judgment against another for the same cause, so that it be such a cause as where in Damages be to be recovered.

If a Tenant for life make a void Lease for life, and the Lessee make a Lease at Will, and the Tenant for life levieth a Fine to the Tenant at Will: Now both these parties are estopped to say against this Fine, *Quod partes inter finem nihil habuerunt*, *Co.* 2. 55.

Fine.

If a Precipe be brought against one for Land, and he since the Statute of *Communis Feoffatis*, plead JoynTENANCY with another by Fine; and now by this the other may take advantage, and he is estopped to say the contrary at another time, *Plow.* 6.

12. If a Feoffment be made to two and their Heirs, and after the Feoffor levies a Fine to them two, and the Heirs of one of them: Now this is no Estoppel to the other to demand Fee-simple according to the Deed, for the Fine doth enure as a Release, *Co.* 6. 7. 44. *Co.* 2. 74. 6 *R.* 2.

13. If a Lord Paramount distrain the Lessee of his Tenant, and he in pleading say, he holdeth for ten years by a Lease from the Tenant, when in truth it is by a Lease for twenty years: Now he is not estopped hereby to demand his Term of twenty years, *Dyer* 289.

14. If a Fine be levied *Sur Release* onely, a man may say, that the Comtee had nothing at the time of the Fine levied in the Land, and to Letters Patents, one may say that nothing was granted by them; and in this case there is no Estoppel, *Co.* 3.

15. Though in all Personal Actions Regularly, when one is barred by Judgment, Confession, Verdict, &c. He is barred for ever (as above) yet in Real Actions he is not so concluded; for if he be barred in a Real Action, he may have another Real Action upon the same cause, so it be an Action of a higher nature, as he may have.

So also where the Plaintiff hath mistaken his Action onely, as hath brought a Formedon in Remainder for a form in Reversion, or the like, and the Defendant doth plead to the Action of the Writ, such an Action brought without Judgment upon Verdict or Demurrer, or where the Plaintiff is Non-suit, or the Plea be discontinued will not conclude him, but he may bring the same Action again.

So where the Plea is to the Writ onely in Abatement of that, and that be abated by Judgment, or a Demurrer, or Verdict; yet there he is not estopped, but may have the same Writ again.

So if the Sute be onely discontinued, or the Plaintiff be Non-sute; in this case he is not barred to begin the same Sute again: But if the Plaintiff enter a Retraxit, he is barred for ever, *vide Retraxit. F. N. B.* 48.

16. If one have used as Administrator, and it have been put in Issue, and found against him; yet he is not barred by this to sue as Executor, *Co.* 5. 32. Though a
Judg-

Judgment given for the same thing against the same person or another, is an Estoppel for the suing again upon the same cause (as before,) yet if the same Judgment be reversed that was at first, or it were for some thing else, or not for all, that which is in the new Sure; in this case the Party is not estopped. So where the Judgment is not in a Court of Record, Co. 6. 45.

17. If a Woman covert levy a Fine as a Feme-sole, her Husband is not estopped, but may avoid it by Entry or Claim for him; his wife, and her Heirs without any Writ of Error.

So if J. S. with another mans wife, by the name of J. S. and Jean his wife levy a Fine of the Land of the wife, the right Husband may avoid it so, but it seems the wife is estopped, *Keble Whites case, Trin. 7 Jac. Co. 8.*

18. One shall not be estopped to say any thing against that which before he hath said in a Writ, or Court, as in a Formedon, 21 H. 7. 24.

19. If one Claim by Discent from J. S. yet in another Formedon he may Claim from J. D. but one shall be estopped to say any thing contained in his Plea, in Bar, or Replication; yea, though the Plaintiff be afterwards Nonsure.

20. If the King Licence to another, to alien the manner of Dole, which is held of him *Us dicuntur*; this is not any Estoppel to him to whom the Licence is made to say, the Land is not held of the King, for it is no precise Affirmance of the Tenure, *Plow. 398.*

Hitherto of Estoppels by Records, now by Deeds.

1. If one seised of Land in Fee, take a Lease of the same Land from a stranger by Deed indented, now during the Term (and no longer,) this is an Estoppel to him, and he cannot to avoid it, say it was his own; and if there were any Rent reserved, he must pay it also to the Lessor, during the Term. So if one make a Lease of Land by Deed indented, and at that time he had nothing in the Land, but after he purchase it, or it doth descend to him; this is a good Lease by Conclusion, *contra* in both cases, if it were by Deed Poll. Co. 4. 53. *Dyer 256. Plow. 344. 14 H. 6. 23. 4 H. 7. 14. Plow. 434.*

1. By Matter in Writing.

2. If two men do make an Exchange by word, and after before Entry, by either of them, they make Indentures of the Land, each to other; now it seems they are bound by these Indentures, and they shall have such Estate as doth pass by the Indentures, and not by the Exchange, *Perk. sect. 264. Plow. 433.*

3. If one Lease to one man for eighty years, and after make another Lease by Deed indented, to another for the same time; this second Lease is good by Estoppel only; and if the first do determine by Surrender or Forfeiture, or the like, the second Lessee shall have it; whereas otherwise, if it were, by Deed Poll, the second Lease were void, Co. 1. 155.

4. If a Lessee for thirty years of Land, assign it over, and after make a Lease for six years by Deed indented, and then repurchase the Lease again: Now this Lease for six years shall be good against him by Estoppel, and he cannot avoid it, Co. 5. 53.

5. If one by Deed indented, make a Partition of Land with another that hath nothing to do in the Land; by this he hath gotten a part of the Land, and the other is concluded to say ought against it, *Broo. 306.*

6. If one make a Defeasance by Indenture of a Deed; now he is hereby estopped to say, that there is no such Deed, *Plow. 397.* But if there be any thing put in the Deed by way of Recital, he is not concluded to gainsay that, *Broo. Estoppel 5.*

7. If one that hath nothing in Land make a Lease of it by Indenture, rendring Rent, the Lessee is estopped to say, that the Lessor had nothing in the Land at the time

time of the Lease made, and so by this cannot Bar in an Action of Debt; but if it were in a Deed Poll, he might, *Littl.*

8. If the Husband make a Feoffment of the Land of the Wife, and the Feoffee make a Lease to the Husband and Wife for life or years, and the Husband commit Waste, and the Lessor brings an Action of Waste; now the Husband is estopped to say that the Lessor hath no Reversion (as the truth is) for it is in the Wife, *Littl. fol. 666, 667.*

9. If one have a Rent common, or the like, by Prescription, and take a Partent from the King, or Deed from a common person for it; now by this he is concluded ever after to Claim it by Prescription, 21 H. 7. 5.

10. If one in consideration of one thousand pound, bargain and sell Land, and *rei veritate* no such money was paid; yet this being expressed upon the Deed of Bargain and Sale, and a Receipt of the money; the Bargainor, it seems, is concluded to say the contrary, *Dyer 169.*

11. If one do make a Deed *per duces*, and after when he is at large, he do make a *Disseisin* to it, it seems, he is estopped to say it was *per duces*, *Broo. Disf. 17.* If one by the name of J. S. of W. binde himself in an Obligation, or Bill, or the like: Now he is concluded by this, and he cannot say that his name is otherwise, or that he is of another place, and so avoid his Deed; for which see 10 H. 6. 8. 3 H. 6. 25. 22 H. 6. 53.

12. So where a Condition of an Obligation is in the particularity, as to infeoff J. S. of the Manor of J. or to pay such a sum as J. S. doth stand bound by Obligation to pay to W. S. or to stand to the sentence of M. S. in a matter of Tithes, in Question between them, there the Obligor is estopped to deny any of these things, which in the Condition of the Obligation he did grant: But if the Condition be in the generality, as to infeoff one of all his Lands in B. or to the Nonsute in all Actions; there he is not concluded, but may say, That he hath no Land there, or that there be no Actions depending, and the like, *Dyer 196. 18 Edw. 4. 21 Ed. 4. 34.*

13. If a Condition be to perform an Indenture, the Obligor is estopped to say, there is no such Indenture, 28 H. 6. 7. *Bro. Rep. 57.*

14. If one binde himself by the Condition of an Obligation, to give the third part of his Goods, which his Father Devised to him, he is estopped to say, in pleading gave him none, 8 Jac. Co. B.

15. If one Recite in the Condition of an Obligation where A. doth Demise to B. and B. to the Obligor. If now the Obligee shall hold it quietly, &c. now the Obligor is estopped to say A. did not Demise to B.

So if it be a Condition to pay the Rent reserved on such a Lease, he cannot say no such Rent, *Trin. 9 Jac. Sherleys case.*

16. If one be bound to perform the Award made by J. S. he is estopped to say J. S. *Nullum fecit arbitrium King & Percival. B.R. Hil. 14 Jac.*

17. If the Condition of a Obligation be, That the Obligor shall grant to the Obligee all the Lands mentioned in certain Indentures, bearing date with the Obligation, the Obligor cannot plead no such Indentures; but if the Condition were to infeoff the Obligee of all his Land in S. *Contrà per totam Curiam, M. 18 Jac. B. R. Sur. 28 H. 6. 7. 21 Ed. 4. 4, 54.*

So if A. be bound to B. in one hundred pound with Condition that A. before Michaelmas shall seal a Lease to B. under the Covenant contained in an Indenture, bearing date, &c. A. cannot plead that there is no such Indenture. But if the Tenant do confess by Deed indented, That he holdeth by other Services, then he doth of his Lord; it seems this is no Estoppel, neither shall the Services be increased hereby, 39 Ass. pl. 3.

18. If the Lord by Deed indented, reciting, that whereas his Tenant holdeth of him by such and such Services (otherwise then he doth hold by) doth confirm to his Tenant (saving his Services) this is no Estoppel to the Tenant, *Plow. 136. 35 H. 6. 33.*

18. If

18. If a Lessee for life, and he in Reversion make a Feoffment, by Deed indented; this shall not enure by way of Estoppel, because it doth enure by way of passing an Interest; and wheresoever any Interest passeth from a man, there a Deed shall never work by way of Estoppel against him. *Co. lib. Inst. 1 part. fol. 45.*

19. If a Husband make a Feoffment of his Wives Land, and after the Feoffee make a Lease to the Husband and Wife for life or years; this is no Estoppel to the Wife, after her Husbonds death, but she shall be remitted to her first Estate, *Litt. sect. 667.*

20. If A. Lessee for life of B. make a Lease for years by Deed indented, and after purchase the Reversion in Fee, and B. dieth; in this case A. is not estopped to avoid his own Lease, by Confession and Avoidance: But if A. had nothing in the Land, and made a Lease for years so, and after purchase the Land *contra*, *Co. lib. Inst. 1 part. fol. 47.*

21. If one take a Lease of the Herbage of his Land, and not of the Land it self by Deed indented; this is no Estoppel, *Co. Idem.*

22. If one by Deed call himself J. S. Heir of W. S. Now he is not hereby concluded, but in another case he may deny himself to be Heir of W. S. for it was a superfluous Addition, *35 H. 6. 33.*

23. If one Recite, that whereas he is seised of the Manor of W. he doth after grant a Rent-charge out of it: Now this Recital in the Deed, shall not prejudice him at another time, but he may say he is not seised of the Manor of W. for these Recitals are not material, *Plow. 18. 397. 33 H. 6. 10.*

24. If one by Deed Poll recite that he hath leased Land for ten years; and then Lease the same to another, for the same time; this will not work by way of Estoppel. So if one recite that he hath a possibility, or a thing not grantable over, and then grant it away; this shall never enure by way of Estoppel, nay, though it were by Deed indented, because it appears by the Deed it self, the Grantor had nothing to grant, *Co. 155. Dyer 244.*

25. If a Deed be of a Contract, which in truth is Usurious, and the Deed acknowledge; yet in this case a man shall not be concluded to say the truth, *Co. 5. 69.*

26. If one have a debt due to him by Contract, and he take an Obligation for it; he is barred to sue upon the Contract. By other means.

So if it be a debt due by Specialty, and he get a Judgment, he is estopped to sue upon the Obligation again, whiles the Judgment is in force, *Co. 6. 45.*

27. Sometimes by Acceptance of one thing, one is concluded to demand another, (For which see *Acceptance*;) As if a Woman enter upon, and accept a Joynter made to her after marriage, after her Husbonds death; now hereby she is barred of her Dower.

So if she bring a Writ of Dower, and demand, and recover Dower; she is barred of having any Joynter made to her after marriage, *Co. 4. 5. Dyer 317.*

28. If one have a Judgment, and have chosen an Execution by Elegit; it seems he is estopped to have any other Execution after. See *Execution* for this matter.

29. If an Exchange be between two, and one of them enter; now he is estopped and concluded, and he cannot avoid Exchange first made. See for this, *Exchange*, *Co. upon Litt. 170.*

30. If one have his choice of one of two Actions, and he hath chosen one: Now he is barred of the other. So if one have choice of two Remedies, as if one have brought an Appeal of Maime, and recovered Damages, he is barred after to bring any Action of Trespass for the same, *Et sic è converso*. So upon an Executory Contract if he bring Debt, and recover, he is barred of any Action of the Case, *Et sic è converso*, *Co. 4. 43. Co. 4. 94.*

31. If

31. If a Tenant make a Feoffment by Collusion, and the Lord accept the services of the Feoffee; hereby he is Estopped of the Wardship, and of this Averment of Collusion. So if the Husband sell his Wives Land and die, and she accept part of it in Dower; she is barred of her, *Cui in vita* for the whole, *F.N.B. 142. 144.*

32. If the Husband do discontinue the Wives Land, and the Aliens make a Lease to the Husband and Wife for their lives, and the Lessor bring Waste against the Husband; he is Estopped by the Feoffment and Waste, to speak of the Remitter to his Wife, *Littl. 167. 667.*

33. If a man seised of Land in Fee, take a Wife, and then grant a Rent-charge, and after make a Feoffment in Fee, and taketh back an Estate-tail, and die, and the Wife recovereth Dower against the Issue in Tail by Reddicion, the Wife sheweth that her Husband died seised, and pay a Writ, to enquire of Damages, and bath it; in this case she shall hold the Land charged with the Rent; for by her prayer she accepteth her self dowable of the second Estate, and she is Estopped to be endowed of the first, *14 Ed. 3. 28.*

34. *J. S.* seised of Land in Fee hath two Daughters, a Bastard *signe* and *mulier pnisne*, and die, and they both make Partition, the *mulier* is hereby concluded forever, *Co. upon Littl. 170.*

35. But if one bring Action of Trespass, the Case, or the like, where the things are uncertain, and Damages is onely to be recovered, and he hath no Judgment, yet, this is no Estoppel to him, but he may bring any other, or the same Action at another time. But if he have obtained a Judgment upon the first, he is Estopped, and the other may plead it in Bar to the second Action, *Adjudg, Bridges and Difty, M. 5 Jac. B.R.*

36. If Partners do make Division of the Lands they have in Tail, and one of them hath the worst part, though she be concluded, yet it is no Estoppel to her Issue.

So if Husband and Wife be Tenants in Special Tail of certain Lands in Fee, and they have Issue a Daughter, and the Wife dieth, and he take another Wife, and have a Daughter by her; and both these enter and make Division, though this be an Estoppel to the eldest Daughter, during her life, yet it is none to her Issue, *Co. super Littl. 170.*

3. What persons are concluded by an Estoppel, or not.

37. Estoppels do commonly conclude none but such as be Parties or Privies; and no strangers are bound by them, unless it be in some special cases; as when the Estoppel is by Act of Parliament, or the like. And therefore a Jury upon Oath, are not concluded and bound up as the Parties be: As if an Obligation be delivered before the date, and dated after the Delivery, the Obligee cannot plead it so, but must plead it after; yet if the other plead *Non est factum*, the Jury will and may finde it to be his Deed, *Co. upon Littl. 352.*

38. The Heir at Common Law is commonly to be barred by the Estoppel, not another Heir, though the Land be to go to him: As if there be Father and Son, and the Son have Issue a Son and Daughter by one Woman, and a Daughter by another, and the Grand-father do an Act of Estoppel by Deed, the Father die, and the Son die, and his Son also die without Issue; his Daughter now that must have the Land, shall not be barred by this Estoppel: So an Estoppel on the part of the Mother, shall not binde the Heir on the Fathers part. And therefore if Bonds be given to Husband and Wife, and the Heirs of the Husband, the Husband makes a Gift in Tail, and dieth, and the Wife recover in a *Cui in vita* against the Donee, supposing she had Fee-simple, and make a Feoffment and die, the Donee die without Issue, and the Issue of the Husband and Wife bring *Formedon* in the Reverter against the Feoffee; he is not Estopped, but may so do, *Co. upon Littl. 365.* So if the Husband and Wife be Tenants for life, the Remainder to the Heirs of the Baron, and the Husband give in Tail, and die, the Wife Recover in *cui in vita*, supposing that she had the Lands to her and her Heirs in Fee; and after recovery Infeoff another, and die, the Donee die without Issue. Now the Heir of the Donor shall

shall recover this Land, and is not barred by the Estoppel of his Mother, because he was Heir to them both; and therefore the Estoppel of one of them, could not Bar him, 35 H. 6. 33. *Broo. Estoppel* 22. Co. 8. 53. 18 Ed. 3. 9. Co. lib. *Inst.* 1 part. fol. 12.

39. If one Joyntenant in Fee take a Lease for years of a stranger, the Survivor shall not be bound by this, Co. upon *Littl. f.* 185.

If one make a Lease of part of a Term, whereby he is estopped, and after assign away the Term, the Assignee is estopped also; and Regularly none but Parties and Privies shall take advantage of an Estoppel (and not strangers); and therefore none may take advantage of any Estoppel in any Fine or Recovery; but Parties or Privies, or such as Claim the Land, or the Estate, or part of it under him that was party to the Fine or Recovery, 30 H. 6. 2.

But of such Acts by matter of Record, as trench to the dis-inheritance of him, in Reversion or Remainder: There he in Reversion or Remainder may take advantage, though he be no party to the thing; as if Lessee for life or years, pray in Aid of a stranger, or levy a Fine, Co. 4. 53.

Privies in Blood as the Heir, Privies in Estate as the Feoffee, Lessee, &c. Privies in Law as the Lords by Escheat, Tenant by the Courtesie, in Dower, the Incumbent of a Benefice, and others that come under by Act in Law, or in the Poss. shall take advantage, and be bound by Estoppels, Co. upon *Littl.* 352.

It is where one Estoppel is pleaded against another; and that doth put the matter at large, Co. upon *Littl.* 352.

How an Estoppel must be pleaded, and the manner of the Conclusion of the Plea, Co. 4. 53. 111 52.

4. What persons shall take advantage of an Estoppel, or not.

Estoppel against a Plea, what.



CHAP. LXXXI.

Of Estovers, Exchangers of Gold and Silver, Excise and Evesdroppers.



Estovers is a word that hath many significations: For sometimes it signifieth the Sufenance that a man that hath done Felony, is to have out of his Lands and Goods, for himself and his Family, during his Imprisonment. Sometimes it signifieth an Allowance in Meat and Cloath. Sometimes an Allowance of Wood, to be taken out of anothers Wood. Sometimes it signifieth Houf-boot, Hay-boot, and Plough-boot: But most properly it signifieth the Right that a man hath to cut and take

Estovers, what.

Houf-boot, Hay-boot, and Plough-boot, to expend and use in and upon his House, and Tenement, out of the Wood of another man, i. e. Which is either Certain, as ten or twenty load; or Incertain, so much as he shall spend in such a House; or in Grofs, F. N. B. 181. 28 H. 8. 28. See Co. 2 part. *Inst.* 17, 18.

Excise.

For the Excise, who must pay it, what, and how it is to be paid, See the Ordinances, and Act at large. Act, 14 August, 1649. and March 17. 1653. June 12. 1649.

Assa

Of

Of Exchangers of Gold and Silver, or Bankers.

See for this the Statute of 25 Ed. 3: 12.

Of Evesdroppers.

Evesdroppers are such as lie about Mens Houses or Windows to hear Tales, and to carry them about to breed Division, and do so; they are to be punished for this in a Leet, or may be punished by Justices of the Peace, by the Good-behavior, or Indictment.

CHAP. LXXXII.

Of an Execution.

See. 1.

1. Execution, what it is.



Execution is the last performance of some Act, it is most commonly taken for the next Act which doth pursue the Judgement, which is the Sentence that a Judge doth make at the end of a Cause or Sute, speaking the Law in the case, as it appears upon the proofs before him.

In Civil Causes it is, where a Judgment is given in any Court for the Recovery of any Debt or Damage, or any Lands, or Tenements, or other things: Or a man doth acknowledge a Debt by a Recognizance or Statute (which is in the nature of a Judgment) and the Party by a Writ, is put into the Possession of the thing, so recovered by the Judgment, or acknowledged by the Statute. Briefly, It is the obtaining of an Actual Possession of any thing acquired by Judgment of Law, *Terms Ley, Co. upon Litt. 154.*

How many kinds there are.

And some of these Executors are small and valuable, as where the Sheriff doth take the Defendants Lands or Goods, and deliver them to the Plaintiff in satisfaction of his Debt; or not valuable, or *quousque* tending onely to an end: As when the body of the Defendant onely is taken and put in prison, where it is to lie as a pledge till the Debt be satisfied; but this doth not satisfy the Plaintiff, *Co. 6. 87.*

The means whereby this is done, are by Writs, which are called Writs of Execution; and these are some of them against the person, and some of them against the Goods, and some of them against the Lands, and some of them against them all, *Co. 8. 143.*

The Writs whereby Execution is done, are for Recovery of Land in a Real Action; as, *Habere facias Seisinam*, and an *Habere facias Possessionem*. And for Recovery of Debt or Damage in a Personal Action; a *Capias ad Satisfaciendum*, *Fieri facias* and *Elegit*, *Co. 6. 51: F. N. B. 265. Westm. 2. 18.*

Extendi facias,
Levari facias
Liberate.

There are other Writs of Execution, which see in *Desinnee, Chap. 37.* And for all the Writs of Execution of a Statute; as, *Levari facias*, *Extendi facias* and *Liberate*; and for a Statute and Recognizance, and that which doth concern it: See in *Statutes* in my Treatise of *Common Assurances, cap. 20.*

Habere facias
Seisinam,
what it is.

It is a Writ Judicial, and it lieth where one hath recovered certain Lands in the Kings Court, then he shall have this Writ directed to the Sheriff, commanding him to put him in Actual Seisin of that Land, *Perk. sect. 206, 207, 208. Terms Ley 217. F. N. B. 220.*

Habere facias
Possessionem,
what it is.

It is a Writ Judicial, and lieth where one that was Evicted out of his Farm, hath recovered the same in an *Ejectione Firme*, or, *Quare ejecit infra terminum*, there he shall have this Writ directed to the Sheriff, to command him to put the Plaintiff

Plaintiff into Actual Possession of the Term again; and in Execution of both these Writs, the Sheriff may justify the breaking of a House to do it, if he cannot do it otherwise, *F. N. B.* 220, 221. *Co.* 104. 5. 91. 6. 51. *Dyer* 278:

It is a Writ Judicial, and lieth where a man hath recovered any Debt or Damages in any Action personal in the Kings Court; then he that hath recovered, may have this Writ unto the Sheriff to command him to take the Body of the Deb or, and thereupon he shall be put in prison, and there shall stay without Bail or Mainprise, until he hath made satisfaction to the Plaintiff, the Debt or Damages recovered. This Writ was given by the *Stat. of Westm.* 2. ch. 11. *Martb.* 13. *Terms Ley* 256. *Co.* 8. 141. *super Littl.* 289, 290.

Capias ad Satisfaciendum, what it is.

It is a Writ Judicial, and lieth where a man hath recovered any Debt or Damages in any Action Personal in the Kings Court, then he that hath recovered may have this Writ to the Sheriff, commanding him to levy the money of the Goods and Chattels of the Defendant, and to bring it into the Court, that the Party Plaintiff may have it, *Co.* 3. 9. *Dyer* 306.

Fieri facias, what it is.

And if the Sheriff take Goods and return so, and that he cannot finde buyers for the Goods, or delay to deliver it to the Party, then he may have a *Venditioni exponas*, and compel the Sheriff to sell the Goods, and bring in the money. And if he say the Goods were taken by his Predecessor, he must have a *Distingas nuper voc'* to the Precedent Sheriff to command him to sell them, and bring in the money, *Dyer* 363. 13 *H. 7.* 1. 34 *H. 6.* 6.

An Elegit is a Judicial Writ that lieth for him that hath recovered Debt or Damages in the Kings Court against another, directed to the Sheriff to command him to make Delivery of the one half of the Parties Lands and Tenements, and of all his Goods, except his Oxen and Beasts of his Plough to the Plaintiff for satisfaction of his Debt, *Old N. B.* 152. *Co.* upon *Littl.* 289. *Dyer* 306. It lieth also upon a Recognisance in any of the Kings Courts.

Elegit, what it is.

But these Writs of Execution must be had within a year after the Judgment; otherwise it cannot be had till there be first sued out a *Scire facias*, which is a Judicial Writ going out of a Record, and lying where one hath recovered Lands or Tenements, Debt or Damages, and the Demandant or Plaintiff doth not sue out Execution within a year after the Judgment had; in this case he cannot sue Execution, till he have first summoned the Party to shew cause why Execution should not be done; and if now he neglect to answer, or cannot be found to be summoned, then a second Judgment shall be given, that Execution be done on the first Judgment. And in this case the Defendant may plead any matter growing after Judgment, as Outlawry, Release, &c. to prevent Execution, *Co.* upon *Littl.* 19. *Dyer* 148. *Co.* 3. 12. And yet if he sue out Execution within the year, it seems he may continue it after the year without a *Scire facias*, *Old N. B.* 163. *Dyer* 207. 271. *Fines Ley* 477.

Scire facias, what it is.

After Judgment had in the upper Bench or Common Pleas, the Plaintiff may have Execution, either of the Body of the Defendant by a *Capias ad satisfaciendum*, or upon his Lands by Elegit, or upon his Goods and Chattels by *Fieri facias*. But a *Capias ad satisfaciendum* will not lie in Execution, unless it be in such an Action wherein, and against a person, against whom a *Capias* doth lie at the beginning, as Debt, Account, Action upon the Case, Action of Trespass, *Vi & Armis*, Annuity, and Covenant; in all which cases *Capias ad satisfaciendum* doth lie, but no Execution by *Capias ad satisfaciendum* may be had for Recovery of Damages in a Real Action, nor in any Action against a Duke, Earl, or Baron, or their Wives, unless it be in some special cases: Nor against an Heir, or an Executor, but in some special cases, *Magna Charta* 2. 18. *Co.* 3. 12. *Westm.* 2. 11. *Co.* 5. 88. 6. 53. *Co.* 8. 141. 11 *H. 7.* 15. 2 *H. 4.* 657.

Scire facias, 3. What Execution the Plaintiff may have upon a Judgment, to recover Debt or Damage, and how, or not.

If one have a Judgment against divers for one cause, and take out a *Capias ad satisfaciendum* against one of them, it seems, that after this he can have no other Execution against any of the rest of the Defendants, *Trin.* 9 *fac. B. R.* The Plaintiff after a *Fieri facias*, if Execution be not done upon it, may have an Elegit

or a *Capias ad satisfaciendum*. But after he hath taken out a *Capias ad satisfaciendum*, and the same be entred upon Record or returned, he can have no other Execution. So also it seems after an *Elegit* sued out and returned, the Plaintiff can have no other Execution by *Fieri facias* or *Capias ad satisfaciendum*; but he must have an *Alias Elegit*, or he may have an *Elegit* in another County, 13 H. 2. 1. Co. 5. 87. 15 H. 7. 15. 33 H. 6. 47. 28 H. 8. 9. 19 H. 6. 4. 17 Ed. 4. 4. 21 H. 7. 19.

If one have recovered part of his debt by a *Fieri facias*, he may have a *Capias ad satisfaciendum* to recover the residue, Mich. 4 Jac. B. R. *Carri* Case, 18 Ed. 4. 11.

If the Defendant be arrested on a *Latitat*, and he in prison for want of bail, and after the Plaintiff do get a Judgment against him; in this case, if he will, he may waive his body, and take Execution of his Lands or Goods, M. 4 Jac. B. R. *Curia*.

If a Judgment be had against the Defendant, and he having Land, die, and the Land descend to his Heir, after a *Scire facias*, he may have Execution by *Elegit* against the Heir for this Land, Dyer 2. 8. If a Judgment be given in the Common Bench, and removed from thence into the Upper Bench, by Writ of Error, and there affirmed within the year; in this case the Plaintiff shall have the same Proces of Execution in that Court, as he might have had in the Common Pleas without any *Scire facias*, Co. 5. 88.

If a Judgment be for Damages against two Defendants, and the Plaintiff take out an Execution by an *Elegit* against one of them: In this case it seems he can have no other Execution against the other, 33 H. 6. 47. The same Proces of Execution as a man may have before a *Scire facias* sued out upon a Judgment, the same he may have after the *Scire facias*, and none other. And therefore where a *Capias ad satisfaciendum* will not lie before a *Scire facias* upon the first Judgment, it will not lie upon the second Judgment, 48 Ed. 3. 48. 34 H. 6. 45.

If one be condemned in Trespas, and taken *Pro fine Regis*, and the Plaintiff pray he may be in Execution for him; in this case he cannot after have an *Elegit*, or a *Fieri facias*, unless the Defendant die in Execution before the Plaintiff be satisfied his debt, F. N. B. 246. Co. 5. 77. After Judgment had in an Annuity, the Plaintiff upon a *Scire facias* may have a *Fieri facias* to levy it as it becomes due, 11 H. 4. 34. Broo. 119. After the Sheriff upon a *Fieri facias* hath returned a *Fieri feci, sed non inveni emptores*, &c. The Plaintiff cannot have a *Capias ad satisfaciendum*, or an *Elegit*, 13 H. 7. 1. When the Defendant was outlawed after Judgment, the Plaintiff must have prayed when he was taken for the King, that he may stay in Execution for him also; for he hath no other Proces of Execution afterwards, nor hath he any other Remedy, unless it be by a new Action of Debt, brought upon the Judgment, Co. 5. 88. No Execution can be had against Executors on a Judgment against the Testator, but by *Fieri facias*, and that *De bonis Testatoris* only, unless it be in case where he hath wasted these Goods. But for this see in Executors in my Treatise of Common Assurances.

See 4.
4. For and against whom Execution shall be had upon Judgments for Land, Debt, or Damage, or not; and when, and how it shall be done.
Heir.
Executor.

If one have a Judgment to recover Land, and die before he have Execution, his Heir after his death, may and must have Execution. And if there be Tenant in Tail, the Remainder in Fee with Warranty, and he have Judgment to recover in value, and die before Execution without Issue, in this case he in the Remainder may sue Execution. If one have Judgment to recover a Term, or any Goods, or a Debt, or Damages, and he die before he have Execution; in these cases the Executor or Administrator, not the Heir, shall have the Execution. And if one have a Judgment to recover Land and Damages together, he may have Execution of both together: But if he die, his Heir must have the Execution for the Land, and his Executor or Administrator must have the Execution for the Damages. And so it is in case of a Judgment to remove a Nuisance, and to recover Damages for the times past. And if a Judgment be to recover a Deed belonging to his Land, or twenty pound, and the Plaintiff die before Execution; in this case the Heir must first have a *Disfringe* for the Deed, ere the Executor sue Execution for the money; and if the Deed may be had, the Heir is to have him. But if the Deed cannot be had, the Executor shall have Execution for the money, *Terms-Lay Proces*, Dyer 208. 19 Ed. 4. 5. Co. upon

List.

Litt. 251. 22 H. 6. 41. But in all these cases neither the Heir nor the Executor nor Administrator may have Execution of the Judgement till first they have sued out a *Scire facias* against the party against whom the Judgement was had, to warn him in, to shew cause why Execution should not be had against him. And then if he either make default, or appearing can shew no good cause why Execution should not be done against him, the Execution shall be done for the Plaintiff, as it should have been for him under whom he claims, *19 Ed. 4. 5.*

If an Administrator get a judgement on the behalf of the intestate, and die; neither his Executor (if he have any) nor his Administrator shall have Execution of this Judgement, but the Administrator *de bonis non Administratis* of the first intestate, shall have Execution. And if an Executor get a judgement on the behalf of the Testator, and then die; If he make an Executor he shall have Execution upon this Judgement. But if he die intestate, his Administrator, unless he have also an Administrator *de bonis non Administratis* of the Testator, cannot have Execution upon this Judgement, *Co. 5. 9.* If an Executor *durante minore etate*, get a Judgement, and before Execution the Executor doth come of age; in this case the Executor himself may have Execution of this Judgement. So if one be Executor till he be married, and get a Judgement, and before Execution he is married; in this case it seems the first Executor may sue out Execution, *M. 9 Jac. B. R. Darnley Case.*

If Judgement be given against a Tenant in tayl, and he die before Execution, it may be done by *Habeas facias seisinam* against the issue in tayl, *Co. 1. 94. 196.* If a Judgement be against two Disseisors, and one of them die before Execution, the whole damages shall not be levied of the survivor, but a part of it shall be levied upon the Heir or him that is dead, *Co. 3. 13.*

If the principall upon a speciall Bayl do not after Judgement pay the money, or yield his body; then and not before, Execution is to be sued against the Bayl, *Co. 5. 70.* An Heir or an Executor shall never be charged by an Execution, but for so much in Land, Goods or Chattels, as are come to his hands from the debtor, unless it be by his own false or foolish pleading. If the Defendant be taken upon a *Capias ad satisfaciendum* upon a Judgement, and he die in Execution; in this case the Plaintiff may have a new Execution against his Heirs, Executors or Administrators (as the case is) and shall recover his Debt upon his lands, goods, or chattels, *Co. 5. 86. 87. F. N. B. 267.*

But no Execution can be had against an Heir, Executor, or Administrator, upon a Judgement given against another under whom he comes, and in whose room he stands, albeit it be within a year after the Judgement had, but there must be first a *Scire facias* against him to shew cause why it should not be had, *Co. 3. 11: Dyer 208.*

If two or more be bound in an Obligation jointly and severally (as the manner is) and the Judgement is given against them all, in this case the Plaintiff may take them all in Execution by a *capias ad satisfaciendum*. But he can be satisfied the debt but once; and therefore if one of them pay the debt, and any of the rest be in Execution; in this case he and all the rest are to be discharged of the Execution. So if he recover the Debt or value thereof by *fi. facias* or *elegis* of one of them, the Lands and goods of the rest are to be discharged; for he shall have Execution with satisfaction but once. So if the Judgement be on a joint-bill, it seems the Law is the same; And if in these cases the Judgement and Execution be had against one only, the Sheriff may levy the whole debt of him. *Co. 11. 7. 3. 87. 119. 4 H. 7. 8.* And yet if one have a Judgement for damages against divers men for one joint-Trespas, in this case he can have but one Execution against them all. But upon this, if it be against the bodies by *capias ad satisfaciendum*, the Sheriff may take all or any of them at that time in Execution, and if it be against their goods by *fi. facias*, he may levy it once, of all or any of them. But it must be levied but once, and they must bear it equally amongst them. And therefore if in the case before, Execution be first sued out against one of them, and the damages is levied, and after another of them is sued for the same Trespas, he may pleade Execution with satisfaction against the other, *Co. 11. 43. 3 H. 4. 13. 20 H. 6. 11. 34 H. 6. 33. Pasch. 3. Jac. B. R. Hutchins Case.*

Upon

Scire facias.

Administrator

What things shall be liable to Execution, and the Sheriff may take by virtue thereof

Sect. 5.

Upon a *Capias* ad satisfaciendum.

Upon a *feri facias*.

Executor.

Upon an *Elegit*.

How the Sheriff is to do Execution, and what shall be said to be well done by him, or not.

Sect. 6.

Action of the Case.
Trespas.

Upon a Judgement given for debt or damages in the two Courts of Record at *Westminster*, generally all the Land that the Defendant hath *tempore redditionis Judicii*, or at any time after, and all the goods and chattels he hath *tempore executionis* shall be subject and liable to the Execution. And all these may be taken in Execution by the Sheriff, in whose hands soever they be, *Di. 306. 34 Co. 3. 12. 34 H. 6. 45.*

Upon a *capias ad satisfaciendum*, the Sheriff can take nothing but the body of the defendant, for the writ is to doe no more but to take his body: and to detain him in prison till he hath satisfied the Debt. *Co. 5. 8.*

Upon a *Fieri facias* the Sheriff may take in Execution any Goods or Chattels real or personall, that the Defendant hath at the time of the Execution awarded as Lease for years, wardships, cattell, corn, household stuff, apparrell, and the like, and this having taken he may sell and make money of it, and this money pay to the Plaintiff. *Co. 8. 171. 7. 39.* But the goods or Chattels a man hath as Executor or Administrator, cannot be taken in Execution, for the Executor or Administrator own debt, as they may and must for the Debt of the Testator. *Plow. 525.* And yet it hath been held that the goods I have to the use of another are liable to Execution for my Debt, because they are mine by Law, and his only in equity, *M. 7. Jac. C. A. B.* So if the defendant deliver his goods to me, to deliver over to another, that in this case before the delivery they are liable to Execution, *Co. 9. 171.* If a man have a Lease for years in the right of his wife, & a Judgement be had and Execution awarded against him, and he die before it be executed, yet it is said, the Lease is liable to the Execution: So likewise if the Defendant have a Lease for years in Jointenancy with another, *Plow. 224.* And yet if the defendant die before Execution awarded out, the Term is discharged and shall goe to the survivor. But goods pledged and not redeemed, or leased for any time and the time not expired, goods distrained and continuing as a distress, goods taken in Execution for another man and another Debt, are not liable to Execution. So offices of Trust which are not grantable over, may not be taken in Execution, *Dyer 363. 7 H. 6. 11. Dyer 67. Co. 8. 171. 2 H. 4. 14.* But some say that if there be other goods enough that the Sheriff may not take in Execution the Beasts of the Plow, if the other goods be then and there present and to be had, whether it be an Execution for the Lord Protector, or a subject, Therefore let the Sheriff take heed to this, *Co. 2 parts Inst. 133.*

Upon an *Elegit* the Sheriff is to make Execution of the one half of all the Houses, Lands, Medows, Pastures, Rents, Versions, and Hereditaments, whereof and wherein at the time of the Judgement had, or after the Defendant had any sole estate or interest in Fee tayl, or for life, into whose hands soever the same doe afterwards come, so also the one half of all such Lands he doth hold in Jointenancy, so long as the Defendant doth live, and of all, if he do outlive his companion: So also if the husband and wife hold Lands for their two lives, this is extendable upon this Writ. But a right only to Land, an Annuity, Copiehold Land, Land the Husband had in right of his wife in Fee, or for life after her death, is not extendable, nor liable to Execution. And all the Goods and Chattels (except only the beasts of the Plough) which the Defendant hath at the time of the Execution made, are liable to Execution on this writ, as on a *Fieri facias*. But none of the Goods or Chattels before Execution, *Bona fide* made away, are liable to Execution on this writ, *Westm. 2. 18. Co. 6. 78. 8. 171. Dyer 206. 335. Co. 7. 59. 38. 4. 67. 78, F, N, B. 48. Plow. 224. 178, 2 H. 4. 14.*

And if the one halfe be extended by one *elegit*, and then another *elegit* comes, the one half of the Residue only, and not the one half of the whole shall be extended upon this second writ. *Brownl. 2 parts 97.* As to this purpose, these things must be premised, &c. That if a Sheriff enter into a Franchise to do execution, it is good, *Fieri non debet, factum valet*. But the Lord of the Franchise may have an Action of the case against him for it. But if the Bailiff of a Franchise do Execution without this Franchise, it is void, and he a Trespassor in all he doth, *11 H. 4. 7. 2.* If the Sheriff open or break any house to do Execution at the suite of a common person, the Execution is good, but the party whose house is broken may have an Action of Trespass against him for the breaking of the house, *Co. 5. 93.*

3. If a Sheriff do make Execution upon a *Capias ad satisfaciendum*, *Fieri facias*, *Habere facias seisinam*, *Habere facias possessionem*, a *Liberate*, or any such like final Proces, upon which no further Proces is to go, though he never return the Execution, yet is the Execution good. But if the Execution be made by Inquest, as upon an *Elegit*, or the like, there Execution is not well done, if it be not returned. If the Sheriff levy the money, and give it to the party Plaintiff, though he never make any return to the Court, it is good enough, *Co. 5. 90. 4. 67. 11. 40. 20 H. 6: 24.*

4. If the Sheriff have a *Fieri facias*, or *Capias ad satisfaciendum* against a man, and before Execution he pay him the money; in this case he cannot do Execution after: If he do, an Action of Trespasse or false Imprisonment lieth against him, *Per Just. Jones. & Just. Berkly, B. R. Pasch. 12 Car.*

Trespasse.
False Imprisonment.

Upon an *Habere facias seisinam*, or *possessionem*, the Sheriff is to put the Plaintiff into possession of the Land recovered according to the Writ; and if it be of a house, and he cannot otherwise do Execution of the house, he may break open the house to do it, *Co. 5: 93.* If the Judgement be for Rent, the Sheriff may make Execution by word, or by any part of the Land out of which the Rent doth issue, *F. N. B. 179.*

Sett. 7.
Upon an *Habere facias seisinam*, or *possessionem*.

The Sheriff upon this Writ is to do his best to take the body of the party in Execution, and for this purpose he is to seek for him, and if the door of his house be open he may go into his house, and take him out of the house. But he may not break open the house, nor (as it seemes) may he pull the latch, and open the dore if it be shut, *Co. 5: 92. 93. Dyer. 67: 224.* And yet if the Officer do so, and by that means doth apprehend and arrest the party, the Arrest is good, but the Officer may be punished for his excess, *Per ch. Just. Hobart. Pasch. 21 Jac.* And if the Sheriff cannot find him he must return upon the Writ a *non est inventus*, and thereupon the Plaintiff may have a Writ of Exigent, and so out-law him, *Dyer. 67. 224.*

Sett. 8.
Upon a *Capias ad satisfaciendum*.

The Sheriff upon this Writ is to do his utmost endeavour to levy the money upon the Goods and Chattels of the Defendant, and for that purpose to enquire and seek if he can finde out any Goods or Chattels of his, whereof Execution may be made; And it will be wisdom in the Plaintiff to make a diligent search to see if he can finde out any thing to be taken hold of, and if he can discover any, to direct the Sheriff to it, who *ex Officio* is to take it, and to sell it; and if he cannot sell it, he is to return it so, and thereupon a Writ called a *venditioni exponas* shall be sent to the Sheriff to force him to sell them, and pay the Plaintiff. But for the opening hereof, these things are to be known.

Sett. 9.
Upon a *fieri facias*.

1. If the out-dore of the house be open, the Sheriff may go into the house, and take any thing there liable to the Execution, and being come in at the open door, it seemes he may break open any of the inner doors 18, *Ed. 4: 4. Co. 5. 90. Co. 4. 74.*

2. If any of the Defendants Goods or Chattels be made away by fraud and covin of purpose to deceive Creditors, the Sheriff may notwithstanding take them in Execution, *Co. 5: 90.*

Fraud.

3. If the Sheriff take Leases for years or other Chattels real in Execution, he may seise and sell them without taking an Enquest by a jury of them, and the sale will be good, *Co. 5. 90: 4. 74.*

4. If a Sheriff after Execution made, sell Goods or Chattels and after the judgement whereupon the Execution was had is reversed by Writ of Error, yet the sale made by the Sheriff is good and unavoidable, *Co. 5. 90.*

5. If the Sheriff sell the Goods under foot, yet the sale is good, and the Defendant hath no remedy; And yet if there be Covin between the Sheriff and the buyer, perhaps the owner may have remedy by an Action of the Case, or by some other means, *Kelw. 64.*

Action of the Case.

The Sheriff upon this Writ is to pursue the charge and direction of the Writ (that is) to deliver to the Plaintiff the one half of the Defendants Lands he had, at, or after the time of the Judgement, and all the goods and Chattels the Defendant hath at the time of the Execution done. But in this case the Sheriff may not do all himself, as he doth upon the *Fieri facias*. For in this case, the Lands, Goods and Chattels must be found and prized by an Inquisition, and the verdict of a jury, and the same, and the value thereof returned before he can deliver them to the party or sell any of them

Sett. 10.
Upon an *Elegit*.

them away, and then if there be any Lease for years, the Sheriff may either sell it, and deliver the money to the Plaintiff, or he may deliver it to the Plaintiff at a yearly value, which he will, *Co. 6. 73. 4. 75. 7. 39. Plow. 324. 441. Dyer. 1 c. 0. Westm. 2 ch. 202*

If there be two several Judgements against one man, he that first sues out the *Elegit* shall have the one half of the whole, and he that sueth out the *Elegit* last shall have but the one half of that which is left, *Trin. 38. Eliz. Co. B. Curia in Hints Case*. If an Action be brought against one upon the Deed of his Ancestor, Binding his Heirs to do any thing, and Judgement be had against the Heir, in this case the Plaintiff may either have this Execution of the one half of his Land upon the *Stat. of Westm. 2.* or (as it seems) he may have Execution of all his Land by a Writ at the Common Law, *Plow. 440.*

7. In what case the Defendant in Execution shall be said to be discharged, or not.

Self. 11.
By Act of God.
By Act of Law

If a man be in Execution for a Debt upon a *Capias ad satisfaciendum*, and die under Execution, the Debt unpaid; in this case the Execution is not discharged. But the Plaintiff shall have as much remedy to take his Execution upon his Lands, Goods or Chattels, as if he had never taken his body in Execution, *Stat. 21. Jac. ch. 24. Cus. 86.* If two be in Execution for one Debt, and one of them die under Execution, this doth not discharge the other, *F. N. B. 146.*

If one be in Execution upon a *Capias ad satisfaciendum*, and the Court adjudge the Judgement or the Execution erroneous, and so Null it; by this the Defendant shall be discharged of Execution, *Co. 8. 143. 38 H. 6. 4.*

If one taken in Execution escape, and the Plaintiff bring his Action against the Sheriff, or have a *Capi* returned upon the *Capias ad satisfaciendum*, and this is filed; in this case the Defendant as to the Plaintiff is discharged of Execution for ever; But if no *Capi* be returned, nor Action brought against the Sheriff; in this case the Law doth judge him to be out of Execution, *13 H. 7. 1. Plow. 36. 33 H. 6. 24.*

If divers be in prison for one cause, and the Plaintiff receive satisfaction from one of them, all the rest are to be discharged, *Co. 11. 7. 2. R. 3. 9.* But if two be bound in a bond, and Judgement and Execution against them both, this will not discharge the other, nor shall he be discharged till the Plaintiff have recovered the Debt of the Sheriff, *Co. 5. 86.* If one be taken by a *Capias pro fine*, in such a case wherein he shall be said to be in Execution for the Plaintiff also, and he do after sue Execution against the Defendant by *Fieri Facias*, or *Elegit*; in this case the body is discharged from Execution, as to the Plaintiff, *13 H. 7. 6.* If one be in Execution by a *Capias pro fine*, and he is after taken in Execution for a felony; in this case he is discharged of the first Execution, *6 Ed. 4. 4. Dyer. 60.* If a prisoner be delivered out of Execution by privilege of Parliament, this is no discharge, but after the privilege is determined he may be taken again, *Stat. 1 Jac. ch. 13.*

By the Act of the parties.

If the defendant pay the money, he is hereby to be discharged of the Execution: But if the Plaintiff make any release, defeasance, or other such like Act to the Defendant being in Execution, amounting to a discharge of the Execution; this is not a discharge *ipso facto*, but by this means the party may procure a discharge; and yet if the Plaintiff himself shall deliver the prisoner out of Execution, hereby he is *ipso facto* discharged of the Execution for ever. So if the Plaintiff acknowledge satisfaction of Record, by this the Defendant is for ever discharged, *Co. 5. 86. 6. 13. Co. 8. 152. Dyer. 152. Trin. 9. Jac. B. R.*

Self. 12.
8. When a man shall be said to be in Execution, or not.

If the Sheriff have a man in his custody by Process of law, and after this a Writ of *Capias ad satisfaciendum* is delivered to him; in this case in Judgement of Law he shall be in Execution presently upon that Writ, though he never make any actual Arrest thereupon, *Co. 5. 89. 11 H. 4. 12. 14.* In all cases where the Plaintiff may have a *Capias ad satisfaciendum* in the suit, and the defendant is taken by a *Capias pro fine*, or a *Capias ut legatum* after Judgement, there the Defendant shall be in Execution presently as the suite of the party, also without prayer or motion to the Court: And in all cases where he may have a *Fieri facias*, and no *Capias ad satisfaciendum*, as in Assise, Rediffisin, and the like, and the party is taken by a *Capias pro fine*, and committed to prison at the Keepers of the Liberties suite; in all these cases also, upon a prayer and motion to the Court, the Defendant shall be in Execution for the party also, but not without prayer. And in cases where the Plaintiff hath a

Judgement,

Judgment, and doth surcease his time, so that now he cannot have Execution by *Capias ad satisfaciendum*, or *Fieri facias*, but he is put to his *Scire facias*; in these cases if the Defendant happen after to be taken by a *Capias pro fine* for the Keepers of the Liberty, or by a *Capias ut legatum*, he shall not be in Execution for the Plaintiff, without Prayer or Motion to the Court, *Co. 5. 89. F. N. B. 121. 7 H. 6. 6. Dyer 306. 11 H. 7. 15. 13 H. 7. 1.*

If a man arrested by a *Latitat* be in prison for lack of Bail, and the Plaintiff get a Judgment against him; in this case he shall not be said to be in prison, unless the Plaintiff desire it, *M. 4 Jac. B. R. Carrs case*. So in case where a prisoner is committed to a wrong prison, or unduly committed to prison, *Dyer 197. 306*:

If after a Judgment given, the Judges of their own heads, or at the request of a Gaoler, or the like, without any Prayer of the Plaintiff, do commit the Defendant to prison; by this the Defendant shall not be said to be in Execution at the Sute of the Plaintiff, *Dyer 297*.

And in all these, and such like cases where the Law doth once adjudg the party to be in Execution at the Sute of the Plaintiff, if the Sheriff suffer him to escape, he is chargeable for the same to the Plaintiff in an Action of Debt, or the case, *Dyer 306*:

If a Defendant die, his body being in Execution, the Plaintiff may have a new Execution against the Lands or Goods of the Defendant as he pleaseth. But the Plaintiff whiles he hath the body of the Defendant in Execution, can have no other Execution against his Lands or Goods, *Co. 5. 65, 66, 86, 87*.

If a man have Lands in Execution by an Elegit, and he be wholly evicted out of it; in this case he may have a new Execution, either against the Defendants Lands or Goods, as he might have had before the first Execution, onely he must first have a *Scire facias* against the Defendant, or he that comes in under him: But if a man be evicted out of part of the Land, or for a time onely, so that he may take his full Execution by holding it over afterwards; in this case he shall not have a new Execution, for a man shall never have a new Execution by the Statute of 32 H. 8. 5. But in case where he is clearly evicted out of all that which he had in Execution, *Co. 4. 66*. A new Execution may be sued against any man, who by Privilege of Parliament shall be set at liberty, *5 Jac. 13*.

It is a Writ lying where a man hath a Judgment in the County-Court, Court-Baron, or Hundred-Court, against Plaintiff or Defendant, and the Execution is deferred in favor of him, then the party grieved may have this Writ to hasten it, *F. N. B. 120*.

See the old Statutes of Executions, *Westm. 2. 18. 15. 31 H. 8. 5. 1 Jac. 13. 3 Jac. 8. 21 Jac. 24*.

Debt.
Action of the
Case.
Sess. 13.
9. Where
and in what
case a man
shall have a
new Execution,
on, or not,
and how:
Scire facias.

Executions Judiciali, what it is.

CHAP. LXXXIII.

Of Extinguishment.



T signifieth the effect of Consolidation, and is used for a perpetual stop of a mans right; as for example, If one have a Rent-charge, issuing out of Land for ever, and after he purchase the same Land for ever; now hereby the Rent is extinct for ever. So if a Lessee for years obtain the Fee-simple of Land, so that both Estates are *simul & semel*, in him, now by this the lesser Estate for years, is extinct; and this differeth from Suspension, because in that case the right suspended doth revive again: But in this the right extinct dieth for ever; but in this they both agree, that whiles the thing suspended or extinct doth so remain, it is as if it were not, and cannot be used or disposed, or had as before; as a Debt so Suspended or Extinct, cannot be sued for, or had by Executors: A Term of years so suspended or extinct, cannot be had, or disposed, or devised, neither shall go to Executors

Sess. 1.
1. Extinguishment, what.

Reviver.

as another Term, and so for the rest; for this operation of Law makes a kinde of nullity of it: And yet in some special Cases, a thing suspended, or extinct, shall be said to be in *esse*, as to a third person; as if one that is Lessee for years, charge his Land he holdeth, so for his Term with a Rent, and then surrender to his Lessor. Now howsoever his Term be extinct, as to his Lessor, and to himself, yet as to the Grantee of the Rent it hath his *esse* still: So if an Executor have a Lease for years, and purchase the Fee-simple of the Land, as to the Executor, and others; this is, and shall be said to be extinct; but as to Creditors to be accounted Assets, this shall be said to be in *esse*, and the Executor shall answer for it. See *Extinguishment. Co. 10. 52.*

1. Suspension,
what:

This word is sometimes used *Pro minori Excommunications*. For which see the Statute of 24 H.8. 12. But more commonly, and so in this place it is used for a Temporal Stop of a Mans Right. As for example, When one hath a Rent or Service out of Land in Fee, and then Purchase an Estate in the Land for life or years; now by this, the Rent for the time is suspended, and the Purchaser cannot have it, *Co. upon Littl. 313. 379. 147. Co. 2. 61.*

3. What things
may be Ex-
tinguished or
Suspended, or
not.

All kinde of Rent, Seigniories, Services, Commons, Ways, Customs, Franchises, Liberties, Immunities, Uses, Executions, Warranties, Debts, Statutes, Obligations, Rights, Titles, Actions, Conditions, Prescriptions, Authorities, and Estates for life or years, may be Extinct, and some of these suspended. But Estates in Fee-simple, or Fee-tail cannot be suspended, nor extinguished by a greater Estate. See *Infra, Dyer 181. Co. upon Littl. 101. 389. 390.* And this Suspension may be of any of Seigniorie, Rent, Profit, Appreder, &c. By reason of the unity of possession of the same, and of the Land, out of which it doth issue, and then it sleepeth only, and may be awaked or revived; but when they are extinguished, they die, and cannot be revived, and so long no benefit can be taken of the Possession, by Rent, Wardship, or the like; but of an Escheat, or any thing touching the Right, *Contrà, Co. upon Littl. 313.*

4. In what
case an Ex-
tinguishment shall
be, or not.
Of an Estate.

Where a greater and lessor Estate do come together, by what means soever in one person *final & semel*, and the one is less then the other, and that other so great, as it is able to swallow up the lesser; in this case the lesser shall be drowned in the greater, and utterly extinct: As for example, If an Estate for life, or years, and the Fee-simple, or Fee-tail, come together, the Estate for life or years, is extinct. So if a Lease for years, and a Lease for life, come together, the Lease for years (though it be for never so many years) is extinct. *Broo. Extinguishment 51: 34. Co. upon Littl. 300.*

So if an Executor have a Lease for years from his Testator, and then purchase the Fee-simple, or the Fee descend upon him, the Lease for years, is extinct. So if one have an Estate for his own life, and an Estate, (*i. e.*) for anothers life at once, the Estate *pur auter vie*, is extinct, and drowned in the Estate for his own life. So if a Lease be made to *A.* for the life of *B.* the Remainder to *A.* for his own life; the Estate for the life of *B.* is extinct, and drowned, *Co. 1. 87. Bro. 409. Dyer 11. Co. 11. 87.*

If one be possessed of a Term of years, and do by his will devise it to *A.* for life, the Remainder to *B.* and after *A.* purchase the Fee, or it do descend upon him; in this case the Lease is extinct, because the Remainder to *B.* is void, *Ca. 10. 52.*

If the Tenant for life or years, and a stranger purchase the Fee-simple, the Term is extinct; as to one Moyety of the Land, *Co. 2. 61.*

If a Lessee for years be ousted, and he in Reversion disseised, and the Lessor do Release to the Disseisor, the Term is extinct, and the Disseisor may enter: But *conversim* if he that Release had an Estate for life, *Co. upon Littl. 276:*

If an Estate be to *A.* for life, the Remainder to *B.* for life, the Remainder to *A.* in Fee, and *A.* die; now the Estate for life to *A.* is extinct, *46 Ed. 3. 16.*

If one that hath an Estate, as Tenant in Tail after a possibility of Issue extinct come by an Estate in Tail, or in Fee; the Estate he hath as Tenant after Possibility, is extinct. *Bro. Estate 25.*

If one that hath an Estate for his own life, get after an Estate for two other lives, his last Estate for two other lives, is extinct. But such Estates may be one in Remainder after another, *Co. 5. 11.*

Sess. 2.

If a Tenant by Elegit take a Confirmation from the Conusor, for the Term of his life, his Estate he had by the Elegit, is extinct; and the Tenant that was by Elegit, hath now an Estate onely for life, from the Confirmor, subject to his charges before the Confirmation as other Estates for life. *Bro. Extinguishment 30.*

If a Tenant by Statute obtain the Fee-simple of the Land, his Estate he had by the Extent, is extinct. *Bro. Extinguishment 30. 56.*

If an Estate in Fee Conditional, and an absolute Fee-simple come together, and they are united, the absolute Estate hath drowned the other, *Co. lib. Inf. 1 part. fol. 18.*

If one after his Title, begun to be Tenant by Courtesie, make a Feoffment in Fee upon Condition, and enter for the Condition broken; yet by this he hath extinct his Estate, so that though his Wife die, yet he shall not be Tenant by the Courtesie.

But to make an Extinguishment of an Estate, these two things must be.

1. The two Estates must be together in the same person *simul & semel* in possession; and there must be no intervening Estate between them.

Of Rent, Services, Way, Common, and the like.

2. The one of them must be greater and higher then the other, able to drown and swallow up the other, or else there will be no Extinguishment of either; as for Examples.

If there be a Lessee for ten years, the Remainder for ten years, or the Lessor grant to another for twenty years, and the first Lessee for ten years, have or purchase an Estate for life, or in Fee: Now in this case his Lease for ten years is not extinct. *Bro. Extinguishment 1. 54. Bro. Sess. 409.*

If the Lessor make a Deed of Feoffment, and a Letter of Attorney to the Lessee for years, to make Livery, and he doth it accordingly; this will not extinguish the Term, *Co. lib. Inf. 1 part. fol. 52.*

If Lands be given to two men, and the Heirs of their two Bodies, though here they have an Estate for life jointly, and several Inheritances; yet the Estate for life, is not extinct: But if it were by several conveyances, *contra*; as if a Lease were made to two for lives, and after the Lessor grant the Reversion to them two, and to the Heirs of their two Bodies, the Estate is drowned, *Co. upon Litt. fol. 182.*

Sess. 3.

If an Estate-tail, and a Fee-simple come together, they continue divided in him, and the one of them doth not drown the other, *Co. 1. in Altonwoods case.*

If an Estate in Tail after possibility of Issue extinct, and an Estate for life, otherwise come together, they are neither of them extinct; for they are all one in quantity.

So if a Fee-simple, and a Fee tail Estate meet together, the Estate-tail is not extinct. *Co. 12. 81. 3. 61.*

If a Man or Woman Lessee for years, take a Husband or Wife that hath the Reversion, it seems this Term by this is not extinct.

If an Estate be to a Husband and Wife for the life of the Wife, the Remainder to the Husband in Tail, the Remainder to the right Heirs of the Husband, the Estate for life here, is not extinct, *8 Ed. 4. 20.*

If a Lease be made to one for his life, and twenty years over, these two Estates will stand together well enough, and there shall be no Extinguishment: But if it were a Lease for twenty years, the Remainder to him for life; here the Estate for years were extinguished, *Bro. Extinguishment.*

If a Lessor make Livery upon the Land of his Lessee for years Rendering Rent, and the Lessee give him leave to do it; it seems this is not Extinguishment of the Term, *Dyer 33.*

If one that hath a Lease for years, grant it to his Wife that hath the Reversion, and to a stranger; by this the Moyety, that the Wife hath, is not extinct, *Plow. 67.*

If one that hath Execution by a Statute, get a Judgment against the Conusor, and

and Execution of the same Land by Elegit; here is no Extinguishment. *Bro. Extinguishment* 67.

If *A.* makes a Lease to *B.* for years, and after Covenant with *C.* to levy a Fine to *B.* and do so till a Recovery be had, to the intent onely that *B.* might be Tenant to the Precipt, and that a Recovery might be had, which was to be to the use of *C.* and his Heirs, and a Fine and a Recovery is had accordingly; in this case the Term is not drowned, but saved by the Statute of 27 H. 8. of *Uses, Hill. 20 Jac. B. R. Fermers case. See Afts.*

Of Rent, Services, Way, Common, and the like.

Where one hath as high, as good, and durable Estate in any Land, as he hath in any Rent, Common, or other profit, Appreder in or out of the Land, there the Rent, Common, or other profit, is extinct: As if the Lord do purchase the Land, or the Land do descend to him from his Tenant; now the Services are extinct.

So if one have a Rent-charge issuing out of the Land to him, and his Heirs, and he purchase the Fee-simple of the Land, out of which the Rent doth issue, or of any part of it, the Rent is extinct.

So if the Lord and another do purchase the Land, out of which he is to have Services, the Services are extinct: But if in that case the Grantor by his Deed, reciting the said purchase of part, doth grant that he may distrain for the Rent; in the Residue this will amount to a new grant, *Co. upon Littl. fol. 147, 148.*

Sec. 4.

If a Lord disseise the Tenant, and make a Feoffment of the Land on Condition, and enter on the breach of him; yet the Seignior, is extinct. *Co. lib. Inst. 1 part, fol. 30. Co. Rep. 1 part. 38. 134.*

By Release, Services may be extinct, *Co. lib. Inst. 1 part. fol. 76.*

If three Joyntenants hold by an Entry yearly Rent, as a Horse, &c. and the Tenant cessa by two years, and the Lord recover two parts against two of them, and the third sues his part by tendering, and giving Sureties; now hereby the Entry, Annual Rent, is extinct, *Co. upon Littl. fol. 149.*

If there be Lord and Tenant by Fealty and Herriot Service, and the Lord purchase part of the Land, the Herriot-Service is extinct, but *contra* of an Herriot Custom, *Co. upon Littl. 149.* And see Knights Service; for in these cases, the Service doth continue: But Escuage shall be Apportioned, and is not extinct. *Co. on Littl. 149.*

If the Grantee grant the Rent to the Tenant of the Land, and a stranger, it is extinct for a Moyety, *Co. idem.*

If there be Lord Mesn and Tenant, and the Lord purchase the Tenancy in Fee; the Mesnalty is extinct; but if the Tenant infeoff the Lord, and his Wife, and their Heirs, here it is but suspended; for if the Wife survive, both Seignior and Mesnalty are revived, *Co. upon Littl. f. 155.* See more there.

So if the Tenant purchase the Seignior, the Mesnalty is extinct: So if one that hath Common Appendant in another Land, purchase all that Land; this unity of that Land doth extinguish the Common. So if one have a Way Appendant to his Mill, or House, or to Church, or the like, through another mans ground, and he purchase the ground, through which his Way is, whiles he hath the ground, or House to which it is Appendant; now by this, the Way is extinct: And therefore if he sell this ground, after it will be wisdom for him to take care, that he do except and reserve his Way again which he may *de novo*, if he will: But if a whole Parish had such a Way, through a ground to Church, and one purchase the ground; this would not extinguish the Way.

If *A.* have White-acre and *B.* Black-acre, and *A.* have a Way over Black-acre, belonging to White-acre, and he purchase both the Acres, hereby the Way is extinct. And therefore if *A.* afterwards infeoff *C.* of Black-acre without exception, his Way is gone, *B. R. Trin. 2 Car. Mich. Mr. Dovers case, 11 H. 4. 5. 21 Ed. 3. 2.* So by a Release of Rent or Services, they may be extinct: For which see *Release*, *Co. upon Littl. fol. 147. a. b. & 312. Co. 2. 73. Co. 4. 38. D. & Sr. 35. Dyn. 45. Plow. 72. 3 Afs. 2415.*

If

If there be Lessee for life, the Remainder in Fee, and he in Remainder die without Heir; now hereby the Services are extinct.

If a Father grant a Rent-charge to his Son in Fee out of his Land, and the Rent is behinde, the Father die, and it doth descend to the Son; in this case both the Rent and Annuity are determined, and yet an Action of Debt lieth for the Arrearages, Co. 4. 49. *Bro. Extinguishment* 3.

If there be any Joyn tenants or Coparceners that are to do Sute, and the part of one come to the Lord; now the Sute is extinct. See *Crompt. Jur. f. 50. Perk. Salt. 391, 591, 593. Bro. Sute* 1.

If the Lord and another purchase the Tenancy in Fee, and the other survive the Lord; yet by this the Seigniority is extinct, 34 *Aff. pl. 151*.

If one that hath Common by Prescription in twenty Acres, Release his Common in part of this Land; by this he hath extinct his Common in all, Adjudg. *Kitterams case*, 39, 40 *Eliz.*

A Lord by Disclaimer of Services or Seigniority, doth extinguish them, Co. upon *Littl. fol. 102*. If it be in a Court of Record, to make an Extinguishment of Rent, &c. these three things are requisite,

1. That the Land and Rent, &c. to be had out of it, be in one hand.
2. That he have both by a good Title.
3. That he have a like Estate in both, for otherwise there shall be no Extinguishment. *Plow. 419. Littl. fol. 561*. As for examples.

If a Woman have a Rent out of three Acres, and after she recover one of the Acres by a Title of Dower; now hereby it seems the Rent is not extinct, but shall be Apportioned. *Bro. Extinguishment* 52. Homage and Fealty are not extinct by the Lords purchase of part of the Land, Co. upon *Littl. 149*.

If one make a Lease for years, rendring Rent, and after make a Feoffment of the Land, and give Livery without the leave of the Lessee; this is no Extinguishment of the Rent. *Bro. Extinguishment*. So also of a Lease for life: But if one be seised of a Rent in Fee, and Disseise the Tenant of the Land, and make a Feoffment in Fee, the Rent is extinct, and will not be revived by the Regress of the Tenant. Co. 5. *Sir Mory Finch's case*. Co. upon *Littl. 319*.

If a Commoner alien part of his Land, to which the Common doth belong, by this his Common is not extinct, but it shall be divided. See *Common*. If one that hath Common Appendant, purchase part of the Land, in which he hath the Common, is not extinct, but shall be Apportioned, *contra* of Common Appurtenant, Co. 8. 78.

If one have Common Appendant in a great Waste belonging to his Tenant, and the Lord improve part of the Waste, and leave sufficient (which he may do) and after make a Feoffment to the Commoner of this; this is no Extinguishment, *Dyer* 339.

If a Copiholder by Custom claim Common in a great Waste, and the Lord grant part of it to another, and then make a Copihold Estate, yet the Tenant will have Common still, Co. 8. 64.

If one have a Warren in other Land, and he after purchase the Land; this Unity of Possession alone, doth not extinguish the Warren; but if he make a Feoffment of the Land without excepting his Warren, it seems it is extinct, Co. 11. 13. *Bro. Extinguishment* 5.

If one make a Lease of three Acres of equal value, yielding three shillings Rent, and the Lessor grant the Reversion of one, the Grantee shall have part of the Rent, Co. 8. 79.

If a Parish hath Way through a ground to Church or Market, and one of them purchase it, the Way is not extinct; for this is of necessity, otherwise it is for other ways, Adjudged, *Jordens case*, *Hill. 4 Jac. B. R. Crompt. Jur. 95. Co. 517*.

If a Lessee for years grant a Rent-charge, and then doth Surrender, yet the Rent doth continue.

If one that hath a Service in Chivalry, purchase Parcel of the Tenancy, yet the Service is not extinct, but remaineth entire, Co. 26.

So if one purchase of his Tenant, that holdeth by Rent, Service, Parcel, the Rent shall be divided, and is not extinct, Co. upon *Littl. 149*.

If one that hath a Rent-charge of twenty shillings, Release to the Tenant of the Land ten shillings, or more, or less; this doth not extinguish the rest: So if such a Grantee grant over ten shillings parcel of the same to another, and the Tenant Accorn; and yet these are good, and hereby the Rent is divided, *Co. upon Littl. fol. 149. 9 H. 6. 12, 53. F. N. B. 152.*

If the Land out of which Rent-charge is granted, be recovered by an elder Title, the Rent is not extinct, but the party hath this Writ of Annuity for yet, though the Land be discharged, *Co. upon Littl. f. 148.* So if *cestuy que vie* of Land grant a Rent out of it for one and twenty years, and he for whose life it is, dieth within the one and twenty years, yet the Rent shall continue as an Annuity, *Co. upon Littl. 148.*

If *B.* make a Lease of one Acre to *A.* for life, and *A.* is seised of another Acre in Fee, and granteth a Rent-charge to *B.* out of both, and doth Waste in the Acre, which he holdeth for life, or maketh a Feoffment of it, and *B.* recovereth or entereth; in this case the whole Rent is not extinct, but shall be apportioned, *Co. upon Littl. fol. 148.*

If one de cease the Term-Tenant, that hath a Rent in Fee, or take a Feoffment on Condition; this will not extinct the Rent, *Littl. 58.*

Of Debts, Causes
of Action, Ob-
ligations, Con-
dition, or Right.

If Causes of Sute, or other matters arbitrable, be put in Arbitrement, and a legal Award made thereupon; now by this, these Causes and Matters are extinct, see *Award. Plowd. 6.*

If a Debtor marry with his Debtee, or a Debtee with his Debtor; now by this the Debt is extinct; so if a Woman Obligee marry with one of the Obligers, *Co. 8. 136. Plow. 36. 4 H. 7. 3. 11 H. 7. 4. 21 H. 7. 29.*

If a Debtee by Obligation, or otherwise make a Debtor his Executor, or the Debtor, and another, his Executors; by this the Debt is Released, in Law, and extinct; and that also, though the other Executor do survive the Debtor: But as to other Creditors and Legates, this shall be said Assets, *Simons case. Trin. 7 Jac. B. R. Adjudg. Plow. 36. 334. Co. 8. 136. 21 H. 7. 29. Kelm. 63.*

If a Debtee to whom a Debt is due by Contract, take an Obligation from the Debtor for this Debt, or part of it; by this the Debt is extinct, *Bro. Contract 8.*

If an Executor or Administrator make a Bond to the Legatee for his Legacy, the Legacy is extinct. *Curia, M. 17 Jac. B. R.*

If a man promise to a Maid, that if she will marry him, he will leave her one hundred pound at his death, if she survive, and after they do marry together; this will not extinguish this Debt. *Smiths case, Pasche, 15 Jac. B. R.*

If an Executor give an Obligation for the payment of a Legacy, it seems this doth not extinguish the Legacy, but the party may sue for which he will. By *Just. Dabridge, 18 Jac.*

Condition.

If one make a Feoffment in Fee, or Lease for life or years, on Condition, and after make a Feoffment, or levy a Fine of the same Land; by this the Condition is extinct, unless by special words of Agreement it be saved. *Co. on Littl. 379.* So if a Lessee or Feoffee, on Condition make a Feoffment to his Feoffor or Lessor; the Condition is extinct. *Co. 4. 52.*

If a Debtee upon a Debt due to him, obtain a Judgment, hereby the Debt is extinct.

If one after he hath Execution of the Land of the Conusor, purchase the Land, or any part of it; by this the Statute, Debt, and Execution, is extinct. See *Statute.* But if it were before Execution, *contra. Fitz. Execution 21. 88.*

If a Feme-sole deliver Goods to one, and after marry with the Bailee, the Cause of Action is extinct. *21 H. 7. 29.*

If a Debtee take one of the Executors of the Debtor to Wife, who hath accepted of the Executorship, the Debt is gone; but if she had not accepted, *contra* he may sue the other Executor. *Fitz. Executor 58.* See for this of the Debtor or Creditor, being made Executor. *New Book of Executors 47, 48.*

If a Debtor makes his Debtee his Executor, this doth not extinguish the Debt, or Duty, but it doth the Action, whether he accept or refuse; and if he do accept, he may pay himself first: But if the Debtor make his Debtee, and others his Executors, and the Debtee refuse, and the rest administer; it seems in this case, the Debt is extinct, for how shall he sue? *Plow. 184.*

If

If a Debtor by Obligation, or otherwise be made Administrator to the Debtee; this doth not extinguish the Debt, Co. 8. 136. Trin. 7 Jac. *Simons* case, Adjudg.

Sess. 6.

If a Feme-Executrix take the Debtor of the Testator to Husband, this is no Extinguishment, nor Release of the Debt, but it is a Suspension of it, during the Coverture, Co. 8. 136. on *List* 264.

If an Obligation be given, and taken for a Debt due, or a Judgment, or another Obligation; this doth not extinguish the former Debt. So neither an Obligation for a Debt due before Auditors on an Account. See *Debt*, Co. 8. 135. *Brow. Oblig.* 23:

If an Obligation be made to a Feme-sole, and three Executors be, and one of them marry the Feme-sole; yet it seems the Debt is not extinct, and that he and his Wife may sue the other Executors, and himself, *Fitz Executors* 81.

If a Lord of a Leet do purchase Land within the Jurisdiction of his Leet; this doth not extinguish his Leet, Co. 11. 13.

If I have a Water-course, that time out of minde hath run to my House or Close, Of a water-unity of possession in the Close, through which it doth run, and in the Water-course course. doth not extinguish it: So of a Gutter.

Unity of possession in one person of Tithes, and the Land which is to pay it, Of Tithes, will not extinguish them as Rents, Commons, and other such like things, Co. 11. 8.

If one make a Feoffment of Land with power of Revocation of Uses, and after make a Feoffment, or levy a Fine of the same Land; concerning which, he hath that power of Revocation or Alteration; this power is extinct, and he cannot after revoke or alter any of them: But if he levy a Fine, but of part, his power is not extinct for all, as it is in the case of a Condition, Co. upon *List* 219.

If a Verbal Agreement be put in writing, this doth determine the Agreement by word. See *Contract*.

Of a Parol Contract.

If one have Liberties or Franchises by Prescription, and he take Letters Patents of it; now hereby the Prescription is gone and extinct. *Brow. Extinguishment*. For things of a higher, do determine things of a lower nature, 21 H. 7. 3.

Of a Prescription.

If one recite by his Deed, that where by Prescription he hath used to finde a Chaplain, because some controversie is about it, he granteth by the same Deed to do it; this doth not determine the Prescription, *Idem*.

How a Use or a Trust may be extinct or suspended. See Co. in *Cludleighs* case.

If an offence of a lower nature, be made of an higher nature, the lesser offence is gone: As if that which is murder at Common Law be made Treason, the offence of murder is gone, and no Appeal will lie for it; for things of a higher nature do determine things of a lower nature, *Dyer* 30.

Of an Offence.

In all cases, for the most part, where a Feoffment will make an Extinguishment of an Estate, Condition, Rent, or the like, there a Lease for years will make a Suspension, Co. 8. 79. See above and beneath.

5. In what case a Suspension shall be, or not.

And Note, that where there is a Suspension there is no Extinguishment: As if one that hath Common Appurtenant in Land, take a Lease of part of the Land; this doth suspend his Common, Co. 8. 79.

Note.

If one have a Rent or Services out of any Land in Fee, and he purchase the same Land for life or years, by this the Rent or Service is suspended for that time: So if one have a Rent-charge in Fee, and grant it for life to the Tenant in Fee of the Land, or in Fee to the Tenant for life of the Land; this is a Suspension of the Rent, *Finches Ley* 134. But it is no Extinguishment, and therefore in the first case, it may be with a Remainder over; in the next, the Tenant may grant it in his life, if he do not, his Heir shall have it.

Of Rent, Services, Way, &c.

If the Tenant that holdeth by Rent-service, make a Gift in Tail, or Lease for life, or years to his Lord; now hereby all the Rent is suspended, and shall not be apportioned; *Contrā*, if the Lord purchase in Fee, Co. upon *List* 148.

If a Lease be made rendring Rent, and the Lessor, and Lessee agree, that the Lessor shall occupy part of the Grounds; this is no Suspension of the Rent.

Sess. 7.

So

So when the Lessor doth enter upon his Lessee, and before the day of payment, the Lessee doth re-enter; this shall be no Suspension of the Rent, *Co. 2. 31. Packhurst case. Pasche, 7 Jac. B. R.*

If a Feoffee or Lessee Covenant to pay a yearly sum, as a sum in gross, and not as a Rent, and the Lessor enter upon the Lessee, or the Lessee redemise to the Lessor; this is no Suspension of this payment, as it were, if it were a Rent, *Co. 4. 52.*

The Entry of the Lessor by Right, as upon a Forfeiture, or the like, into part of the Land, will not suspend the Rent, but it shall be apportioned, *Co. upon Littl. fol. 148.*

If a Feoffment be made in Fee or Lease for years, rendring Rent, and the Feoffee, or Lessee make a Lease for years, to the Feoffor or Lessor, of all or part of that which passes by the first Lease or Feoffment; by this the Rent is suspended, *Co. 4. 52.*

Rent.

If a Lessor do enter upon his Lessee for life or years, wrongfully, and keep him out of Possession: Now by this, the Rent is suspended till the Lessee re-enter again; and if he enter upon his Lessee, and make a Feoffment (and this be a good Feoffment) till the re-entry of the Lessee, the Rent is suspended. So if he enter upon part only, and keep but the Lessee; this is a Suspension for the whole. So if he keep the Possession at first, and the Lessee never enter. But if the Lessor re-enter severally, the Rent is revived, if he enter specially *contra*, where the Lessor doth enter lawfully, as upon a Surrender, Forfeiture, or the like, there shall be Apportionment of the Rents. *Co. 2. 31. & 4. 5. 21. Plow. 421. Co. upon Littl. fol. 148. Co. 4. 52. Brownl 80. pl. 18.*

If a Lord have a Wardship of the Body and Land of the Heir of his Tenant, now during this time the Services are suspended, *Plow. 104.*

Rent.

If an Infant that hath a Rent, purchase the Land, out of which it is issuing, during the Minority, the Rent shall be suspended, but not extinct. *Bro. Extinguishment.*

If one have Common Appendant in Land, and he take a Lease for life or years, of all or part of that Land; now hereby the Common is suspended.

Way.

If one have a Way Appendant to any place, through anothers ground, and he take a Lease of that ground; now by this he hath suspended his Way.

Rent.

If Lessor grant a Rent-charge, and die, the Tenant for life, being his Heir, he shall hold it discharged for his life; and therefore the Rent is not extinct to all purposes; but if the Tenant for life purchase the Fee, *contra*, 9 *Edw. 4. 18. 11 H. 7. 12.*

If Tenant for life make a Lease for years, rendring Rent, and after this, the Reversion discend to the Tenant for life, the Rent is not gone, *Adjulg. Winsors case*: But if he purchase the Reversion, *contra*, *Co. 1. 96.*

If there be Lord and Tenant, and the Tenant letteth Tenements to a Woman for life, the Remainder to another in Fee, and the Lord grant the Services to the Husband and his Heirs; these Services are suspended; during the Coverture; but when the Wife dies, are revived, *Littl. sect. 558.*

Of Debts and
Causes of Affi-
on and Condi-
on, &c.
Condition.

If a Debtor marry with a Debtee Executrix, hereby the Debt is suspended, during the marriage. See before.

If one make a Feoffment of Land in Fee, on condition that the Feoffee shall re-lease the Feoffor of it, and before it be done, the Feoffor make a Lease of all or part of this Land to another; now by this the Condition is suspended: So if the Feoffee had made a Lease to the Feoffor of all or part of the Land; this had suspended the Condition, during the Lease, if the Condition were to pay Rent, or the like: But if the Condition were for a Collateral thing, the payment of a sum in gross, or the like, *contra*. If a Feme-sole Inseoff a man of Land by Deed indented, reserving Rent to her, and her Heirs, at *Easter*, on Condition to re-enter for non-payment, and then they intermarry; now hereby, during the Coverture, the Rent and Condition are suspended; and if the Condition had been to pay him ten pound at a day, and before he marry her, the Condition is gone, *Co. 4. 52. 2. 59. Co. upon Littl. 217, 218.*

A Rent-service may be extinct or suspended in part by purchase of the Land, but not a Rent-charge; but by a Release, part of a Rent-charge (as it seems) may be extinct. *Bro. Extinguishment, Perk. sect. 71.*

A Condition cannot be extinct or suspended in part, but must be so in all, *Co. upon Littl. 215. Co. 2. 50.*

A Seigniority Rent, or the like, cannot by any rightful or wrongful act of the party be suspended in part, and in esse, for another part, in respect of the Land, out of which it is issuing: So neither can it by such act be suspended for a Remainder, and in esse for the particular Estate; but by the act of Law, or of a third person, such a Suspension may be, *Co. 9. 129.*

By act of the party, a Rent-service cannot be suspended in part, and in esse for another part, but by act of Law it may: As when the Gardein in Chivalry entreteth into his Wards Land within age; now is the Seigniority suspended, and yet if the Wife of the Tenant be endowed of a third part of the Tenancy, she shall pay to the Lord the third part of the Rent, *Co. upon Littl. 148.* So if the Tenant give part of his Land in Tail to the Father of the Lord, and he die, and it descend to the Lord; and so it is of a Rent-charge. *Idem.*

A Seigniority may be suspended in part, by the act of a stranger, as if two Joyntenants or Coparceners be of a Seigniority, and one of them doth Disseise his Tenant, the other may distrain for his part, *Co. upon Littl. 148.*

All the things noted before to be suspended, it seems, may be revived again, unless it be Estates; and personal things, for they being once suspended, can never be revived, unless it be in special cases; as the case of marriage of a Feme-Executrix with a Debtor (before) and as some hold, if a Feme-Obligee marry with the Obligor, and after they be divorced, that now here shall be a Reviver of this Debt: But Rents, Seigniorities, Services, Conditions, and the like, being once suspended, may be after revived; and therefore if the Tenant Infeoff his Lord on Condition, and after enter; for the Condition broken, the Seigniority is revived, *Perk. 19.*

If one have a Rent-charge in Fee going out of his Land, and marry with the Woman-Tenant in Fee of the Land, after the marriage dissolved, the Rent is revived; and if the Husband grant it away, during the Coverture (as it seems he may) the Grantee may distrain for it presently. See more *Co. upon Littl. 312, 313, 314. 5 Ed. 3. 16. Co. 8. 136. Plow. 36. 72. 154.*

If the Heir make a Lease for life, reserving Rent, and the Wife recover Dower against his Lessee, and dieth, and the Lessee have the Land again; now the Rent is revived, *Co. lib. Inst. fol. 42. 1 part. 7 H. 5. 4.*

If a Man Lease a House and Close, rendring Rent, and the Lessor enters into the House, and pulleth it down, and then the Lessee doth re-enter in the Close; in this case the Rent once extinct, is not revived, *Goldsb. 125. pl. 15.*

If one hold 3 Acres by three Rent, and Lease one to his Lord for years, here the whole Seigniority is suspended, *Bro. 133.* If a Feoffment or Lease be of divers Parcels of Land, rendring several Rents out of every Parcel, with Condition of re-entry for non-payment, and the Feoffor or Feoffee make a Lease or Feoffment of one Parcel onely, or a Lessee in such a case Surrender one Parcel onely; in these cases the whole Condition is extinct or suspended, *Co. 2. 59. 5. 54.*

If a Lord do purchase Parcel of the Land that his Tenant doth hold by Herriot-service, the whole service is extinct, *contra* if it were by Herriot Custom, *8 H. 7. 10.*

If the Lord and another purchase the Land of his Tenant, out of which his services do come; the whole services are extinct, *34 Aff. 15.*

If the Lord purchase or accept Parcel of the Tenancy, out of which an entire service is to be paid, or done, or Release his Right in Parcel, the whole Service (whether it be matter of pleasure, or profit) is extinct, if it be onely such a thing as for the benefit of the Lord; but if it be *pro bono publico*, then no part of it is extinct, *Ca. 6. 1. 8. 105.*

If one that hath twenty pounds due by Contract, take an Obligation for ten pounds, the whole Debt of twenty pounds is extinct. See more of these matters in *Apporionment*, and other Titles here and there. *Bro. Contrail 80.*

Cccc

CHAP:

6. Where a thing may be extinct or suspended in part, and how.

Señ. 8.
Seignior.

7. Where a thing once suspended, may be revived, or not.

8. Where all or part of the thing onely, shall be extinct or suspended.

CHAP. LXXXIV.

Of Farm-Farmers, Fee-farm, Fasting-days,
Feoffment, Fairs and Markets.

Of Fairs and Markets.



S to Fairs and Markets, these things are to be known.

1. He that hath a Fair or Market, must have it by the Kings Grant or Prescription, see *Franchise*.

2. They are not to be kept in Church-yards, *Westm cap. 6*.

3. By an old Law they were forbidden to be held upon Ascension-day, *Corpus Christi*, *Whitsunday*, *Trinity Sunday*, the Assumption of the Virgin *Mary*, *All-Saints*, *Good-Friday*, nor any Sundays, (the four Sundays in Harvest excepted) in pain to forfeit the Wares so shewed to the Lord of the Franchise, 27 H. 6. 5. But they may be kept three days before, or three days after Proclamation being thereof made before-hand, *Idem*.

4. Every Lord at the beginning of his Fair, is to cry and publish how long it shall endure, in pain to be grievously punished, 2 Ed. 3. 15.

5. No person may keep a Fair longer then he ought to do, in pain to have it seized into the Kings hand, until he hath made Fine for so doing.

6. Merchants after the Fair ended, shall close their shops, and sell no more after, in pain to forfeit the double value of the Ware so sold, 5 Ed. 3. 5.

Pi-powder
Court.

7. No Action shall be admitted in the Pipowder Court, (which is incident to every Fair,) but where the Plaintiff, or his Attorney first swear, That the matter contained in the Declaration was done within the Jurisdiction, and at the time of the Fair, to which Oath the Defendant may joyn issue. And if it be tried and go against him, or he refuse to be sworn, the Defendant shall be discharged, 17 Ed. 4. 2.

8. Any *Londoner* may carry to and sell Wares in any Fair or Market, 3 H. 7. 9.

9. Every owner of Fair must have a Toll-taker, or if no Toll be paid, a Book-keeper, that must sit there from ten a clock till Sun-set in pain of forty shillings.

10. He must within one day of the Fair, give to the owner of the Fair, a Note of all the Horses there sold in pain of forty shillings, which the owner must subscribe in pain of forty shillings.

11. Sale of a stolen horse, and sold there without Entry in this Book, making him known, *Vaucher, &c.* will not change the property of it. See *Property* and *Statutes*, 2, 3 Ph. & Ma. 7. 31 Eliz. 12.

Toll in a Fair
or Market.

12. Toll to the Fair or Market, is a reasonable sum of money due to the owner of the Fair or Market upon sale of things, tollable within the Fair or Market, or for Stallage, Vicage, or the like.

As touching which, these things are to be known.

1. If the King had granted to a man a Fair or Market, and granted no Toll, the Patentee should have had no Toll; and this is a free Fair or Market: And after the King could not have granted Toll without *Quid pro quo*, (i. e.) some proportionable benefit to the Subject.

2. If the Toll be outrageous that the King grants, it is void, and it is a free Market or Fair.

3. No Toll is to be paid for any thing brought into a Market or Fair to be sold to the owner of the Fair, before sale of the thing, without especial Custom for it time out of minde.

4. It ought to be taken of the buyer onely, when the thing is sold, but in ancient Fairs and Markets, Toll may be paid for a standing in a Fair or Market, though nothing be sold, Co. 2 part. Inst. 320, 221.

5. If the King had granted to any generally or specially to be discharged of this Toll; this will discharge him from all Tolls, to the Kings own Fairs or Markets, and if the Tolls of any Fair or Market, granted after such Grant of Discharge, but cannot discharge Tolls formerly due to subjects, either by Grant or Prescription. Exemption from Toll.

6. Tenants in Ancient Demesne for the Lands in their own possession, are to pay no Toll; but if he be a common Merchant, and use buying and selling of things that rise not upon the Manurance and Husbandry of those Lands, for these he must pay Toll.

7. The King was not to pay Toll for any of his Goods.

Prerogative Trial.

8. The reasonableness or unreasonableness, is to be tryed by the Judges, *Co. 2 part. Inst. 223.*

Of Farm-Farmers.

THe word Farm is most properly taken for the chief Messuage in a Village or Town, whereunto doth belong great Demesne of all sorts, and hath been used to be let for life, years, or at Will: So that it is a Collective word, consisting of divers things gathered into one, as a Messuage, Land, Meadow, Pasture, Woods, Commons, and the like. And he that is Lessee of such a Farm, or occupieth it, is called the Farmor; but the Rent reserved upon a Lease of such a Farm, is called a Farm or Ferm. And a Farmor doth sometimes signifie any Lessee for life, years, or at Will, of Lands or Houses, though never so few: So sometimes by Farm or Ferm, is understood any House of Land, taken by Indenture of Lease or Lease-Parol: And Fee-Ferm properly is where the Lord upon the making of the Tenancy, doth reserve to himself, and his Heirs the Rent, for which it was before let to Ferm, or at least the fourth part thereof, and is always a great Rent, and reserved upon an Estate in Fee for ever, *Plow. 295: Co. 2 part. Inst. 44.*

The Laws of Holidays, *5, 6 Ed. 6. 3. 2, 3 Ed. 6. 19.* And are now repealed, or out of use, *1 Jac. 25.* And Religion: And for Fasting-days, *2, 3 Ed. 6. 19. 5 Eliz. 5.* *Holidays. Fasting-days.*

Of a Feoffment.

Feoffmentum, i. e. *Donatio feodi*, strictly and properly is the Gift or Grant of any Honors, Castles, Manors, Messuages, Lands, Houses, or other Corporal Immoveable things of like nature, which be hereditable to another in Fee-simple, i. e. to him and his Heirs for ever, by the Delivery of Seisin and Possession of the things given. And from hence comes the word Infeoff, for by this word and the words Give and Grant (as the most apt words for that purpose) is this kinde of conveyance most commonly made. Hence also it is, that he that makes this Feoffment is called the Feoffor, and he to whom it is made the Feoffee. Also it is sometimes, but improperly, called a Feoffment, when an Estate of Freehold onely doth pass, *New Terms Ley. Co. super Lit. 9. Litt. sect. 57.* *1. Feoffment. what. Infeoff. Feoffor. Feoffee.*

This kinde of Conveyance, albeit it may be made in most cases by word without any writing, yet it is most commonly done by writing, and this writing is then called a Deed or Charter of Feoffment, but hence is the division of a Feoffment by word, or a Feoffment by writing. The ancient Forms and Examples of these Deeds are very brief, and yet they had these parts contained in them. 1. The Premisses. 2. The *Habendum*. 3. The *Tenendum*. 4. The *Reddendum*. 5. The Clause of Warranty. 6. The *In cuius rei Testimonium*. 7. The Date. 8. The clause of *Huius testibus. Hac fuit candida illius atque fides & simplicitas, qua pauculis lineis omnia fidei firmamenta posuerunt.* See *West Sym. 1 part. sect. 235. Co. super Lit. 6.* *2. The kinds.*

And this manner of Conveyance, as it is the most ancient kinde of Conveyance, so is it the best and most excellent of all others, and in some respects doth excel the Conveyance by Fine or Recovery: For it is of that nature and efficacy by reason of the Livery of Seisin evermore inseparably incident to it, that it cleareth all Disseisins, Abatements, Intrusions, and other wrongful and defeasible Titles, and reduceth the Estate clearly to the Feoffee when the Entry of the Feoffor is lawful, which neither Fine, Recovery, nor Bargain and Sale by Deed indented and inrolled *3. The nature and operation of it.*

will doe when the Feoffor is out of possession. And it passeth the present estate of the Feoffor, and not only so, but barreth and excludeth him of all present and future right and possibility of right to the thing which is so conveyed, insomuch that if one have divers estates all of them pass by his Feoffment, and if he have any interest, Rent, Common, or the like into or out of the Land, it is extinguished and gone by the Feoffment. And further it barreth the Feoffor of all collateral benefits touching the Land, as condition, power of revocation, writs of error, attaint and the like, insomuch that if a man make an estate of his land upon condition, or with power to revoke it, and after he make a Feoffment of the Land; by this he is barred for ever of taking advantage of the condition or power of revocation. It destroyeth contingent uses, gives away a future use inclusively, gives away a Seignory inclusively, and gives away a right of action: for both the Feoffment andivery of feisin incident thereunto are much favoured in law, and shall be construed most strongly against the Feoffor and in advantage of the Feoffee. And besides all this, because it is so solemnly and publickly made, it is of all other conveyances most observed, and therefore best remembered and proved. *Co. super Lit.* 49. 9. *Co.* 1. 111. 112. *Plow.* 554. 9 H. 7. 24. 39 H. 6. 43. *Co. super Lit.* 237. *Perk. sect.* 210. 24 E. 3. 70. *Co.* 1. 111. *Co.* 6. 70. *Bro. scire facias.* 28. *Plow.* 423. 424.

If the Feoffment be made by Deed, then must the Deed be so made, written, read, sealed, and delivered as all other Deeds that are well made must be. For which see *Deed supra cap. 4. Numb. 5.*

And in every good feoffment that is made there must be a Feoffor: i. a personable to grant the thing passed by the Feoffment; a Feoffee: i. a person capable of it and able to take it, and a thing grantable; and it must be granted in that manner as law requirith. And for this therefore observe that whosoever is disabled by the common law to take, is disabled also to make a Feoffment, gift, grant, or lease, and many also that have capacity to take by such conveyances, have no ability to grant by them, as men attainted of treason, felony, or in a Premunire, alien borne, the Kings villaines, Ideots, mad men, a man deafe, blind and dumbe from his nativity, a Feme covert, an infant, and a man by duress, for the Feoffments, gifts, &c. of such persons may be avoided. But such persons as have committed treason or felony if attainder doe not follow, such as are attaint of heresie, a leper removed by the Kings writ from the society of men, bastards, such as are deafe, dumbe or blind, that have understanding and sound memory, albeit they cannot expresse their intentions otherwise then by signes, those that are drunken; the villaines of a common person before entry, &c. also excommunicate persons, and outlawed persons, albeit the King take the profits of their lands, all these may make Feoffments, gifts, &c. and all these have capacity to take by such conveyances. See *Grant Numb. 4. Co. super Lit.* 2. 42. 43. *Perk. sect.* 182. 183. 185. *Bro. Feoffments.* 2. 7. 8. 9. 17. 39 H. 6. 43. 21 H. 7. 7.

A woman that hath a husband alone and by her selfe without her husband cannot make a Feoffment of her own land, and if she doe so, it is void, albeit her husband agree to it. *Perk. sect.* 185. 186.

Neither the head alone, nor any one or more of the members of a Corporation aggregate of many alone may make a Feoffment of any of the Land belonging to their corporation. But all of them together may make a Feoffment: and if any of them be seised of Land in his own right and in his naturall capacity, he may make a Feoffment of this land as another man may doe; yea he may make a Feoffment of this Land to the same corporation whereof he is a head or member, and so give and take also in a divers capacity. *Fitz. saitt & Feoffments* 29. *Perk. sect.* 205. 224. 225.

Ecclesiasticall persons cannot make Feoffments, gifts, &c. of their Ecclesiasticall Lands for longer time then three lives, or twenty one years, for all Feoffments, gifts, grants and leases by Bishops, albeit they be confirmed by Deane and Chapter, or by any of the Colledges or halls in either of the Universities or elsewhere, or by Deane or Chapters, masters or gardians of any hospitalls, Parsons,

Vicars

4 Who may make or take a Feoffment. And what shal be said a good Feoffment. Or nor. And what things are requisite thereunto.

1. In respect of the persons thereunto and the quality of their estate. Men de non sane memorie. Feme covert. Infant. Attaint persons. Outlawed persons.

Feme covert.

Corporation.

Ecclesiasticall persons.

Vicars, or any other having spiritual or ecclesiastical living, are avoidable. *Ca. super Lit. 43.*

A man cannot make a Feoffment to his own wife after the marriage is consummated: But after a contract made, and carnall knowledge had, he may make a Feoffment to her, and such a Feoffment will be good. *Perk. fell. 1194. 1211.*

Husband and Wife.

One Jointenant cannot make a Feoffment of his part of the Land to his companion; for a man cannot give a possession to him that hath before. And hence it is also that the Lessor cannot make a Feoffment to his Lessee for life, years, or at will. And yet perhaps a Feoffment in this case if it be in writing, may work as a confirmation: But one Tenant in common, or one coparcenor may make a Feoffment of his part of the land to his companion. *Perk. fell. 197. Fitz. saits & Feoffments 26.*

Jointenants. Tenants in common.

If a man make a Feoffment of another's land, it is a Disseisin, but a good Feoffment against all men but the Disseisee himself. And if four join in a Feoffment of Land, and three of them have nothing in the Land, and the fourth hath all the estate; this is a good Feoffment. *Bro. Feoffment 4. Perk. fell. 222.*

Disseisor and Disseisee.

A Disseisor cannot make a Feoffment of the Land to the Disseisee, but it will be void, for the Disseisee will be remitted. But a Disseisee may make a Deed of Feoffment and a letter of Attornay to enter and give livery; and if the Attornay do so, this will be a good Feoffment. *Perk. fell. 197. Co. super Lit. 48. 49.*

No Feoffment, or livery of Seisin can be made to the King, for he doth alwaies give and take by matter of record. *Fitz. saits & Feoffments 21.*

A Feoffment may be made at this day of any thing which doth lie in livery, by whatsoever tenure it be held, notwithstanding the Statute of *Magna Charta, cap. 32.*

But in some cases where a man doth alien his Land held of the King, he must have the Kings licence beforehand to doe it, or else he must pay a fine to the King afterwards for not having a Licence. But of such things whereof no livery of seisin can be made no Feoffment can be made. *Ca. super Lit. 49. 21 H. 7. 7. See, infra at Num. 9. Grants. 5.*

Priogative. 2 In respect of the matter whereof it is made.

One may make a Feoffment of a moiety, third, fourth, or fifth part of his Manor or other land; and that by the name of a moiety, third, or fourth part. *Ca. super Lit. 390.*

A Feoffment may be made of an upper chamber over another mans house beneath. *Co. super Lit. 48.*

If there be a meadow of one hundred acres which time out of minde hath been divided amongst divers persons, and each person hath a certaine number of acres, but in no certaine place; the custome being to allot each person his number one yeare in one place, and another in another *alternis vicibus*, in this case either of these persons may make a Feoffment of his part by the name of so many acres lying in such a meadow without any bounding or describing of it. *Co. super Lit. 4. 48.*

If parceners have made partition of their Land, that the one shall have it from Easter to Lammas to her and her heirs, and the other shall have it from Lammas to Easter to her and her heirs, or that the one shall have it one year, and the other the other yeare *alternis vicibus*: Or if they have two Manors descended, and they agree that the one shall have the one Manor one year, and the other the other Manor the same year, and the next year that he that had the one shall have the other *alternis vicibus* for ever; in these cases the parceners may either of them make a Feoffment of this Land or Manor. *Co. super Lit. 4. 48.*

If there be any lease for life or years in being of that land or thing whereof the Feoffment is made, and he that hath this lease for life or years, or in his absence his bailiff or servant keeping in the house or land whereof the Feoffment is to be made doth give leave and agree that livery of seisin shall be given upon the house or Land by the Lessor himself or by his attornay, and for this cause doth leave the possession of the house or land, and thereupon livery of seisin is made; this is a good Feoffment and a good livery of seisin, and yet it doth not prejudice the estate of the Lessee. And if the lessor make a Feoffment of the Land to a stranger, by assent or licence of the Lessee, the Lessee then being on the land; this is a good Feoffment. In like manner as it is, where the Lessor doth enfeoffe a stranger to which the Tenant doth

3 In respect of the presence or possession of other persons on the Land at the time of the Feoffment made.

Attornment.

doth agree saving his terme. And if the Lessor make such an entry upon the Lessee for life or years as to put him out of possession of the House or Land, and then he doth make a Feoffment and livery of seisin of it, or if the Lessor in the absence of the Lessee, his Wife, Servants and Children enter upon the thing in Lease and make a Feoffment and livery of seisin thereof; in these cases there is a good Feoffment to pass the reversion, for in these cases when the Lessee for life or years doth re-enter, the law doth adjudge this to be an attornment in law. But if a Lessor will enter upon his Lessee, and against his will (the Lessee being still in possession of the land) make a Feoffment of the Land and give livery; this is void and can never take effect as a Feoffment. And therefore if there be a conveyance made of a house, and Land thereunto belonging in Lease, and the Feoffor come into part of the Land without the leave of the Lessee, and there make livery of seisin of that part in the name of all the rest of the Land, (the Lessee himself, his Wife, Child, or servant being then upon any other part of the Land, and especially if they be in the house) this is no good Feoffment for any part of the Land, but void for the whole. And yet if the Lessee for years make an under-lease of part of the Land to another, and the Feoffor doth make a Feoffment of this part, and give livery of seisin upon this part, in this case the possession of the first Lessee in the residue will not hurt the Feoffment or livery for this part, but it is a good Feoffment. *Veynors case Trin. 7 Jac. B. R.*

Also if the Lessee give the Lessor leave to make livery and depart and leave a servant of the Lessee upon the Land; in this case it seems his presence upon the Land whiles the livery is made, will not hurt. *Co. super Lit. 48.*

And so if the Lessee leave the possession and leave nothing upon the Land but his cattell; they will not keep his possession nor prejudice the livery of seisin.

If a Lease be made of one acre to one, and another acre to another, and the Lessor make a Feoffment of both these acres, and make livery in one of them in the name of both acres; this is no good Feoffment for the other acre, for by this livery he is not put out of possession of that acre. *21 H. 7. 7. Dier 18.*

So if one make a Feoffment of two Manors, the one in possession, and the other in Lease, and give livery of seisin of the Manor in possession in the name of both the Manors; this is no good Feoffment for the other Manor, neither will it pass by this Feoffment. So if one make a lease for years of a house, and after Feoffment in Fee of the house, and of a close adjoining, and give livery of seisin of the house, the termors wife and children being then in the house; in this case this is no good livery neither to pass the house nor the close. *21 H. 7. 7. Dy. 18.*

Forfeiture.

If Lessee for life, or years make a Feoffment of the Land, the Lessor being then upon the Land and not contradicting it; it seems this is a good Feoffment, and that the presence of the Lessor upon the Land, especially if he doe not contradict it, will not hinder the virtue of the Feoffment; as against the Feoffor and all others: but the Lessor may enter afterwards for the forfeiture notwithstanding if he please. *Perk. fess. 222. Dier 362.*

Husband and Wife.

If the Husband alone make a Feoffment of the Land, he hath in the right of his wife, or that he hath jointly with his wife, his wife being then upon the Land and disagreeing to it; in this case the Feoffment is good against the Feoffor and all others but the wife notwithstanding her presence and disagreement, but the wife may after his death avoid it. *Perk. fess. 223.*

Jointenant.

If one jointenant make a Feoffment of the whole Land, his companion being then upon the Land; by this there doth pass no more but a moiety, and the Feoffment is void as to the moiety of his companion, for the Feoffment doth not give his moiety. *Perk. fess. 229.*

If a man enter into my Land by wrong, and make a Feoffment of it to a stranger, I being then upon the Land; this Feoffment is void, for in this case the law doth adjudge me to be alwaies in, and never out of the possession, *Perk. fess. 210.*

Prerogative.

If the King have any possession of the Land by wardship or otherwise, the owner of the land can make no feoffment of it: And therefore if the King be entitled

tuled to land by wardship, or primere seisin after office found after the death of an Auncestor of one of his tenants; in this case it is said the feoffment of the heire is void and passeth nothing, for the King is still in possession. And if it be before office found it will be all one, for the office shall relate to the death of the Auncestor. And yet in these cases the feoffment is good against the heire himself, and all others besides the King. If the heire before office found, enter and make a feoffment, and then the King doth pardon the feoffee; in this case the feoffment is good. And yet such a feoffment after office with a pardon is void. And the like law is if the entry be before office, and the pardon after the office; for this is void also. But if a man be out-lawed for debt or trespass, and thereupon the King hath the profits of the lands, in this case the owner may make a feoffment of this land notwithstanding. *Perk. Sect. 219. Bro. Feoffment: 3. 17: 21 H. 7. 7. a H. 6. 5. 1 H. 7. 5. Stamf. prer. Regis, 40.*

Outlawed persons.

Divers persons cannot make a feoffment but it must be by deed, as corporations, and such like: Also divers things cannot be granted by a feoffment, but the feoffment must be made by deed, for a feoffment cannot be made of a reversion of land but it must be by deed. But a lease may be made of land to one for life, the remainder to another in fee, and this may be done without any writing by word only. Also a feoffment may be made of the moiety, third, or fourth part of a manor, or of a pece of land without deed. And yet if one be seised of a manor, whereunto an Advowson is appendant, and he make a feoffment of three acres parcell of the manor, together with the Advowson to two men, *Habendum* the one moiety with the Advowson to one of them, and the other moiety to the other, in this case the feoffment cannot be well made unlesse it be by deed. *Fitz Fais & feoffments. 32 See Grants Numb. 4. Litt. Sect. 60. super Litt. 190.*

4. In respect of the manner of making of it. Reversion.

If a lease be made for five years, on condition that if the lessee pay to the lessor within the two first years ten pound, then that he shall have the land to him and his heires, or otherwise but for five years; in this case if livery of seisin be made to the lessee before his entry, this is a good feoffment. *Es sic de similibus. Litt. Sect. 350.*

Every feoffment also whether it be made by deed or without deed, must be made with livery of seisin, and this livery of seisin must be made according to the rules of livery and seisin herein after laid downe, for this is of the essence of a feoffment, and a feoffment is not accounted perfect untill livery of seisin be made, for untill then the feoffee hath only an estate at will in the land, and the feoffor may put him out when he will. And if either of the parties die before the livery of seisin be made, the feoffment is void, and no warrant of attorney to make livery can be executed after the death of the feoffor or feoffee, neither is there any remedy in this case to get the assurance to be made perfect but in a Court of Equity. But in case where there are many feoffees, there the death of one or some of them will not hinder the livery but it may be made to him or them that doe survive, we must see therefore in the next place what this livery of seisin is. *Litt. Sect. 59. 66. Co. super Litt. 52. Doct & Stud. 13.*

Livery of seisin

Equity.

Livery of seisin, or giving of possession is a solemnity or overt ceremony required by law and used for the passing of lands or tenements corporall as an evidence or testimoniall of the willing departing by him that makes the livery from the thing whereof livery is made, and the willing acceptance thereof by the other party. And this is as ancient as a feoffment, for no feoffment is made without livery of seisin, albeit livery of seisin be sometimes made upon other conveyances. And it was first invented as an open and notorious act to this end, and that by this means the country might take notice how lands doe passe from man to man and who is owner thereof, that such as have title thereunto may know against whom to bring their actions, and that others may know that have cause, of whom to take leases, and of whom to require wardships &c. And by this means if the title come in question, the jury can the better tell in whom the right is. And of this livery of seisin there are two kinds. 1. A livery in deed. 2. A livery in law, called a livery within view. The livery in deed is when the feoffor, donor &c. by himselfe or another, taketh the

3. Livery of seisin, what

6. the Kind.

ring

ring of the door of the house, or a turfe or twig of the land, and delivereth the same upon the land unto the feoffee, donee, &c. in the name or seisin of the house, or seisin of the land. And this is done sometimes by the parties themselves if they be present, and sometimes in their absence by their attornies or procurators. The livery in law is where the feoffor saith to the feoffee being in view of the land, I give you yonder house to you and your heires, goe enter into the same and take possession thereof accordingly, or the like. *New terms of the Law West 2. part Symk. Sess. 251. Co. super Litt. 48.*

7. The nature and operation of it.

Because this manner of conveyance by feoffment is so ancient, therefore this ceremony (being inseparably incident to a feoffment) is much favoured in law. And therefore it is expounded and taken strongly against him that doth make it, and beneficially for him to whom it is made. And for this cause it worketh not only to transmit the present estate, but also to barre all present and future rights and possibilities. If therefore one make a lease for life to *I. S.* the remainder to the right heires of *I. D.* (which *I. D.* is then living) and give livery of seisin according to the deed, in this case albeit he in remainder be not capable of this remainder, yet by the livery it shall passe out of the feoffor, and shall be in Abeyance during the life of *I. S.* So if a feoffment be made to one *& heredibus*, without the word [*Suis*,] and livery of seisin be made of the deed; this livery perhaps may make the estate good. *Bro. estates 4. Plow. 28. 29.*

8. Where and in what cases it is requisite, Or not.

Livery of seisin is needfull and must be had and made in all cases where any estate of fee-simple, fee-taile, or for a mans owne or another mans life is made or granted by writing, or word in the country of any lands or tenements corporall. And so also where one doth make a lease of land to another for years the remainder to a stranger in fee simple, fee tail, or for life; in these cases livery of seisin must be had and made to the lessee for years or else nothing will passe to him in remainder; and yet the lease for years will be good. And so also where a lease for years is made upon condition that if such a thing happen the lessee shall have the fee-simple; in this case the lessee must have livery of seisin before his entry; otherwise the estate will not increase. And so also if the King make a feoffment of the land be hath in the right of the Duchy of Lancaster that is not within the county Palatine; in this case livery of seisin must be made as in the case of a Subject. And in all these cases where livery of seisin is requisite and it is not made, there doth passe no estate by the conveyance, but an estate at will at the most. *Co. 5. 92. Litt. Sess. 70. Co. 6. 26. Doff. & Stud. 13. Co. super Litt. 49. Co. super Litt. 216. Plow. 214. 219.*

But livery of seisin is not needfull or requisite to be had and made in cases where any estate of fee-simple, fee-taile, or for life is made or granted of any lands by matter of record, as by the Kings Letters Patents, Fine, Recovery, Deed indented and inrolled, and the like; nor is it needfull where any such estate is created by way of covenant and raising of use, by way of Exchange, Indowment *ad officium Ecclesie* or *ex Assensu patris*; nor is it needfull where any such estate is passed or granted by way of surrender, devise, release, or confirmation, or by way of increase or executory grant, as when the fee-simple is granted to the lessee for life or year in possession; neither is it requisite or can be made where any incorporeall hereditaments, as reversions, rents, commons, or the like are granted in fee-simple, fee-taile, or for life: for in some of these cases there is an attornment to be made that doth supply a livery: Neither is it requisite in some cases where an estate of freehold is made of a corporall thing, as if a house or land belong to an office, and the office be granted by deed; in this case the house or land doth passe as incident thereunto. So if a house or chamber belong to a corody; in this case by the grant of the corody the house or chamber passeth without any livery of seisin. Neither is it requisite upon a lease for years, for if a man make a lease for one thousand years; this lease is perfect by the delivery of the deed without any livery of seisin. Neither is it needfull where one doth grant to me and my heires all the trees growing on his ground; for these will passe without any livery of seisin at all. *Co. 2. 23. Litt. Sess. 59. Co. super Litt. 49. Co. 8. 137. 11. 49.*

Nor is it needfull when an estate is made to one that is in possession already, be

he Tenant at will or sufferance only, or (as it seemes) but a Disseisor only. But if an estate be made to *A.* in possession of the lands and to *B.* out of possession of the land, this without livery of seisin cannot execute any Estate in *B.*

Livery of seisin may and must be made either by the party himselfe that maketh the estate, or if it be a livery indeed, it may in his absence be made by his attorney sufficiently authorized by writing. And he that may make an estate, to the perfection whereof livery is requisite, may himselfe and in his owne right make livery thereupon: and in the right of another, and as attorney to another, so divers that cannot make any estate may notwithstanding make livery of seisin. And therefore the husband albeit he may not make a feoffment in fee, or lease for life, &c. of land to his wife, yet he may as an attorney make livery of seisin to her upon a conveyance made by another. And so also may the wife upon a conveyance made to the husband or her: And so also Monks, Infants, Aliens, and such like Persons disabled to make feoffments &c. may notwithstanding make livery of seisin as attorneys upon conveyances made to others. And so likewise may he in remainder in fee make livery to the lessee for years. *Et sic de similibus.* And this livery of seisin may and must be made to the party himselfe that taketh the estate, or in his absence to his attorney or procurator sufficiently authorized: and in this case any one may be an attorney to take that may be an attorney to give livery. If a feoffment be made to divers by deed and livery of seisin is made to one or some of them; this is a good livery to execute the estate to them all. But if a feoffment be made to divers without deed, and livery of seisin is made to one or some of them in the name of all the rest; in this case the feoffment is good to execute the estate in him or them to whom the livery is made, and void as to the rest. If a lease for years be made to *A.* and *B.* without deed, the remainder to *D.* in fee, and livery of seisin is made to *A.* or *B.* in this case this is a good livery to make the remainder to passe to *D.* But if a lease be made for years to *A.* the remainder to the right heirs of *J. S.* in fee, *J. S.* being then living, and livery of seisin is given to *A.* this remainder is void: for *terminus heredes viventis.* One Jointenant cannot take livery of seisin to his companion as a tenant in common may. And a lessor cannot make livery of seisin to his lessee for life or years. See before Numb. 4. *Perk. Sell.* 184. *Co. super Litt.* 48. 49. 52. *Co. super Litt.* 48. 49. *Dier.* 35. *Co. super Litt.* 49. 359. *Co.* 5. 95. *Co. super Litt.* 217. *Perk.* 40. 10 E. 433.

In all cases where this ceremony is requisite, whether it be done by the parties themselves in person or their deputies, it must be done and made, 1. in the life time of the feoffor, donor, or lessor, and in the life time of the feoffee, donee, or lessee, for if either of them die it cannot be done afterwards: neither can a warrant of attorney be made to deliver seisin after the death of the feoffor &c. But if there be more feoffees, donees, or lessees, then one, in such cases albeit all of them die but one, the livery of seisin may be made to that one that doth survive, and it will be good to him to execute the estate in all the land. And so it is if there be a warrant of attorney made by a Corporation aggregate, as a Mayor and Community, Deane and Chapter, or the like, to give livery of seisin, in this case the death of the Mayor, &c. will not determine the authority, and therefore in that case the livery of seisin may be made after his death. 2. If it be a lease for years with a remainder over in fee, the livery must be made to the lessee for years before his entry or at the time when he doth enter for that purpose, for afterwards it cannot be made: *Quod semel meum est, amplius meum esse non potest.* *Quare* also whether the law be not so in all other cases, and let men take heed they doe not (as commonly they doe) enter into the land before they have livery of seisin made thereof unto them: And yet it seemes the livery of seisin is good when it is made afterwards, by *Co.* 2. 55. 3. It must not be made before the estate begin, for if a lease be made for years to begin at Michaelmas with a remainder over, and the livery of seisin is made before Michaelmas, this livery of seisin is void; for if a livery worke at all, it must worke presently, and so it cannot in this case, because it is before the estate doth begin. *Co. super Litt.* 52. *Co. super Litt.* 49. 216. *Perk. Sell.* 208. *Co. super Litt.* 217.

If an estate be made of divers peeces of land in divers villages in the same county,

D d d d

m

9. How it may & must be made, And what shall be said a good livery of seisin Or not.

1. In respect of the persons that make it & to whom it is made, and the quality of their estate, woman covers laiaur.

2. In respect of the time when it is made.

A caveat.

3. In respect of the place or thing wherein it is made.

in this case the making of livery of seisin of land in any part thereof in the name of all the rest, or of one parcell according to the deed, albeit he doth not say in the name of &c. sufficeth for all, if all the peeces be in the grantors possession and out of lease. But if the peeces of land lie in divers counties, or in the same county and they be in lease, or out of the possession of the feoffor *contra*; for in that case the making of livery in one part in the name of all the rest is not sufficient for the rest, for in this case it is requisite that livery of seisin be made upon and in some of the land in both counties, and upon every parcell of land that is out of possession, or at least in some parcell of the land in the occupation of every severall tenant. And yet if one part of a Manor be in one county, and the other part in another county in view of that part; in this case it seemes livery of seisin in the one part in the one county in view of the other part in the other county is good and sufficeth for all. So if the scite of a Manor lie in one county, and the rest of the Manor in another county; in this case the making of livery in the scite of the manor is sufficient for the whole Manor. If a feoffment be made of the Manor of Dale in Sale, the which Manor doth extend in Dale and Sale, and livery of seisin is made accordingly in Dale only and not in Sale also; by this feoffment there doth passe no more of the Manor but that which is in Dale only. If I be seised of one acre in fee, and of another acre for life, and I make a feoffment of both acres, and make livery of seisin in that acre whereof I am seised in fee in the name of both acres; in this case it seemes this sufficeth to passe both the acres. But if I be seised of one acre in fee, and possessed of another acre for years, & I make a feoffment of both acres and livery of seisin in that acre only whereof I am seised in fee in the name of both the acres, *contra*; for this is as if I make a feoffment of land whereof I am seised, and of other land whereof I am not seised &c. If I be seised of two acres of land, and let one of them for years, and then make an estate of both of them to another, and make livery of seisin in that I have in possession in the name of both the acres; this will not serve to passe the other acre, but livery must be made in that acre also. And accordingly it was agreed in a case in the Kings Bench Hil. 38. Eliz. which was, that a man was seised in fee of a Manor and other lands called Groves, and he made a feoffment of it (Groves being then in lease for years) and a letter of attorney to give livery, and the attorney made livery of the Manor in the name of the rest, the lessee being still in possession of Groves; in this case it was agreed that this was no good feoffment for Groves. *Co. super Lit.* 48. *Perk. Sess.* 227. 228. *Doff. & Stud.* 3. *Lit. Sess.* 61. 418. *Perk. Sess.* 226. *Fitz. Feoffments & Faits.* 111. *Perk. Sess.* 228. 9 H. 7. 25. *per Frowick. Fitz. Faits & Feoffments.* 2. *Mountagni versus Jefferies.*

When a feoffment is made of a house and land, the livery of seisin is most aptly to be made of in the house in the name of the rest, and at the door of the house &c. And when a feoffment is made of a Rectory or Parsonage; the livery of seisin may be made in the Parsonage house; or if there be no house, it may be made upon the Glebe; or if there be neither, it may be made at the ring of the Church door: *See infra.*

4. In respect of the presence or possession of others.

In the making of every livery of seisin it is requisite that all persons that have any lawfull estate and possession in the thing whereof livery is to be made, as lessees for life, years, and such like joine in the making thereof or be removed thence, for every livery ought to bring an immediate possession to the feoffee, donee, &c. *See before Numb. 4.*

If lessee for years make a feoffment and a warrant of attorney to give livery of seisin, and the attorney make livery of seisin the lessor being present upon the land and not contradicting it, it seemes this is a good livery of seisin: *Dier.* 362.

The presence of the feoffor, donor, &c. upon the land after he hath delivered seisin to the feoffee, donee, &c. albeit he stay upon the land a while and doe not depart and leave the feoffee &c. in possession, will not hurt the livery. See more *supra* Numb. 4. *Bro. Feoffments.* 24.

5. In respect of the matter whereof it is to be made.

Livery of seisin may be made of any corporall thing, as Manors, houses, lands, meadows, pastures, woods, chambers, or the like. And these things therefore are said to lie in livery. But of incorporall things; as rears, advowsons, commons, flowers, and

and such like things livery cannot be made. And these things therefore are said to lie in grant and not in livery. And therefore when a livery is made of these *nil operaturus*. See more above *Num. 4 Co. Super Litr. 49.*

To every good livery of seisin is requisite either such an act as the law doth adjudg to be a livery, or apt words that doe amount unto it; for a livery may be good by words without any act or deed at all. But it cannot be good by an act or deed without any words at all: howbeit that livery that hath an act or ceremony in it is the best, because it taketh the deepest impression in the witnesses. *Co. 9. 137. Super Litr. 49.*

The most usuall formall and orderly manner of making of livery of seisin is thus, that the feoffor, donor, &c. and the feoffee, donee, &c. if they be present, or in their absence their attorneys or servants that have authority doe come to the door, backside or garden if it be a house, if not, then to some part of the land where seisin is to be delivered; and there in the presence of many good witnesses doe shew the cause of their meeting, openly and plainly, doe read the deed or declare the contents thereof and of the letter of attorney if there be any. And then the feoffor, &c. or his attorney (if it be a house) doe take the ring, latch or haspe of the door (all the people, men, women and children being out of the house,) or (if it be of a peece of ground) doe take a clod of the ground or a bough or twig of a tree or bush growing thereupon; and (all the people being out of the ground) the same ring &c. clod, bough &c. with the deed doe deliver to the feoffee, donee, &c. or to his attorney: and in the delivery hereof doe use these or some such like words, *viz.* I deliver these to you in the name of seisin of all the lands and tenements contained in this deed, To have and to hold according to the forme and effect of the same deed. Or, I deliver you seisin and possession of this house or ground in the name of all the lands contained in the deed according to the forme and effect of the deed. And then if it be a house, the feoffee, &c. doth enter in first alone and shut to the door, and then he doth open it and let in others. And if the feoffment, gift, or lease be made without deed, then they doe and must withall expresse the very estate it self, which the feoffee, donee, or lessee is to have: as for example, the feoffor, donor, or lessor must come to the house or land which is to be granted and where livery of seisin is to be made and there must by apt words grant the house or land to him that is to have it in fee-simple, or in taile, or for life, (as the agreement is) and in seisin thereof must deliver him the ring of the door, or a turfe or twig of the land, And if the feoffment &c. be made by writing, then it is wisdom to indorse and set downe on the back of the same, how, when and where the same is made, and the names of the witnesses thereunto. But a livery of seisin that is not so exactly made, may be good notwithstanding. And therefore if the feoffor, donor, &c. or his attorney take any thing else that comes from off the land, as a stone, or the like, and therewithall doth make the livery of seisin; or if he take a turfe, or twig from off another mans ground, and not from the same whereof possession is to be given, and deliver that upon the ground in the name of seisin; or if he take a peece of silver or gold, or a rod, stick or the like, and deliver this upon the land in the name of seisin; all these are good deliveries of seisin and possession. So if the feoffor &c. be at the door of the house, or by the land, or in the house, or upon the land, and after he hath delivered the deed, he say to the feoffee, donee, &c. [Here I deliver you seisin and possession of this house or land in the name of seisin and possession of all the lands and tenements contained in the deed.] Or [have and enjoy this house or land according to the deed.] Or [enter into this land or house, and God give you joy of it.] Or [I am content, you shall enjoy this land;] in all these cases there is a good livery of seisin, *Et sic de similibus. West. Symb. 1 part. Sect. 251. Perk. Sect. 109. 210. Co. Super Litr. 48: Co. 9: 137. Fitz feoffments & saits. 111. Co. 6: 26. 41. E. 3: 17.*

If I being seised of a house in fee make a feoffment of it and of divers lands to a man then present with me in the same house, and there deliver him the deed in the name of seisin of all the lands contained in the deed; in this case this is a good delivery of the deed, and a good livery of seisin also, albeit I continue in possession of the house still and goe not out of it. And if I be Lord of a Manor, and lying sick within some part of the Manor I make a feoffment of the Manor, and deliver the deed to the

6. In respect of the manner & order of making it. And how livery of seisin is to be made.

feoffee saying to him, I will that you take seisin presently, and thereupon command all my tenants of the manner to attune to him, and they doe so; this is a good livery of seisin. So if I make a deed, and after I have read it, being upon the land I deliver it to the feoffor, donee, &c. and say, Here I deliver you this charter as my deed in the name of seisin of all the lands therein contained, or the like. this is a good delivery of the deed and of seisin. But if I doe only seale and deliver the deed upon or in view of the land without saying or doing any more; this will not amount to a livery of seisin. And therefore if a man make a feoffment with a letter of attorney to give livery of seisin, and then he deliver the deed upon the land, this is no good making of livery of seisin. And so also if there be no letter of attorney. *Bro. feoffment* 28. *Perk. Sess.* 21. 212. *Perk. Sess.* 215. *Co. 6. 26. Cromwale case Adjudged in the exchequer* 13. *Elix.*

If I be seised of a house in fee, and being in the house say to *I. S.* Here *I. S.* I demise you this house for terme of my life; this will not amount to a livery of seisin; and therefore it is no good lease untill livery of seisin be made; but it is a good beginning of a lease. *Co. 6. 26.*

If the father infeoffe his son of land, and the son suffer his father to enjoy it, and after the son doth come to the Parish Church where the land doth lie, and there in the audience of the parishioners useth these words to his father, [Father you have given me such and such lands (and doth name them) as freely as you gave them to me I give them to you againe;] this is no good livery of seisin, neither doth any estate passe hereby. So if one being upon his land say to *I. S.* [*I. S.* stand forth, I doe here referring an estate to me for mine owne life give this land to thee and thy heires for ever;] this is no good livery of seisin, neither doth any estate passe thereby. So if one make a charter of feoffment to me and make no livery of seisin thereupon, and after I make a feoffment of the land to *I. S.* and the feoffor hearing and having notice of it [I doe willingly agree to it and am contented that *I. S.* shall have it;] or I doe agree to the feoffment, or the like, in this case this doth not make the feoffment that was made to me good, *Perk. Sess.* 216. *Hil. 37. Elix. B. R. Callards case. Fitz. Fess. & feoffments.*

If divers parcells of land be conveyed and livery of seisin is made in one; or there be divers feoffees, and livery of seisin is made to one of them according to the deed without using any more words; this is good. But the best forme and order of making of livery in this case is to adde these words, [in the name of all the rest &c.] *Co. super Lit.* 48. *Fitz. E. 10. 177.*

Livery in law,
or within the
view.

If the feoffor, donor, &c. deliver the deed in sight or view of the land, and use these or any such like words, [I will that you shall enter into the land and have it according to the deed;] Or, [take and enjoy the land according to the deed;] Or, [I deliver you this deed in the name of seisin;] Or, [enter you into the land and take seisin of it;] Or [take the land, and God give you joy of it;] Or, (if the estate be made without deed) [I give you yonder land to you and your heires and goe and enter into the same and take possession thereof accordingly;] Or [enter into the land and enjoy it in fee simple to you and your heires, or for your life &c.] in all these cases the estate and the livery is good, albeit the feoffor &c. stand in one county, and the land in view be in another county. But an Advowson will not passe by livery made in view of the Church without deed, there being an Incumbent in the Church *per. ch. Just. & Just. Manwood* 18. *Elix. in Carys. Rep.* 52. And in all these cases of livery within the view, 1. It must be made by the person himselfe that doth make the estate, for it cannot be made by his attorney. 2. There must be a relation to the land: for if the feoffor doe deliver the deed only to the feoffee in sight of the land; this is not a good livery within the view. 3. The parties must stand within view of the land, for if the feoffor &c. being out of the sight of the land say to the feoffee &c. Goe and enter and take seisin of the land and God send you joy of it; this is no good livery of seisin. 4. There must be some body capable of a freehold to take by the livery, for if it be made to a lessee for years the remainder to the right heires of *I. S.* and *I. S.* is then living, it is void. 5. The feoffee &c. must enter presently, for if either the feoffor, donor &c. or feoffor, donee &c. die before entry; the livery cannot be made good. And yet if the party dare not enter for feare, in this case if he claime it only

commandement, all that he doth is void. But for the most part where the Attorney doth that which he is authorised to doe, and more also, it is good for so much as is warranted, and void for the rest. And therefore if the letter of Attorney be to give livery of seisin to *A* and the Attorney give it to *I* and *W*; this livery is good to *I* and void to *W*. So if the letter of Attorney be to give livery of seisin of white acre only, and he make livery of white acre and black acre also, this livery is good for white acre, and void for black acre. *Co. super Litt.* 52. 258. *Park. fell.* 187. 188. 189.

So if the letter of Attorney be absolute; and the Attorney give livery upon condition, some hold this to be good, and the condition to be void. *Park. fell.* 109. *Co. super Litt.* 258.

If a letter of Attorney be made to two jointly to make or take livery of seisin, and one of them alone doth it without the other, this is a void livery. But otherwise it is, when it is made to two jointly or severally, for there one of them alone may doe it. *Co. super Litt.* 49.

If a letter of Attorney be to make livery of seisin after the death of another man, and the Attorney doth make livery of seisin during that mans life; this livery is void. *Park. fell.* 39.

If I make a letter of Attorney to *I* to give livery in the Capital messuage, and he doth it in another place, or to doe it between two 2 or 3 a clock, and he doth it at another time, or a Feoffment be made to *A* and *B* and the letter of Attorney is to give seisin to *A*, and he give it *B*, in all these cases it is not good. But if the Feoffment be to *I* and a letter of Attorney to make livery to him and the Attorney doth make it to his Attorney this is good. 10 *H.* 7. 39. *Dyer* 337. 483. 68.

Livery of seisin is sometimes made single, and without any Relation to the Deed whereby the estate upon which the livery is made is created at all: and sometimes and most commonly it is made with reference to the Deed in these or such like words

[*secundum formam charta.*] In the first case the estate is oftentimes made upon the livery; and then there may be one estate contained in the Deed, and another made by the livery, also there may pass more Land by the livery than is in the Deed, and by this means when there is a fault in the Deed, so that the Land will not pass by the Deed, it may perhaps pass by the livery: but in this case then there must be apt words used in the making of the livery to create the estate also; as well as to give the possession. But where the livery of seisin is made with relation to the Deed, there it must take effect according to the Deed, or not at all, for these words *secundum formam charta.* are to be understood according to the quantity and quality of the effectuall estate contained in the Deed. And therefore if one make a Deed of Feoffment to another, and in the Deed there is contained no condition at all, and when the Feoffor doth make livery he doth make livery upon condition; or if the Deed contain an estate to him and his Heirs, and he maketh livery of an estate in taile or for life; in these cases there doth pass nothing by the Deed. And yet if there be apt words used to create such an estate at the time of the livery made; such an estate may be made by the livery without the Deed, and then the Deed shall be void. But if in these cases the Feoffor say when he doth make livery on condition in taile, or for life, *secundum formam charta;* in this case there is a good Feoffment made according to the Deed, and the additional words are void. So if a man make a Lease for years, and make livery *secundum formam charta;* this is but a Lease for years still. And if *A* give land to *B* To have and to hold after the death of *A* to *B* and his heirs; this is a void Deed, and therefore if the livery of seisin be made *secundum formam charta,* the livery of seisin is void also. But if when he doth give livery of seisin, he give it to him and his heir, without these words, *secundum formam, &c.* or if in the making of livery he say Here I deliver you seisin of this Land, To have and to hold to you and your Heirs for ever, or the like; this may make a fee-simple. So if one make a Deed of Feoffment of 3 acres, & after make livery of seisin of 4 acres; in this case if there be words in the livery of seisin sufficient to make a new estate, the other two acres may pass also. *Litt. fell.* 359. *Co. super Litt.* 48. 122. *Fitz. Estoppel* 177. 7 *Ed.* 4. 25. *Co. super Litt.* 49. *Fitz. feoffments & sais.* 23.

11: How it shall enure, and be taken, and construed.

If *A* by Deed give Land to *B* to have & to hold after the death of *A* to *B* and his Heirs; this is a void Deed, and therefore if upon this Deed livery of seisin be made before the day by the party himself, or at, or after the day by his Attorney *secundum formam & effectum chartæ*; the livery is void also, for it cannot enter so. And yet if a Lease be made for life to begin *in futuro*, and at, or after the day come, the Lessor himself in person doth make livery of seisin *secundum formam chartæ*; in this case, the Lease perhaps may become good by this livery of seisin. *Co. 2. 55. 5. 94. & Greenwoods case. B. R. Mich. 17. Jac.*

If an agreement be between two, that the one shall enfeoff the other upon condition for surety of money, and afterwards livery of seisin is made generally without any such condition; in this case it is said by some the estate shall be on condition still. *Co. super Litt. 222.*

If there be a fault in the Deed, as by the mis-naming of the Feoffor, &c. Feoffee &c. or the like, and afterwards the Feoffor, &c. doth himself in person make livery of seisin upon this Deed to the Feoffee, &c. by this the fault of the Deed may be holpen and cured. *Perk. fell. 42.*

If one make a Feoffment to himself and another, and give livery of seisin to the other; this is a good Feoffment and shall enure to the other wholly, and he shall take the whole by the Feoffment and the livery. And so if the livery be made to one that is capable, and to another that is not capable; he that is capable shall take the whole, and the other shall have nothing. So if a Feoffment be made to two, and one of them die before the livery is made, and after the livery is made to the survivor; in this case the livery shall enure to the survivor only, and he shall have all the estate thereby. So if a Feoffment be made without Deed to a Corporation, and to *I S*, and livery is made to *I S* alone; in this case *I S* shall have the whole and the Corporation nothing at all. *Perk. fell. 204. 203. 7 H. 7. 9.*

If a Feoffment be made to four, and livery of seisin is made to one, two or three of them; this shall enure to them all. But if the Feoffment be without Deed, it shall enure to him wholly to whom the livery is made. And if one of them give warrant to the rest to take livery for him, and they do so; this shall enure to them wholly, and not to him at all for any part. *Dier. 35. 10 E. 4. 1. G. 5. 95.*

If the Tenant make a Feoffment to his Lord and another, and give livery of seisin to the other; this shall enure wholly to the other untill the Lord agree to it, and then to them both. *10. E. 4. 12.*

If one make a Deed of Feoffment of one acre of Land to *A* and his Heirs, and another Deed of the same Land to *A* and his Heirs of his body, and deliver seisin according to the form and effect of both Deeds; in this case it shall enure by moieties; i. he shall have an estate taile, and the Fee-simple expectant in the moiety, and a Fee-simple in the other moiety. *Co. super Litt. 21.*

If two severall Deeds of Feoffment be made to two severall persons of one and the same thing; he that can get the seisin first shall have it. *Rem. domino vel non domino vendente duobus, In jure est potior traditio prior.*

If Lessee for life make a Feoffment, and a Letter of Attorney to the Lessor to make livery, and he doth make livery accordingly; in this case this shall not enure to bar him of his entry upon the Feoffee for the forfeiture of his Lessee. But if Lessee for years make a Feoffment in Fee, and such a letter of Attorney to the Lessor, and he doe deliver seisin accordingly; this livery shall bind him, for it shall be said as in his own right, because the Lessee had no freehold whereof to make livery. *Co. super Litt. 52.*

If a Lessor make a Deed of Feoffment, and a letter of Attorney to the Lessee for years to give livery, and he do accordingly; this shall not be construed to extinguish or hurt his term. See more in *Exposition of Deeds, supra ch. 3. Co. super Litt. 52.*

CHAP. LXXXV.

Of a Fine.

Fine, what.



His word is ambiguously taken in our Law, for sometimes it is taken for a sum of money or mulct imposed or laid upon an offender for some offence done, and then also it is called a ransom: And sometimes it is taken for an Income or a sum of money paid at the entrance of a Tenant into his Land. And sometimes it is taken for a final agreement or conveyance upon Record for the settling and securing of Lands and Tenements. And in this sense it is taken here; and so it is defined by some to be, an acknowledgement in the Kings Court of the Land or other thing to be his right that doth complain. And by others, A Covenant made between parties and recorded by the Justices, And by others, A friendly, reall and finall agreement amongst parties concerning any Land or Rent or other thing whereof any suit or writ is hanging between them in any Court. And by others more fully, An instrument of record of an agreement concerning lands, tenements or hereditaments, duly made by the Kings license and acknowledged by the parties to the same, upon a writ of covenant, writ of right, or such like, before the Justices of the Common Pleas or others thereunto authorized, and ingrossed of Record in the same Court, to end all controversies thereof both between themselves which be parties and privies to the same, and all strangers not suing or claiming in due time. And in every Fine there is a suit supposed, wherein the party that is to have the thing is called the Plaintiff, and sometimes also in another respect the Conusee or Recognisee, and the other that doth depart with the thing is called the Deforciant, and sometimes in another respect the Conusor or Recognisor. And it was anciently the end of a suit indeed, for after there had been some contention about the thing by suit, the parties became agreed who should have it, and so a fine was levied of it, and there was an end of the matter; and hence it is said to be *fructus* or *effectus legis*, because it gives a man the fruit or effect of his suit. And to this day therefore a writ doth alwaies goe forth before a fine can be levied, and this is now one of the common Assurances of the Kingdom. Co. upon List. 126, 127. Plow. 357.

The parts of it.

There are five essentiall parts of a Fine. First, the originall writ taken out against the conusor, for without this a fine cannot be levied: Secondly, the Kings license for the levying of the fine, and for this the King is to have a fine or sum of money, which is called Kings silver, for this is properly that money which is due to the King, in the Court of Common Pleas, in respect of a license there granted to any man for passing a fine. And this is part of the revenues of the Crown. Thirdly, the Concordance or Concord it selfe which is the very agreement between the parties that intend the levying of the fine how and in what manner the thing shall pass, and doth begin thus: *Et est Concordia talis, &c.* (i.e.) And the Concordis such, &c. And this is the foundation or substance of the fine, for if upon this the Kings silver be entred, albeit the Conusor die afterwards, yet the fine is good, and the note or foot of the fine are but abstracts out of this. Fourthly, the note of the fine, which is an abstract of the originall Contract or Concord, and doth begin thus, Between A plaintiff and B and C deforciant, &c. *Iner A. quarentum & C. deforciantes, &c.* Fifthly, the foot of the fine, which doth begin thus. *Hac est finalis Concordia, &c.* this is a final Concord, &c: and containeth all the matter, the day, yeer, and place, and before what Justices it was levied, which is therefore called the Foot of the fine because it is the last part of it, and when this is done all is done: And for this there are indentures made by the Chirographer and delivered to the party to whom the Conuance is made, which is called the Ingrossing of a fine, for then a fine is said to be ingrossed when the Chirographer makes the indentures of the fine, and doth

Kings silver what.

Concord what.

Note of the Fine, what.

Ingrossing of the Fine, what.

A Fine is either without Proclamations, which is also called a Fine at the common Law, and this is such a Fine as is levied after such manner and forme as Fines were usually levied before 4 H. 7. upon which no Proclamations were made, which Fine doth still remain of the same force as it was at the common Law to discontinue the estate of the Cognisor if it be executed. Or it is with Proclamations, which is also called a Fine according to the Statute, and which is such a Fine as is levied with Proclamations after the forme and manner ordained by the statute of 4 H. 7. chap. 24. (and such a Fine shall every Fine that is pleaded intended to bee if it bee not shewed what Fine it is, and of this sort were and are most Fines since 4 H. 7. as being the best kinde of Fine of all; and it is in the election of him that sueth out the Fine as long as he liveth to have it with, or without Proclamations. A Fine also whether with or without Proclamations, is either executed, which is such a Fine as of his owne force giveth a present possession (or at the least in Law) unto the Cognisee, so that he needeth no writ of *Habere facias seisinam* or other means for the execution thereof; but he may enter: of which sort is a fine *Sur Cognissance de droit* come ceo que *ad de son done*, an acknowledgment of Right &c. which is in every deed the best and surest kind of Fine of all, and this kind of Fine doth alwaies suppose a feoffment, or gift precedent of the same thing whereof the Fine is had, which the Fine is to corroborate and strengthen. Or it is Executory, which is such a Fine as of his own force doth not execute the possession in the Cognisee, and of this sort is a Fine *Sur Cognissance de droit tantum*, when the party that doth levy the Fine is seised of the thing, and hee to whom the Fine is levied hath no freehold therein, but it passeth by the Fine: and a Fine *Sur Done, Grant, Release or Confirmation*. And if these kind of Fines be not levied or such Render made unto them that be in possession at the time of the Fines levied, the Cognisees must enter or have writs of *Habere facias seisinam*, according to their severall Cases for the obtaining of their possessions. But if at the time of levying of such an executory Fine the party unto whom the estate is limited be in possession of the lands passed, he shall not need any writ of execution to put him in possession, for then the Fine will enure by way of Extinguishment of right, and doth not alter the estate or possession of the Cognisee, however perchance it doth better it. The fine *Sur consance de droit tantum*, also doth serve sometimes to make a surrender, and then it is therein recited that the Conusor hath an estate for life, and the Conussee the reversion: and sometimes it doth serve to grant a Reversion, and then the particular estate is recited to be in another, and that the Conusor willeth that the other shall have the reversion, or that the Land shall remain to the other after the particular estate spent: a Fine also is either single, which is such a Fine by which an Estate is granted to the Cognisee and nothing granted or rendred back again to the Cognisor by the Cognisee. Or it is double, which is such a Fine as doth contain a grant, and render back again either of the Land it selfe, or of some rent, common, or other thing out of it to the Cognisor for some estate, limiting thereby many times remainders to strangers which be not named in the writ of covenant, which also is sometimes with reservation of rent, clause of distresse, and grant of the same over. *West. Symb. part. 2. Sect. 19. Dyer. 216. Plow. 265. Co. 3. 86. stat. 32. H. 8. 36. 4 H. 7. 24. 1 R. 3. 7.*

A Fine is a Record as of great antiquity, so of a high nature, great force, and much credit and esteeme, and it is now become and serves for a formall conveyance of land, and one of the common Assurances of the Kingdome, for by this meane a man may convey his land to another in fee simple, Fee-taile, for life or years, with reservation of rent also. It is therefore called a Feoffment of record, for it doth countervaille a Feoffment with livery of seisin in the country; and it includeth all that the Feoffment doth; and worketh further of his own nature, and it is indeed for many purposes the best and most excellent assurance of all others, for by the ancient common Law it was so high a barre, and of so great force, and of so strong a nature in it selfe, that it did conclude and barre not onely such as were parties and privies thereto and their heirs, but all others of full age, out of prison, of good memory, and within the four Seas the day of the fine levied, if they did not make their claim within a year and a day. And it is still of that force, albeit it be somewhat enfeebled by some Statutes, that

5. The nature, use, and fruit of a Fine.

either it passeth all the right and interest of the Conusor to the Conusee, or else it worketh by way of extinguishment and Estoppel, and doth perpetually barre the Conusor and his heires of all present and future right and possibility of right or other collaterall benefit to the thing whereof the fine is levied. And if it be a fine with Proclamations, it doth in time become a perpetuall barre to all others also, that have right, except they doe take care to prevent the barre by their claime, Action or entry within five years after the proclamations ended. And it barreth locatiles peremptorily whether the heire do claim within five years or not, if he make his claime by him that levied the fine. *Statute of Fines*. 18: E. 1: Co. 1: 3. *Plow.* 358. 365.

What shall be said a good Fine, or not: and how.
1. In respect of the persons thereunto and their capacity. And by, or to whom a Fine may be levied, and who may be conusors or conusees. And by what names. Persons attaind. Non sana memoria. Infants.

Any person male or female, body sole, or corporate, that hath capacity to grant, or is able to be a grantor by a deed, may levy a fine and be a Conusor therein, but there are certain persons prohibited by Law, which the Judges or Commissioners that take the Conusance of fines ought not to admit or receive, and yet if they doe admit them, and a fine be levied by such persons, the fine is good and unavoidable, and of this sort are mad men, lunatikes, villaines, Ideots, men that have the Lethargy, doing old persons that want discretion, drunken men, and men that are forced to it by threatening, imprisonment or the like, also such as are born blind, deafe and dumb, but a man that becomes so accidentally may be received and ought not to be refused.

Also persons attaind of felony or treason ought not to be received to levy a fine, but such persons being admitted to levy a fine, the fine will be good against all persons but the King and the Lord, of whom their lands whereof the fine is levied, are held for their times: but persons waived or outlawed in personall Actions only, ought not to be refused. *West. Symb. in his Treatise of Fines*. 17 E. 3. 32. 17 Aff. pl. 17 Litt. Sect. 731. *Perk. Sect.* 24. *Fine. Fines*. 120. See in grant infra chap. 11. Numbr. 17 E. 3. 32. *Crompt. Jur.* 37. 10 E. 4. 13. Also Infants ought not to be received to levy a fine, and yet if an Infant be admitted to levy a fine, and he doe not avoid it by writ of error during his minority (as he may if it be not a fine *Sur Grant & Render* in taile or for life, the fine will be good for ever against him and all others. And if he die during his nonage, before he hath avoided it, it seemes his heir can never avoid it, and yet upon this point the Judges of the Common Pleas have been divided on a solemn argument, and of this Just. *Dod. in* 17. *Jao.* made a Quere. *Perk. Sect.* 19. *Dyer.* 220. et per Just. *Bridgman's opinion in private*. 17 E. 3. 53. 30 E. 3. 5. 17 Aff. pl. 51. *Perk. Sect.* 19. 20. Co. 7. 8. Also women that have husbands ought not to be admitted alone without their husbands to levy fines, and yet if such a woman alone levy a fine of her own land she hath in Fee simple, and her husband doe not avoid it (as he may if he will) by writ of Error, entry, or otherwise during her life, or after her death during his own life, if he be Tenant by the Curtesie, this is now a good fine, and will bind her and her heires for ever, except she be an Infant at the time of the fine levied, and her husband happen to die during her minority, for then in this Case, if it be not a fine *Sur Grant & Render* to her in taile or for life, she may avoid it during her minority; but if the coverture continue untill her full age, in that case she cannot avoid it except her husband joyne with her in it, but the husband and wife ought to be received together to levy any fine of her Land. If such persons as are civilly dead, as Fryars, Monkes, and the like, be admitted to levy a Fine, the Fine is void. But such civil bodies as have absolute estate in their possessions, as Maior and Commonalty, Dean and Chapter, Colleges, and other Societies corporate, may levy Fines of the Lands they hold in common, even by the Common Law, and such Fines are good, but Ecclesiasticall persons, as Bishops, Deans, Masters of Hospitals, Parsons, Vicars, Prebends, and such like, are by divers Statutes refused to levy Fines of their spirituall inheritances. *West. Symb. part. 2. Sect. 9. Plow.* 538. 579. Co. 11. 78. 1. in *Adagdale College case*.

Corporations.

Any person that hath capacity to take by grant, or may be a Grantee by deed, may take by Fine and be a Conusee therein, as any person male or female, of full age or under age, whether it be a *Feme Covert*, mad person, lunatike, Ideot, any person in prison, or beyond the Sea, also any person attaind of felony or treason, or outlawed in any personall action, a Bastard, Clark convict, or Alien, may be Conusee in a fine and

Women co-vert.

and a Fine levied to such persons is good. 3 H. 6. 42. 41 Ed. 3. 7. 50 Ed. 3. 9.

Also Corporations spirituall and temporall may be Conveyed in Fines, and Fines levied to them are good, but before the ingrossing of such Fines there goeth alwaies a writ to the Justices of the Common Pleas, *Quod permittant finem illum levare*. But such persons as are civilly dead, as Fryers, Monkes and the like, cannot be Conveyed in a Fine, and therefore a Fine levied to such persons is void. See *Grant Numb. 2.*

The names of Cognisors and Cognisees in Fines must bee certainly set downe; and they must for the most part bee described by their right names of Baptism and Surname, whether they be King, Prince, Dukes, Marquesses, Earls, Vicounts, Barons, Lords, or Knights, which be names of dignity; but some of these are sometimes described without their surname, as *Georg' Comes Salop. Iohannis Dux Lancast.* Or whether they be Esquires or Gentlemen, which be names of worship and honour. But these additions of names of dignity and honour given to such persons or any others, as Bishops and the like, are used in Fines, rather of curtesie then necessity, for they are not needfull in Fines. But in case where there bee two of one name it is safe to make some addition by way of distinction, as *Senior* and *Junior* and the like.

If a woman, living her first husband, take a second husband and with him and by his name knowledge a Fine; it seemes this is void, because of this mistake: but if a woman with her right husband, by a wrong Christian name, levy a Fine she is concluded by it, and cannot avoid it during her life. And yet if a Fine be levied to a man and his wife by a wrong name, as to *A. and Sybil* his wife, when her name is *Isabel*, this is holden to be void. But if a Fine be levied by a woman by the name of *Margery* when her name is *Margaret*, or by the name of *Agnes*, when her name is *Anne*, it seemes this Fine is a good Fine. *Brumf. 1. part. 30. 7 H. 4. 22. 1 Aff. pl. 11.*

A Fine may be levied of all things whereof a *Præcipe quod reddat* lieth, and of all things which are inheritable and in esse at the time of the Fine levied, whether the thing be Ecclesiastical and made Temporal or Temporal: As of an Honor, Manor, Island, Burgony, Castle, Messuage, Cottage, Mill, Toft, Curtilage, Dove-house, Garden, Orchard, Land, Meadow, Pasture, Wood, Underwood, Chappel, River, Chauntry, Corrody, Office, Fishing, Warren, Fair, Rectory, Mises, a view of Frankpledge, Waste, Ertay, Relons goods, Deodands, Hospitall, Furzes, Heath, Moor, Rent, Common, Adrowson, Hundred, Way, Ferry, Franchise, Seigniorie, Reversion, Toll, Tallage, Pickage, Pontage, Aquitaine, Service, Portion of tithes, Oblations, or the like. 33 H. 7. West. 1. *ymb. his Tract of Fines, sect. 25. 30. See Exposition of Deeds infra.*

If either the Cognisor or Cognisee at the time of the Fine levied be seised of any estate of Freehold in Fee-simple, Fee-taile, or for life, in possession, reversion, or remainder, whether the same be by right or wrong, the Fine will bee a good Fine in this respect. And therefore if one that is seised of Land in Fee-simple, or Fee-taile, generall or speciall, levy a Fine of this Land to a stranger, this is a good Fine. So if a stranger levy a Fine to him of this Land, this is a good Fine. So also a Fine levied by, or to, a tenant for life of the Land he doth so hold is good in this respect: but hee must take heed of a Forfeiture in this case, for if tenant for life levy a Fine *Sur Cognisanc' de droit come ceo*, &c. to a stranger, or levy a Fine *sur Grant & Release* to a stranger, to hold to the Cognisee for a longer time then for the life of the tenant for life, howsoever in this case the Fine be a good Fine, yet this is a forfeiture of the estate of the tenant for life whereof he hath reversion or remainder may take present advantage. And yet if such a tenant for life levy a Fine *sur Grant & Release*, to hold so the Cognisee for the life of the tenant for life, or grant his estate by such a Fine to him in reversion or remainder; or by Fine grant a rent out of the Land for longer time then for his own life, in these cases the fine is good, and there is no forfeiture of the estate of the tenant for life. So likewise if a Fine be levied to a tenant for life by a stranger, who doth thereby acknowledge all his right to be in the tenant for life, and release and quite claim to him and his heirs, and go no further, this is a good Fine and no forfeiture of the estate of the tenant for life, for his estate is not changed thereby, and it may come to him in reversion, but if the stranger say further in the Fine *Come ceo que'il ad la son done*, this is a Forfeiture. *Seas. 27. Ed. 1. m.*

But if neither the cognisor nor cognisee be seised of any estate of Freehold in possession or reversion of the lands whereof the Fine is levied at the time of the levying of

3. In respect of the thing whereof the Fine is levied, and of what things a Fine may be levied or not, and by what names.

4. In respect of the estate of the parties thereunto.

Forfeiture.

the same, but have only a lease for years; or not so much, the Fine is void and of no force as to any stranger, howsoever it may be good between the parties by way of Estoppel. And therefore if a lessee for years, or a disseisor, or one that hath right only to a remainder or reversion levie a Fine to a stranger that hath nothing in the Land, this Fine is void, or at least voidable as to, and by any stranger thereunto, and he that hath cause may shew that the free-hold estate and seisin of the land was in another before and at the time of the Fine levied; and that *Partes finis nihil habuerunt tempore levationis finis*. The parties to the Fine had nothing when they levied the Fine, and by this avoid it. And yet a vouchee after he hath entred into the warranty may levy a Fine unto the demandant, but not to a stranger. And a disseisor may levy a Fine to a stranger that hath nothing in the land; and this is a good Fine, for he hath the Fee-simple by wrong in him. Also the issue in taile may be barred by way of Estoppel, by a Fine levied by Ancestor being tenant in taile, albeit neither consor nor Conusee have any Estate of Freehold in the Land. Co. 3. 123. 3. 88. 90. *Super Lis.* 251. 3 H. 7. 9. 5 H. 7. 40. 3 H. 6. 21. 27 H. 8. 4. A Joint Tenant, Tenant in Common or Coparcenous, may levy a Fine of his part to a stranger, and this will be a good Fine: And so also as it seemes, may one Coparcenour or tenant in common to another. 26 H. 8. 9. *Dyer.* 334. 49. *Plow.* 375. 138. E. 4. 13. 11. E. 4. 68. One single member of a corporation aggregate of many cannot levy a Fine of the Lands of the corporation, as the Major or Master of a College cannot levy a Fine without the communalty, or his fellows, &c. But such persons may levy Fines of the Lands they are solely seised in their own right as othermen may doe. Such as have Estates of freehold in Ecclesiasticall Lands in the right of their Churches, houses, &c. as Bishops, Deanes, and Chapters, Prebends, Parsons & the like, may not levy a Fine of such lands, for if they doe it wil not bind the successor. *Cam.* 78.

He that hath an Estate of fee-simple in lands in the right of his wife ought not to levy a Fine thereof without her, and if he doe, shee and her heires may avoid it after his death. Also he that hath an Estate of Lands given in taile by the King, or by the provision of the King ought not to levy a Fine of this Land, for it is void as against the issue in taile and the King. Also he that hath an Estate of Lands that are prohibited to be sold by Act of Parliament, ought not to levy a Fine of such Land. Also she that hath an estate of Lands of her husband, or of any of his ancestors assised to her for her Jointure Dower, or in taile by the meanes of her husband or any of his ancestors, may not levy a Fine of this Land; for if she grant a greater estate then for her own life, this worketh a present Forfeiture. *Stat.* 32 H. 8. chap. 28. 12 E. 4. 12. Co. 6. 55. *Broo. Fines.* 111: *Stat.* 32 H. 8. ch. 36. Co. 5. 3. 4 *Stat.* 1 H. 7. chap. 10.

A Fine at the common Law, or a Fine without Proclamations was once a perpetuall bar to all persons that had right and no impediment at the time of the Fine levied, and that did not claime within a year and a day after the execution of the Fine by possession; but now this Law is changed, and this kind of Fine will barre none but such as are parties and privies thereunto. But a Fine by the Statute, or a Fine with Proclamations is now much of the same virtue and force as a Fine at the common Law was, for by the Statute of 4 H. 7. it is provided, that every Fine after the ingrossing thereof shall be proclaimed in the Court the same Terme, and the three next following Termes, four severall daies in every Terme; which Proclamations so made, the Fine shall conclude all parties, privies and strangers, except women covert, persons within 21 years of age, in prison, out of the Realme, or of *non sane memoris*, (being no parties to the Fine) so as they or their heires take their Action or Lawfull entrie within five yeares after these imperfections removed. Saving to all persons and their heires (other then parties) the right claime and interest which they have at the time of the Fine, so as they pursue it by Action or entrie within five yeares after the Proclamations. And saving to all other persons such right, title, claime and interest as first shall grow or come to them after the proclamations by force of any matter before the Fine, so as they make their claime or entrie within five yeares after the same grow due; or if at that time there be any impediment as aforesaid, within five yeares after the impediment removed. And by the statute of 32 H. 8. (which is an exposition of this statute) it is provided, that all Fines with Proclamations levied according to 4 H. 7. by any person of 21 yeares of age of any land

8. What persons shall be barred by a Fine, or a Fine and Non-claime. And in what time. Or not. And how.

land, &c. before the fine levied entailed to him that doth levy the fine or any of his Ancestors in possession, reversion, remainder, or use, immediately after Proclamations had, shall be a bar against him and his Heirs, claiming only by force of any such entail, and against all others claiming only to the use of him or any Heir of his body. By which Statute it doth appear, that all the parties to the fine, Conusors and Conusees, whether they be *femes Covert*, men *de non sane memorie*, or others, (Infants only excepted who during minority may avoid it) and whether they have a naturall or civill capacity: and privies, *viz.* privies in blood, as Heirs whether they be lineall or collaterall, or privies in representation, as Executors and administrators: and all strangers also, *viz.* all others besides parties and privies that have or pretend any present right or title (except women covert, and the rest that have impediment that doe make their entrie or claim, or bring their action within 5 years after Proclamations had, & those persons excepted also if they make not their claim, &c. within five years after the impediment removed) all these are concluded. 1. so shut & closed up together, for their right is so extinct hereby, as they can never open their mouthes or lift up a finger against it. Saving to all others. 2. such as have no present right at the time of the fine levied, and were excepted before such Right, Title, Claim or interest as shall accrue to them after the Proclamations upon any trust, gift in Tail, or other cause, before the fine levied, so as they make their claim, &c. within five years after their right first accrued if they have then no impediment, or if they have, within five years after the impediment removed. *Stat. 18 Ed. 1. de finibus, Stat. 34 Ed. 3. 16. Plow 373. Stat. 4. H. 7. chap. 24. 1. R. 3. chap. 7. 32 H. 8. chap. 36.*

For a more full understanding of which Statutes and this matter, these things in generall must first be observed. 1. That the persons to be barred by a fine are, 1. Parties. 2. Privies. 3. Estrangers. The parties if they be of the age of 21 years, are bound for ever by the fine, and shall have no time to claim to preserve their right, The privies also, being heirs and Executors to the parties and void of impediment at the time of the fine levied, or not, if they claim by the same title that their Ancestor had that levied the fine, are barred for ever by the fine, and shall have no time to claime to preserve their right. And therefore if my Father disseise my Grandfather of Land, and then levie a fine of the Land, and then my Grandfather die, and after my Father die, by this fine I am barred of the Land for ever. *Dyer 3. paschs. 7. Jac. B. R.* And here note, that he that is a privie within the intent of 4 H. 7. is an Heir within the Statute of 31 H. 8. *Et sic e converso. Trin. 21 Jac. Com. B. Curia in Will. Godfreys Case.* And that privies or Heirs in estate and blood, as he that is Heir to whom the land doth or should descend, are within these Statutes, and shall be barred by the fine of their Ancestor of that land. And so also shall privies in estate that are not privies in blood, as where one hath land in burrow English, and levie a fine of it, hereby the youngest son is barred. So if one be Tenant in taile to him and the Heirs females of his body, and he levie a fine, having a Son and Daughter, hereby the issue female is barred, and yet she is not the Heir of his blood. But he that is privie in blood only, and not in estate also, is not within these Statutes; neither shall he be barred by the fine: and therefore if Lands be given to a man, and the Heirs females of his body, and he hath a Son and a Daughter, and the son levie a fine and die without issue, this is no barr to the Daughter, for howsoever she be Heir of his blood, yet she is not Heir to the estate, nor shall need to make her conveyance to it by him. The strangers that are to be concluded by the fine, are either, 1. Such as have present right and no impediment, and these are barred within five years if they make not their claim within five years after the Proclamations. 2. Such as have present right, but have impediment of infancy, &c. and these are barred if they doe not make their claim within five years after the impediment removed. 3. Such as have no present but future right upon cause precedent, and they are either without impediment, and then they are barred if they claim not within five years after their right doth accrue: or they have impediments, and then they are barred if they claim not within five years after the impediment removed. 4. Such as have neither present nor future right at the time of the levying of the fine by reason of any matter before the fine, but whose right groweth either

either entirely after, or partly before, and partly after the fine, and these are not barred at all by the fine, but they may make their claim, &c. when they will. And parties, privies, and strangers to fines that are barred thereby, are such as have naturall capacities or civill, for both these are barred. And therefore it is held, if such a Corporation as hath an absolute estate and authority of his possessions so as he may maintaine a writ of right thereof, as Major and Communalty, Deane and Chapter, &c. levie a fine of their Lands, they and their successors are barred presently, but if a Bishop, Deane, or Prebend, without assent of the Dean and Chapter, or a Parson or Vicar without assent of the Patron and Ordinary had levied a fine, this would not have barred the successor; neither will it bar now with their assent, for they are restrained by divers Statutes. *Plow.* 337. 375. 378. So also such persons are barred by the fines that are levied by others if they make not their claime in time, as if one disseise a Corporation aggregate of land belonging to their Corporation, and after levie a fine of it with Proclamations; and they doe not make their claim, &c. within five years, hereby they are barred. 2. Where the Ancestor is barred by the fine, there for the most part the Heir is barred also. *Co.* 9. 105. And therefore if Tenant in taile be disseised, and the disseisor levie a fine with Proclamations, and the Tenant in taile suffer five years to pass without claim, &c. hereby he and his issues are barred for ever, so that the heir doth suffer for the laches of his Ancestor. 3. The estates that shall be barred by the fine are estates by the common Law, or by Copihold in Fee-simple, Fee-taile, or for life, or for years, the estates also of Tenant by Statute, Elegit, and of Gardeins in Chivalrie, and of Executors that have land untill Debts and Legacies be paid. And therefore if one enter upon, and put out a Copyholder of Land, and levie a fine thereof, and the Copyholder suffer five years to pass and make no claim, &c. the Copyholder and his Lord both are hereby barred for ever. And if a Lease be made for years, and the Lessor or another before entrie of the Lessee levie a fine with Proclamations, and the Lessee doth not make his claim, &c. within five years, hereby the Lessee is barred of his interest for ever. 4. The Things whereunto these Statutes doe extend, are Lands and Tenements, and not a Rent, or other profit appender out of the Land, and therefore if I have a Rent, Common, or Erovers out of Land, or a way over Land, or power to sell the Land, and a fine is levied of the Land it self, and I doe not make my claim of my rent, &c. within five years, yet I am not hereby barred of my rent, &c. And for this cause it is, that if a Tenant in Ancient demesne levie a fine of his Land, and five years pass, the Lord is not hereby barred to avoid it, for herein he claimed not the Land, but his ancient Seigniorie. *Co.* 9. 104. 5. 124. *Plow.* 378. *Bro. Fini.* 113. *Ca.* 5. 124. 6. The time in which they must make their claim, or bring their action that have present right and no impediment, is within five years after Proclamation had, and the time for them which have impediments, is within five years after the impediments removed. *Plow.* 370. Lord *Zouches* case. 6 The time wherein they must make their claim or bring action whose right happens afterwards, if they have no impediment, is within 5 years after the time that their right accrues, and if there be any impediment within 5 years after impediment removed. *Dyer* 3. *Co.* 3. 86. 91. *Plow.* 373. 7. The persons whose right is saved and preserved, are mentioned in the first & second saving of the Statute of 4 H. 7; and they are strangers, and not parties nor privies. 8. They that have benefit by the first Saving of the Statute shall have none by the second Saving, for he that will be within the second Saving to have benefit by it, must be, 1. Another person. 2. The right must come and accrew to him first. 3. It must come to him after the fine and proclamations. 4. His right must be upon some cause or matter before the fine. *Co.* 5. 124. 9. 106. 9. No fine shall bar any estate in possession, reversion, or remainder which is not devised and put to a right at the time of the fine levied. And therefore if one levie a fine of my Land whiles I am in possession of it, this fine will not hurt me. So if the Tenant of the Land, out of which I have a Rent or Common, &c. levie a fine of the Land, this shall not bar me of my Rent or Common, for I am still in possession of this in the Judgement of the Law. So if there be Tenant for life, the remainder for life, or Tenant in Tail, the Remainder in Tail, and the first Tenant in Tail or for life do bargain and sell the Land by Deed

indented

indented and inrolled, and after levie a fine to the Bargaineer, in this case the remainders are not barred, albeit five years pass without claim, for the Law in these cases doth adjudge them alwaies in possession. So if I make a Lease for years of Land, rendering a rent, and a stranger levie a fine of the Land, and the Lessee for years payeth his rent to me duly, in this case I am said to be alwaies in possession, and therefore am not barred by this fine of my reversion. So if there be a Tenant by Copy or Lease for life, the remainder for life, and the first Tenant for life accept of a fine of the Land with proclamations and 5 years pass without claim, &c. hereby he that is in remainder is not barred. So if one have a Lease for years of Land to begin in *future* and a fine is levied of the Land, and five years pass after the terme begin, it seems this is no bar, because this estate is not put to a right. *Brownl. Rep. 1 part. 181. 2 part. 134. 75. 153.*

And for the further illustration of all these things see the examples following. If Tenant in Tail levy a fine of the Land intailed with proclamations according to the statutes, this is a bar to the estate taile, wherein these things are to be known. *Stat. 4 H. 7. 32 H. 8. Co. super Litt. 372. 1] Co. 9. 138. 140. Dier. 3.*
 1. That wheresoever the issue doth claim by the same title and must make his Conveyance to the Lands by him that levied the fine, there the fine will bar him, and therefore if Lands be given to the husband and wife in speciall taile, *viz.* to them and to the Heirs of their two bodies issuing, or the like, or if the gift be to them and the Heirs males or females of their two bodies, or to them and the Heirs of their bodies with the remainder to the right Heirs of the Husband in Fee, and the Husband alone levieth a fine with proclamations, by this the issue in taile is barred. And yet so as the right of the wife is saved so as she makes her claim, &c. within five years after her Husbands death. So if Husband and Wife Tenants in speciall taile have issue and the Wife die, and the Husband marry another Wife and have issue and levy a fine *Sur cognifances de droit come ceo, &c.* and take back by the same fine an estate in speciall taile the remainder over, &c. and die, the issue by the first Wife is barred. *Dier. 354.* So if Tenant in Taile be Disseised, or make a Feoffment in Fee, and after levie a fine with proclamations to the Disseisor or to a stranger, the issues in taile are hereby barred for ever, the continuance of the possession in another notwithstanding. *Co. 3. 90.* So if a gift be made to the eldest son and the Heirs of his body, the remainder to the Father and the Heirs of his body, and the Father dyeth, and the eldest son levy a fine with Proclamations and dyeth without issue, this shall barr the second son for ever for the remainder descended to the eldest. *Co. super Litt. 372.* So if Lands be given to an eldest son and the Heirs of the body of his Father (the Father being then dead) and he levy a Fine of this Land, this will barr the younger brother. *Curia trin: 21 Jac. Co. B.* But if the issue in taile does not make his title by him that did levy the fine, there the fine will not barr, and therefore if my Father be Tenant in Taile, and his brother Disseise him and levy a fine, and he and my Father dye, this fine shall not barr me as issue in taile, because I do not make my title to the Land by him: but if I suffer five years to pass and do not make my claim, &c. by this means I may be barred by the fine. *Dier. 3.* And if the fine be levied of another thing then the thing it self entailed, As if the Tenant in taile grant by fine a Rent, Common, or the like out of the Land intailed, this fine will not barr the issue. So if a Rent be entailed and the Tenant in Taile of the Rent Disseise the Terre-Tenant of the Land out of which the rent doth issue, and then levy a fine of the Land, this is no bar to the issue of the Rent. *Plow. 433.*
 2. Albeit the fine be a double fine with a grant and render, yet it is within these Statutes, and will barr the issue in taile as well as a single fine, so as the grant and render be of the Land it selfe and not of any profit appender out of it. *2] Co. 76. 3. 85. super Litt. 353. Bro. fines. 118. Dier. 272.* And therefore if Husband and Wife be Tenants in speciall taile, and they levy a fine with proclamations, and the Consee grant and Render the Land to them and their Heirs, this fine will barr the issue in taile. And if Tenant in taile joyne with *IS* and levy a fine to a stranger, and the stranger doth grant and render the Land againe to *IS* for years, and to the Tenant in taile in Fee afterwards, the issue in taile is barred by this fine.

2. Issue in taile barred by the fine of his Ancestor or some other.

fine: So if there be Tenant for life, the Remainder in taile, and he in remainder in taile accept of a fine from a stranger, and grant and render to the stranger againe for years with a remainder over, hereby the issue in taile is bound. If Tenant in taile accept of a fine of the Land entailed from a stranger, and then grant and render a Rent out of the Land to the stranger by the same fine, this will not bind the issue in taile to pay the same Rent. *Plow 435.* If Tenant in Taile make a Feoffment on Condition, and die having two sisters inheritable to the taile, and one of them levy a fine with proclamations *sur release* to the Feoffee of the whole, in this case it is doubted whether the other sister be barred of her half or not. *Dier 117.*

3. Albeit the Tenant in Taile die before all the proclamations be finished, yet when they be finished as they may be after his death, the issues in taile are bound by the fine, for howsoever by the death of the Tenant in Taile the right of the estate taile doth descend to the issue, yet when the proclamations are passed, this right that doth descend is bound by the Statutes, and the issue cannot by any claim, &c. save the right of the estate taile that doth descend unto him. 3 *Co. 3. 86. 87. 1 in Shelley's Case.* 4. Albeit the issue in Taile be within age, out of the Realme, under Coverture, *non compos mentis*, or in prison at the time of the fine levied and the proclamations passed, yet the estate taile is barred by the fine. And therefore if *A* be Tenant for life of Land the remainder to *B* in taile, the reversion to *B*, and his Heirs expectant, and *B* levy a fine to *C* and his Heirs, and hath issue and die before all the proclamations are passed, the issue in taile being then out of the realm, the proclamations are made, and after the issue in taile cometh into the Realm and claimeth the remainder in taile upon the Land; in this case the estate taile is barred for ever. 4 *Co. 3. 84, 91, 5.* These Statutes doe extend to fines levied by Tenant in taile by conclusion, and the issue shall be bound by the fine of their Ancestor unto whom they are privie in estate and blood, albeit *partes finis nihil habuerunt tempore finis*. And therefore if the issue in taile in the life of his Ancestor when he hath onely a possibility, as if there be Grandfather, Father, and Son, and the Grandfather be Tenant in Taile, and the Father levy a fine of the Land before the Grandfather's death, and then the Grandfather dye before the Father, and after the Father dye, in this case the issue is barred by this fine. 5 *Co. 3. 90. Dier 279, Plow 435.* So also if the Grandfather survive the Father. *Curia Trin. 21. Jac. Com. B. Godfrey & Wades case. Dyer 48.* But in case of a collaterall descent, if the collaterall Ancestor die in the life-time of his Father without issue, this fine is no bar, but if he survive his Father, *contra*. So if Lands be given to the Grandfather and his wife in speciall taile, and the Grandfather dieth, and the Father doth Disseise the Grandmother, and doth levy a fine with proclamations, the Grandmother dieth, and then the Father dieth, in this case the son is barred. So if Lands be conveyed in taile to a woman for her Jointure within the Statute of 11 *H. 7. cap. 20.* and while she liveth the issue in taile doth levy a fine of the Land, by this the issues inheritable to the estate taile are barred for ever. *Co. 3. 50. 51. 9. 140.* So if Tenant in taile make a Feoffment or be disseised, and after levy a fine with proclamations for a stranger, hereby his issues are barred for ever. So if Tenant in Taile die and his issue before his entry (having a freehold in law only) doth levy a fine with proclamations, this shall be a bar to his issues & to his collaterall Heirs & brothers of the half blood. *Pl. 434. 435 Curia. 21. Jac. Co. B.* So if Tenant in taile have four Daughters and one of them levy a fine in the life of the Father, this will be a bar to her issue for the fourth part of the Land, *Idem*. But in these cases before and such like where the issue in taile doth levy a fine in the life time of the Tenant in Taile, the Tenant in Taile himself may after levy a fine of the Land, and thereby barr his issue, and the Conusee also to whom his issue hath levied a fine, and therefore in all these cases it is supposed that the Tenant in Taile doth dye and suffer the right to descend to his issue, *Co. 3. 50. 51. 9. 140. Co. 10. 50. 9. 141. 3. 50. 51.* If Lands be given by will to one when he shall come to his age of twenty four years, to hold to him and the Heirs of his body, and he after his age of twenty one years levy a fine of this Land with proclamations, this is a barr to the issue in taile.

If a Disseisor make a gift in taile, and the Donee make a Feoffment to *A* and after levy

levy a Fine with Proclamations to B. that hath nothing in the Land, this Fine will barre the issues in taile, and they shall not avoid it by pleading that *partes suas nihil habuerunt* &c. but it is no barre to the disseisee, for he may avoid it by this plea when he will. And *à fortiori* therefore, if a Fine be levied by the tenant in taile that hath only an estate of free-hold in remainder or reversion is good: as if A. be tenant for life, the remainder to B. in taile, and B. levy a Fine, albeit this be no discontinuance, yet it is a barre to the Estate taile. But if tenant in taile have issue a son and a daughter, and the son living the tenant in taile levy a Fine and dye without issue, and then the Tenant in taile die, by this the daughter and the estate taile is not barred. Co. 3 84. Trin. 21. Jac. Co. B. Will. Godfrey versus Wades case. So if the younger son levy a Fine in the life of the father, and then the tenant in taile dye, this is no barre to the elder son. So if Lands be given to a man and the heires females of his body, and he hath a son and a daughter, and the son doth levy a Fine of the Land, this is no barre to the daughter. So if tenant in taile have a daughter, his wife being with childe of a son, and the daughter levy a Fine, and after the son is borne, this Fine shall not barre the son, for these howbeit they be privies and heires to the blood, yet are not privies and heires to the estate. 6. Albeit the estate passed by the Fine be afterwards before all the proclamations had avoided, yet the issue in taile is barred by it.

Discontin-
nuance.

And therefore if tenant in taile discontinue in fee, and after disseise the discontinuee and levy a Fine with proclamations to a stranger, and take an estate back by Render in the same Fine, and the discontinuee before all the proclamations passe enter and claime and so avoid the Fine, yet hereby the estate taile is barred. Co. 3. 91.

And if tenant in taile infeoffe the issue in taile and after disseise him and levy a Fine, the issue enter, and after the proclamations passe, and after the issue in taile doth infeoffe the tenant in taile which levied the Fine and dyeth, it seemes this Fine shall barre the issues in taile. Per Popham & Fenner Just. M. 39. 40. Eliz. B. R. This is a barre to the estate taile and to the issues onely and is no bar to him in remainder or reversion, and therefore when the estate taile is spent, this barre is at an end. And therefore if an estate be limited to A: and B, his wife and the heires males of the body of A. the remainder to C. and A: and B. have issue, and A. dye and B. and her issue, or her issue alone levy a Fine, this will barre the issues of the issues whiles there be any, but if they faile it will not barre C. in remainder, except he suffer five years to passe and so be barred by his *non claime*. So if tenant for life and he that is next in the remainder in taile joyne in a Fine, this is a good barre to the issues in taile for ever as long as that estate taile shall continue, but not to him that is next in remainder, nor to any other that shall come in of any remainder in taile or in fee, nor to him in reversion. If lands be given to A. and the heires males of his body, the remainder to B. and the heires males of his body, the remainder to the right heires of A. and A: doth bargain and sell this land by deed indented and inrolled to J. S. and his heires, and after levy a Fine of it *sur Conscience de droit come ceo* &c. to him and his heires, by this the remainder to B. is not discontinued, but it is a barre to the estate taile by the Statutes, and causeth the estate of the bargainee to last so long as the tenant in taile hath issues of his body, but if the Fine had been before the bargain and sale it had been a discontinuance of the remainder, but in neither case a barre to him in remainder unlesse he suffer himselfe to be barred by his *non-claime* within five yeares after his remainder happen to come in possession: 8. If there be tenant in taile, the remainder to him in taile, and the tenant in taile levie a Fine of this Land, hereby both his estates are barred. *Et sic de similibus*. But all this notwithstanding, If Lands be conveyed to a woman in taile for her joynture within the statute of 11 H. 7. chap. 20: and she levie a Fine of this Land, this will not barre the issues in taile. Or if Lands be given in taile to any subject by the Kings own gift or provision, and the tenant in taile levie a Fine, this Fine shall not bind the issues in taile nor the King, but others it will barre, for these fines are not intended within, but excepted out of the Statute of 32 H. 8. but the King himselfe being tenant in taile of the gift of some of his Ancestors being subjects may levy a

Discontin-
nuance.

Fine of it to barre his issues in taile. *Co. 1. 76. Super Litt. 372. Co. 10. 96. & 9. fac. B. R. Co. Super Litt. 372.*

See 7.
2 Wife barred
by the fine of
her Husband
or some other.

And in all these cases where a recovery will not bar the issues in taile, there a fine will not bar them. *See Brownl. 1. part. 138. 211. Bro. Fines 121. Co. 6. 55. Dyer.*

4 *Co. Super Litt. 372. Co. 8. 17. 78.*
Albeit the fine of the Husband and Wife together of the Wives Land, or of the Land of the Husband and Wife together, be a perpetuall bar to her and her Heirs for ever, yet if the Husband alone levie a fine with Proclamations of such Land, and then he die, in this case she is not barred of her right, but if she doe not make her claim, &c. within five years after her Husbonds death she is barred of her right for ever, notwithstanding the Statute of 34 H. 8. *Dyer 72. Plow. 373.* And if one feile of Land in Fee marry a Wife, and after make a Lease of this Land to A for life, she remainder to B in Fee, and B levie a fine with proclamations, and the husband die, and the Wife doe not make her claim &c. within five years after the death of her Husband; hereby she is barred of her Dower for ever notwithstanding the estate for life in A, but if the remainder of B had been put to a right at the time of the fine levied she might have avoided the fine by Plea. *M. 18. fac. Co. B. in Ann Twists Case. Quod partes finis nihil habuerunt. &c.* And if the Husband levy a fine of his own Land and die, and his Widow having no impediment doth not make her claim within five years after his death; hereby she is barred of her dower for ever. *Dyer 224. Co. 2. 93.*

If a jointure be made to a woman after the coverture, and her Husband and she levie a fine of it; hereby without question she is barred of her jointure in this Land; but it is thought that this is no bar of her dower in the residue of the Land of the Husband, and especially then when the fine is *Sur consensu de droit commun*, &c. *Dyer 358.* If Lands be given to a Man and his Wife in taile, the remainder to the right Heirs of the Husband, and the Husband alone levie a fine of this, this will not bar the wife except she suffer five years to pass after his death without making claim, &c. and therefore if the fine be to the use of the Husband and his Heirs in Fee, he may dispose it as a Fee-simple and his issue hath no remedy. *Brownl. 1. part. 139. Dyer 351.*

3: Disseisee
and the like
barred by the
Fine of the
Disseisor, &c.

If a man disseise me of the Land I have in Fee-simple, or Fee-taile, and after levie a fine of this Land with Proclamations, and I doe not make my claim, &c. within five years after the Proclamations had, hereby I and my Heirs are barred for ever of this Land. *Co. 6. 105. 3. 87. Super Litt. 198.* And if I being such a Tenant in Fee make a Lease for years, or be the Lord of any Copyhold estate, and my Lessee for years, or Copyholder in Fee, or for life be ousted, and I thereby disseised, and the Disseisor levie a fine, and neither I nor my Lessee for years, or Copyholder doe make any claim, &c. within the five years after the fine levied, hereby we are all barred for ever.

And if one disseise me of Land, and after make a Lease for life of it, and then levie a fine with Proclamations, and I suffer five years to pass, hereby I am barred both of the reversion and of the estate for life also.

If I Tenant for life make a Feoffment in Fee, and the Feoffee levie a fine with Proclamations, and he in reversion or remainder doe not make his claim, &c. within five years, hereby he is barred for ever. *Plow. in Stowels Case.*

If I pretend Right or Title to Land, and enter upon it, and put him out that is in possession, and then I levie a fine with Proclamations, with an intent to bar him, and he doth not make his claim, &c. within five years, hereby he is barred for ever, albeit he had the true Right, and I no right at all. *Co. 3. 79.*

If I purchase Land of H. and after perceiving my title defeasible, and that a Stranger hath the right of the Land, I doe levie a fine to, or take a fine from another with Proclamations with intent and of purpose to bar him that hath right, and he suffer five years to pass, and doth not make his claim, &c. hereby he is barred of his right for ever. *Co. 3. 79. Doff. & St. 83. 155.*

And in these and such like cases, there is no reliefe to be had in equity. See more in Numb. 11, 1572.

Equitie.

If there be Tenant in Tail, the Remainder in Tail, and the Tenant in Tail bargain and sell the Land by Deed indented and inrolled, and after levie a fine with Proclamations to the bargainee *Sur Conuſance de droit come ceo, &c.* in this case as to the Tenant in Tail and his issue this is a bar, but as to all others it is no bar, albeit they never make any claim, &c. *Co. 10. 95. 9. 106.* So if Tenant in Tail levie a fine of his intailed Land, this is a bar as to him and his issues, but as to all others it is no bar at all, and therefore he in remainder or reversion in their times may enter notwithstanding. So if Land be entailed to the Husband and Wife, & the Heirs of their two bodies, and the Husband alone levie a fine of this Land, this as to the Husband Tenant in Tail and his issues is a bar, but not as to the Wife, for she shall be Tenant in Tail still, and yet it seems she may not suffer a recovery of this Land afterward, *Co. 9. 140. 132.* So if a man attainted of Felony or Treason levie a fine of his Land, this as to the King and Lord of whom the Land is held is void, and is no bar to their advantage and title of forfeiture, but as to all others it is a good bar. So if one levie a fine of Lands in Ancient Demesne, and of other Lands together; this as to the Lands in Ancient demesne is not good, nor any bar at all, but as to the other Lands it is a good bar. *7 H. 4. 44. F. N. B. 98. Plow.*

By the ancient common Law, he that had right, was bound to make claim &c. within a year and a day after the fine levied and execution thereupon, or else he was barred for ever; but this bar by *non claime* is now gone, and if such a fine without Proclamations be levied at this day, he that hath right may make his claim at any time to prevent the bar, and avoid the force of the fine. *Co. Super Litt. 254. 162.*

Parties to fines void of impediment at the time of the fine levied are barred of the Land presently, and shall have no time to avoid the same fine by entrie, claim, &c. And privies in blood, and privies in representation claiming by the same Title which their Ancestor that levied the same fine had, shall be barred by the same fine presently, and that whether they have any impediment or not. *Stat. 1 R. 3. chap. 7. 4 H. 7. chap. 24.*

Estrangers to fines, (being all such as are neither parties nor privies) who have right to the Land whereof the fine is levied, and have no impediment naturall or legall, shall have time to make their claim, &c. within five years after the fine levied and Proclamations had, and no longer. *See the Sta. Plow. 374. Co. 9. 105.* And therefore if Lessee for years, Tenant by Elegit, Statute, or a Copiholder in Fee, or for life, be ousted, and he in reversion Disseised, they shall have but one 5 years between them to make their claim, &c. and if they claim not within that time they are all barred for ever, for they have all present right and may bring their action presently: but otherwise it is where the Tenant for life, & he in reversion be disseised, for in this case he in reversion is not barred by the first 5 years after the fine levied, for in that time he can have no action, therefore he shall have time to make his claim 5 years after the death of the Tenant for life.

If a Disseisor levie a fine with Proclamations of the Land whereof the Disseisin was, the Disseisee must make his claim within the first 5 years, after the Proclamations had, and if he happen to die within the five years, his Heir shall not have five years more, but so much time more as to make up the time incurred in his fathers or other Ancestors time 5 years, and albeit he be an Infant at the time of his Ancestors death, yet he shall have no longer time. *Plow. 356. 375.* If a Tenant in Tail be disseised and the Disseisor levie a fine, the Tenant in Tail or his issues must make their claim within the next five years after the Proclamations passed, otherwise they be barred for ever. The like it is in the laches of him in remainder or reversion. *19 H. 8. 7. Plow. 374. Dyer 3.* And if, in these and such like cases, he that hath present right and is without impediment, bring upon himself any impediment, as if being within the Realme at the time when the fine is levied, he doe afterwards goe beyond the Sea; or the like, in these cases he shall have no longer time then the first five years after the proclamations had. *Co. 100.*

Estrangers to fines peſſed with impediments of Infancy, Coverture, Madneſſe, Idiocy, Lunacy, Imprisonment, or absence out of the Realme, at the time of

9. Where a Fine shall be a bar, as to one person, and not to another, or as to one part of the Land, and not to another:

Recovery.

10 The time of claim, and within what time he that hath right to Land must make his claim, &c. to prevent the bar of the fine; Parties. Privies.

Estrangers.
11. That have present right and no impediment.

12. That have present right and impediment.

Infant.

Non sane me-
morie.Women Co-
vert.

Imprisonment

Out of Eng-
land.3. That have
divers defects4. That are
without
impediment
having future
right upon
cause preced-
ent.

the levying of the Fine, and having then any present interest or right shall have five years time after the infirmity removed to make their claime &c. And therefore an Infant regularly shall have time for five years after he come to his full age to make his claime &c. although he be in his mothers wombe at the time of the Fine levied. And yet if my fathers brother disseise him, and levy a Fine with proclamations, and a year after the proclamations my father dyeth, and after and within five years my uncle dyeth, in this Case I by reason of my infancy shall have only so much time to avoid the same as at the death of my father remained to come of the five years next after the proclamations, and not a new five years, because I claime by the same title that my father had. So if my father, or other ancestor be disseised and the disseisor levy a Fine with proclamations, and my father or ancestor dye within five years after the proclamations, in this case I shall not have a new five years, but only so much as remaineth of the old five years to make my claime &c. Madmen and Lunatickes (being strangers to the fine) shall have the like time to make their claim &c. as Infants have, and yet if this infirmity happen after the Fine levied, and before the last proclamations be made, these persons are not bound to the first years, but shall have five years time after they be cured of their maladies. Women Covert (estrangers to the Fine) shall have five years time after they be discoverd, to pursue the right. But if a *feme sole* (estranger to a Fine) have present right, and after the Fine levied she take a husband, and so five years pass after the proclamations had, in this case she is barred and shall have no further time to claime. Estrangers to Fines imprisoned at the time of the Fine levied shall have the same time and liberty Infants have; but if such imprisonment happen after the time of the Fine levied and before the last proclamation made, it seemeth they shall have five years after the enlargement. And estrangers to Fines being out of the Realme at the time of the levying thereof shall have five years time after their returne to enter or claime &c. But if they be in *England* at the time of levying of the Fine, and after goe beyond the Sea and suffer the five years after the proclamations to pass, in this case they shall have no longer time, except they be sent in the Kings service and by his commandement. And if the party be beyond the Sea at the time of the Fine levied, and never return but dye there, it seems in this case the Fine will not bar his heire at all. *See the statutes. Plow. 359. Dier 3. Plow. 367. 377. Plow. 366. 375. Plow. 375. 376. Plow. 360. 366. 375. Plow. 366. Sr. Tho. Cottons Case. 27. Eliz.*

Estrangers to fines that have divers defects or infirmities, as Infancy, Coverture, non-sanity of minde, imprisonment, absence out of the Realme, to avoid Fines shall have time for five years after the last of the infirmities removed. But if they have divers impediments, and they be all at once after the proclamations made wholly removed, and after they fall into the like againe and dye, in this case their heires shall not have a new five years, but the first five years begun in their Ancestors time immediately after the first impediments so removed shall proceed, and *non-claim* of their heires during all the residue of the said five years bindeth them as their said Ancestors should have been bound thereby if they had remained void of such impediments during all the said five years. *Plow. 375. Dier. 133.*

Estrangers to Fines that have no present but a future right, and that such as groweth wholly before the proclamations, if they be void of impediment, shall have five years time after their right, title, claime or interest first groweth, remaineth, descendeth or cometh to them after the proclamations. And therefore if a Mortgagee be disseised and the disseisor doth levy a Fine with proclamations, and the five years passe, and after the Mortgagor payeth or tendreth the money, in this case he shall have time for five years after the tender or payment of the money to make his claime &c.

So if a man levy a fine of his Land whereof his wife is dowable, she shall have five years after her husbands death to make her claime &c. and not be bound by the five years after the Fine. *Plow. 373. Dier. 224. Plow. 374.* So if tenant in taile levy a Fine with proclamations, and after the Five years dyeth without issue, the donor shall have five years after his death without issue to bring his *Formedon Co. 78. Plow. 373. 374.* So if Lessee for life levy a Fine, or make a feoffment in fee and the

Feoffee

Feoffee doth levy a fine; in this case he in reversion or remainder shall not be bound by the next five years after the fine levied, but he shall five years next after the death of the Tenant for life, and if he die within the five years, his Heir shall have only so much time as to make up the time before his death five years. *Co* 78. *Plow*. 373. 374. So also is the Law if Lessee for life be Disseised, and the Disseisor or a stranger levy a fine, in this case he in reversion or his Heirs shall have five years after the death of the Tenant for life and shall not be bound to the next five years after the time of the fine levied. *Plow*. 374. *Co*. 9. 105. So if Tenant in Tail in possession levy a fine and dye without issue, in this case he in the remainder shall have time for five years after the death of the Tenant in Tail without issue, and if he make not his claim, &c. in that time, he and his issues are barred for ever. The same law is for him in reversion or the Donor if there be no remainder. *Plow*. 374. 19 *H*. 8: 7. *Co*. 3. 87. 84. *Dier* 3. And if Tenant in Tail discontinue in Fee, and the discontinue levieth a fine with proclamations, and five years doe pass and the Tenant in Tail dieth, in this case his issue shall have five years after the Descender to bring his *Formedon*, *Co*. 3. 87. But if Tenant in Tail discontinue rendring rent and dye, and the issue accept the Rent (which doth bar him for his time) and then the discontinue levieth a fine and dyeth, in this case the issue of the issue shall not be barred by the five years after the fine, but shall have five years after the death of the issue, 30. *El*. And if one *de non sane memorie*, make a Feoffment, and the Feoffee levie a fine and then the Feoffor die; in this case the Heir shall have 5 years after the death of his Ancestor, and not be bound by the 5 years next after the fine levied. *Plow*, 374.

Strangers to fines that have future right upon any cause precedent being affected with such impediments when the right first accreweth, shall have five years after the impediment removed to make their claim, &c. And therefore Infants that are born, or in their mothers womb when such right doth happen to them, women Covert, mad men, Lunatics, prisoners beyond the Seas shall have this time. As if a man have issue a Son and a Daughter, and the Son doth purchase Lands and die, and the Daughter entreat as his Heir, and is Disseised by A who levieth a fine, and five years claim without claim, and ten years after the Father hath another Son who is Heir to his brother; he shall have in this case a new full 5 years after he come to his full age, for he is the first unto whom the right descended after the Proclamations.

5. That have future right & impediment.

But if a stranger to a fine to whom a remainder or other title first accreweth after the fine doe not pursue his right within 5 years, hereby he and his issues are barred for ever. And in like manner if the first issue in Tail to whom the Title of the Tail first accreweth neglect to make his claim &c. within the first 5 years after his Title accrewed, hereby he is bound for ever, and the whole estate Tail also. And if one abate after the death of a Tenant in Fee-simple, and make a Feoffment upon condition, and the Feoffee levie a fine, and 5 years pass without any claim made by his Heir, hereby the Heir is barred for the present, but if afterwards the condition be broken, and the Abator enter, then the Heir may have an assise of Mortdancer against the Abator or enter when he will. *See the Statutes Plow*. 366. 367. *Dyer* 3. *Plow*. 358.

Strangers to fines that have neither present nor future right at the time of the levying of the same fines by reason of any matter before the fines levied, whose right groweth entirely before the Proclamations or partly before and partly after, may make their claim, &c. when they please. As if a Father die seised of Land his elder Son being possessed, and the younger son entreth and is disseised, and a fine with Proclamations is levied, and then the elder Son is dearraigned, in this case it seems he is bound to no time. So if a Tenant cease one year, and then a fine with Proclamations is levied, and after the Tenant ceaseth another year, the Lord may have his *Cessavit* 20 years after the Proclamations. *Plow in Stowels Case*.

6. That have no right for any cause before the Fine.

And Strangers to fines that have severall future rights by divers Titles growing at severall times it seemeth shall have severall five years to make their claim, &c.

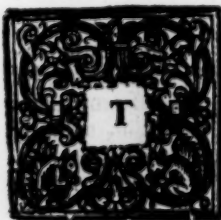
7. That have future rights by divers com-titles.

commencing from the several times that their Titles do first accrue unto them. As if Tenant for life, the Remainder in Fee make a Feoffment in Fee, and the Feoffee levy a Fine with Proclamations, and he in the Remainder suffer the five years to pass, in this case he is barred of his Entry upon the Alienation for the Forfeiture; but it hath been held, that if the Tenant for life die, that he shall have another five years time to bring his Formedon in the Remainder, *Plow. 357. 367. 372.* So if the Husband make a Feoffment of his Wives Land, to another upon Condition, which is broken, and he levieth a Fine of this Land, and the Husband hath issue by his wife, and dieth; and the first five years pass, and then his wife dieth, hereby he is barred of the Title by the Condition, but he shall have five years more to make his Claim as Heir to his Mother. But if Lands be given to *H.* for the life of *A.* the Remainder to *B.* for life, the Remainder to *H.* in Fee, and *H.* is disseised, and after the Disseisor levy a fine, and five years pass; in this case *H.* is barred both of his present and future estate, and shall have no further time to make his Claim, &c. and yet if *Cestuy que vie* and be in the mean Remainder die, *H.* shall have another five years to make his Claim to preserve his Remainder. In like manner it is if Land be given to *H.* for the life of *A.* the remainder to him for the life of *B.* the remainder to him for the life of *C.* and he is disseised, and the Disseisor levieth a Fine with Proclamations; in this case, some say *H.* for his present right shall have five years by the first saving of the Statute, and five years after the death of *A.* by the second saving of the Statute. If one disseise a Feme-sole, and after marry her, and have issue by her, and the Husband is disseised before marriage or after, and then a Fine is levied with Proclamations, and the Husband dieth first, and afterwards the Wife dieth within the five years, the issue being of full age, the five years pass, hereby he is bound as heir to his Father, but he shall have five years more after the death of his Mother to make his Claim, &c. *Quando duo jura in una personâ concurrunt, æquum est ac si essent in diversis. Plow. 357. 368. 372.*

CHAP. LXXXVI.

Of Fine and Amercement.

1. Fine, what.



His word Fine hath divers significations: For sometimes it doth signifie *Pretium*, as when it is the cause of obtaining some benefit, as leave to Alien, a Writ, or the like. Sometimes it doth signifie *Pacem*, as *Finis, quia finem litibus imponit*; and in this sense it is taken when it speaks of a Fine of Lands. But sometimes it doth signifie *Penam*; and so it is a pecuniary punishment imposed upon some offender by a Court or Officer of Justice, for an offence done in satisfaction of the offence. It hath sometimes other senses, Co;

8. 59. *Terms Ley. Crompt. Jur. 55.*

2. Amercement, what.

An Amercement is a penalty or sum of money, put by a Court upon a man for some offence done by Omission or Commission: And this doth differ from a Fine only in this.

1. A Fine is commonly for some great misdemeanor, and therefore the sum imposed is commonly greater: But an Amercement is commonly for some petty fault, and therefore the sum imposed is small, and lesser then the offence doth deserve, and therefore it is called *Misericordia*.

2. No Court but a Court of Record can Fine; but any Court that is no Court of Record, as County Court, Hundred Court, or Court Baron, may Amerce.

Affectors.

3. A Fine is never to be affixed by Affectors, that is, mitigated by men sworn to that purpose: But most Amercements must be affixed.

4. To

4. To most Fines, especially in Courts of Record, Imprisonment is incident, but not so to an Amercement. But Imprisonment doth follow a Fine in a Court of Record, that hath power to imprison. And in that case there lieth a Writ called a *Capias pro Fine* to apprehend the party fined, that he may be imprisoned till he pay his Fine. *F.N.B. 76. Co. 11. 42. 8. 60. upon Littl. 137. Cramp: Jur. 43. 93. 98. 100.*

3. *Capias pro Fine*, what.

For this, take these things.

1. All persons, Male or Female, Clergy or Lay, great or small, may be fined or amerced.

4. Who may be fined or amerced, or not, and where.

2. Cities, Townships, Burroughs, and Villages, may be fined or amerced.

3. The King or Queen might not have been fined or amerced.

4. Officers of Courts for any offence done, in or out of their Court, in relation to their Offices; the proper place to fine them, is in the Court whereto they belong, if the Courts have power to fine; or else there to amerce them.

5. And if any man, Officer or other, offend in the face of any Court, he is there by that Court to be fined or amerced for it: But he may be punished for this in another Court.

6. Infants may not be fined. *Co. 8. 61. Maj. 9 H. 3. 14. Co. of Copiholds 40. Infants.*

For Answer to this, take these cases.

1. If any person do misdeemean himself by contemptuous words or deeds, to a Court of Record, especially in the face of the Court, he may be fined for this, if the Court have power, or else amerced, *Co. 8. 61. 2 Ed. 4. 1.*

2. If any Officer of a Court behave himself corruptly, or negligently, or contemptuously in his Office: for this he is to be fined or amerced according to the power of the Court. And therefore if a Sheriff refuse to execute, or return, or misreturn the Writs of the Court sent to him, or a Juror to be sworn, or the like, they may be fined or amerced, *Co. 8. 59. 61. 26 Ed. 3. 75.*

3. In all Actions *Quare vi et contra pacem*, as Rascous, Trespass, and the like, if Judgment be given against the Defendant in a Court of Record, he is to be fined. So in an Affile, if the Disseisin be found to be with force; but if it be found without force, he is to be amerced only. *Co. 8. 59. 31 H. 6. 21. March. 135. pl. 210.*

4. If a Plaintiff get a Judgment in a Real Action by Disceit, where the Defendant had not Summons, according to Law, he shall be fined. But in an Action Personal for Disceit between man and man, if Judgment be given against the party Defendant, he is to be only amerced, *Co. 8. 59.*

5. If a Defendant plead a false Deed, or deny his own Deed, and it be found against him, or he do after relings with his Plea, and confess the Deed, he is to be fined. But if it were about a Deed of his Ancestor, or he deny a Recovery or Record, to which he is a party, he shall neither be fined nor amerced, *34 H. 6. 20. 10 Aff. 41. 20. Co. 8. 60. 11 H. 4. 4. Dyer 62.*

6. If a Defendant in a Replevin, claim Property falsely, and in a *Proprietas pre hands*, take goods against him, he shall be fined, *Co. 8. 60.*

7. If a Plaintiff in an Appeal of death, Robbery, Felony, or Maim, be barred, nonsute, or the Writ abate by his default, he is to be fined, *Co. 8. 60. 8 H. 4. 17.*

8. If in an Assize the Plaintiff be barred, or nonsute, or it pass against the Defendant, and he were party to the first Record, he shall be fined, *Co. 8. 60. 15 H. 6.*

9. But if he were no party to the first Record, as here where he is Tenant by Receipt, or the like, there it is otherwise, *9 H. 4. 23.*

10. If there be two or more Plaintiffs, and one of them die, and the Writ abate; or if the one appear, and the other be nonsute, which in Law is the nonsute of them both in Personal Actions: In these cases, he that doth survive, or appear, shall not be fined nor amerced. So where the one Plaintiff in such an Action where Summons and Severance lieth, be nonsute, and the other sue on, he that is nonsute shall not be amerced. And so it is in all Judicial Proces where the Plaintiff is barred or nonsute, or the Writ abate: And so it is, if the Sute be discontinued; or the Court be ousted of Jurisdiction, the Plaintiff shall not be amerced, *Co. 8. 61. 5. 49. 21 H. 6. 41.*

10. If

10. If a Trespass be for Battery against the Husband and, Wife supposing it to be the Battery of both, and it be found to be the Wives only; yet the Plaintiff shall not be amerced, for no other Writ can be had, Co. 8. 61.

11. In all Actions which do not contain some force, or some Disceipt to the Court; if the Defendant come the first day, and render the thing demanded the first day to the Plaintiff; he shall neither be fined nor amerced, Co. 5. 49. 8. 61.

12. But in all Writs of *Præcipe quod reddas, quod permittas, & quod facias*, if the Plaintiff be barred, or nonsute, or the Writ abate by his default, he shall be amerced; and so it is in all Actions Personal, where it doth so pass against the Plaintiff, Co. 8. 61.

13. If in Actions that are without force or fraud, the Sute go against the Defendant, he will be amerced. And so it is where part of the thing in question is found against the Defendant; or where are more Defendants, and it is found only against one of them, it is so also, Co. 8. 61. 7 H. 6. 36. 21 H. 6. 41. 9 H. 6. 2.

14. If one sue twice for the same cause, as in a Recaption, or the like, he is to be fined, Co. 8. 60.

15. If one do, or not do any thing against an Act of Parliament, in which there is no certain penalty for the offence, the offender (this is a contempt) may be sued for it. Co. 80. 6. *March. f. 135. pl. 208.*

16. If a Township suffer a murderer to escape, the murder being done in the day time, it may be amerced. 3 H. 7. 1. See more to this, *Mag. Chart. 26. Westm. 1. 9. Crompt. Jur. 93, 94, 97, &c. Doct. & Stud. 178. Mag. Chart. 14. Westm. 1. 6. Marlb. cap. 18.*

For Answer hereunto take these things.

6. How such persons may be fined or amerced.

1. Where there is but one Defendant, he cannot be two times amerced, but where there is but one Plaintiff, and divers Defendants, the Plaintiff may be divers times amerced.

2. Where divers are to be fined or amerced, they must be fined and amerced severally, and not joyntly, unless it be in special cases; and yet an Amercement set entirely upon a City or Township, is good.

3. No man or place may be twice fined or amerced, for one and the same offence.

4. All Amercements set, must be reasonably set and according to the offence, and not excessive.

7. Moderata Misericordia.

5. If any man be unreasonably amerced, he may be relieved by a Writ of *Moderata misericordia*, if it be in a Court Baron or County Court; and from other Courts, he also may appeal in this case. And this matter of Reasonableness, or not Reasonableness, shall be tried by Judges; and not by a Jury. See for these things, *Mag. Chart. ch. 14. 34, 35 H. 8. 36. Merton, ch. 3. Marlb. ch. 23. 24. Co. 8. 61. 11. 42, 43 Westm. 1. ch. 18. 7 H. 4. 3. see Courts.*

8. Extracts or Extrails.

Extracts are Copies, or true Notes of Original writings, as of Fines, Amercements, or Penalties set down in the Records of a Court, to be levied by the Bailiff, or other Officer of every man for his offence. And herein must be expressed the names of the offender, the sum imposed, and the cause or offence it self, *F. N. B. 75. Westm. 2. 8.*

Sheriffs may not levy money out of the *Exchequer*, but by Green Wax, and must ret what they receive, or forfeit treble damage; and the cause or offence must be expressed in the Extract, 43 Ed. 3. 9. 7 H. 4. 5.

CHAP. LXXXVII.

Of Forfeiture.



IT is the effect of the transgression of some Penal Law, or of the doing of some other wrong or misdemeanor; by the doing whereof something, either Inheritances, Chattels, Goods, or a Sum of money is forfeit.

Forfeiture,
what.

And this differs from Confiscation; because that is confiscate which is disavowed by the Offender as none of his, and not claimed by another. But such as are forfeit, have a known Owner; and for something he hath done, he hath forfeited what was his. So that Forfeiture is general, and Confiscation

Sec. 1.
Confiscation.

is more particular for such things as have no Owner, and shall go to the Kings Exchequer; for confiscate goods are such as no body doth claim. As if one indict a man for stealing his own goods, and he doth openly in Court disclaim them, then the King shall have them as confiscate goods. *Quod non capis Christum, capis Fiscum*, *Plow. 483. Stamf. 186. Co. 5. 110. upon Lit. f. 59. Fitz. Coram 371. 355.* So if a woman kill her husband and flee, all her husbands goods are confiscate. So if one indict another for stealing the goods he delivered him, in this case the goods are confiscate.

All the Lands and Tenements, Goods and Chattels, Debts and Duties that a man hath in his own right, and to his own use, are subject in some cases to Forfeiture: But Offices of Skill and Diligence, the Lands and Tenements that one hath in trust, and the Goods and Chattels one hath in anothers right and to anothers use, as the Goods and Chattels of Executors, are not subject to Forfeiture: nor the Goods Churchwardens have in right of the Church. The Lands a man hath in the right of his wife are subject to Forfeiture during his and his wives life together; and the Chattels real and personal a man hath by his wife, are subject to be forfeited altogether. Also Rights and Titles to Land, and Actions in divers cases are subject to Forfeiture, *Stamf. l. 3. c. 26. 4 H. 7. 11. Plow. 487. 379. 4 Ed. 3. 47. 6 H. 7. 9. Co. 3. 2. 11. 35.* Also Actions of Debt and Trespas de bonis asportatis, Account, and such like Actions. But personal Actions, as for Battery, and the like, are not liable to Forfeiture. Future Interests also may be forfeited, *Dyer 58.* Also the Lands or Goods a man hath in Jointenancie, or in Common, are subject to Forfeiture, as well as those he hath sole, *28 Ed. 3. 92. Stamf. l. 3. c. 26.*

2. What things
are subject to
Forfeiture,
or not.

All Estates of Inheritances that one hath alone in Fee-simple or Fee-tail, are forfeited by Treason. So also are all Estates that he hath in Jointenancie or in Common with any other. For which see *Coram*, and *Stamf. Pleas of the Crown*, at large: *St. 5 Ed. 6. c. 11.*

All Estates in Fee-simple are forfeited by many kinds of Felony; for which see *Coram*. But in all such cases the parties must be attainted. Estates in tail may be forfeited by Alienation of the woman, or the woman or her husband that hath them by the Statute of 11 H. 7. cap. 20. See *Discontinuance*.

If an Estate be made by the Husband to himself for life, and after to his Wife and the Heirs males of her body by him begotten, and he and his Wife levy a Fine and suffer a Recovery, yet the Issue may enter for a Forfeiture, *Co. upon Lit. 365.*

One may forfeit his Land by alienating it to a Religious House, or in Mortmain. See *Stat. Mar. Chari. c. 36. de Religiosis, c. 1.*

If a Maid above twelve years, and under sixteen years, agree to be taken away and contracted against or withour Friends, she loseth her Inheritance for her life. See *Stat. 4 Ed. 5. P. & M. c. 8.*

A Religious House founded by the King may forfeit their Land that the King gave them, if they do alienate it, *West. 2. c. 41.*

If a Woman after Rape consent; as well she as the Ravisher be disabled to have any Heritage, Dower, or Joint-Fcoffment after the death of their Husbands and Ancestors; and the next of blood shall have title to enter incontinently, *St. 6. R. 2. ch. 6.*

For Treason or Felony, a man shall lose to the King or Lord all his Lands, Rents, &c. whereof he hath any Estate of Inheritance in possession or in right; as Lands of which he is disseised, and all his Hereditaments from the time of the offence done. For in the case of Felony and Treason, the Offender doth forfeit not only the Land he hath at the time of the Attainder, but the Land he had at the time of the offence committed, although it be after sold away; and this whether the Attainder be by Verdict, Outlawry, or otherwise, *30 H. 6. 5.* And in this case the King or Lord that hath the Escheat, shall avoid all Acts made, done or suffered by the Offender after the offence done. But for divers kinds of Felony a man shall not forfeit any Inheritance, or any thing but his Goods, or his Goods and Chattels; as for killing *se defendendo*, or by mischance, &c. For which see *Corone*.

If a Woman being Tenant in tail of the gift of her Husband or any of his Ancestors, within the Statute of *11 H. 7.* accept a Fine *sur connissance de Droit*, &c. and grant and render back for years; it seems this is no Forfeiture within that Statute, *Dyers Abridg. 38.*

For Petty-Treason or Felony, a man shall not forfeit any of his Lands entailed, longer then for his own life, *Stamf. 1. 3. c. 26.*

If a Son be attainted of Felony in the life of his Father, and be executed, and after the Father die; these Lands are not forfeit, but the next Heir shall have them. But if the Son survive the Father, though he have a Charter of Pardon, *contra. 31 Ed. 1. Discent. 17. 26. Af. 2.*

If a Freeholden cease for such a time to pay his Rent and do his Services, and there is nothing for the Lord to distrain, he may forfeit his Land. See for this *Cessavit*. But Gavelkind-Land in Kent is not forfeited by the committing of Felony. *The Father to the Borough (these.) the Son to the Plough.* For Forfeiture and Confiscation for Felony, &c. See *Co. 3. par. Inst. c. 103.*

Señ. 2.
3. Of particular estates, and of Chattels real; and what shall be said a cause of Forfeiture thereof, or not.

In case of Treason or Felony.
In other cases:

For Answer hereunto, take these things.

1. A Forfeiture may be made by a particular Tenant two ways: Either by doing something to the hurt of the Commonwealth, as by doing Treason or Felony; or by doing something to the hurt of the Lord, or him in Reversion. And the hurt to him in Reversion may be two ways: 1. By matter of Fact. 2. By matter of Record. Also it may be by matter of Record three ways: 1. By Alienation. 2. By claiming a greater Estate then he hath, or ought to have. 3. By affirming the Reversion or Remainder to be in a stranger. Also by Alienation it may be, 1. Either when it doth divest the Estate, as by levying a Fine, or suffering a Recovery of Lands. 2. Or by not divesting, when there is a Fine levied of an Advowson in fee, which doth not divest the Remainder or Reversion. By Claim it may be also in two sorts: 1. Express, which is when the Tenant shall in a Court of Record claim the Fee; or if being Lessee for years and ousted, he bring an *Affise ut de libero tenemento*. 2. Implied; as if in a Writ of Right brought against him, he shall take upon him to join the *Affise* upon the meer right; or if Lessee for years lose in a *Præcipe*, and bring a Writ of Error for Error in Process.

By affirming the Reversion to be in a stranger, he may forfeit his Estate two ways. Either actively; and then, 1. By praying in aid of a stranger. 2. By attorning to a stranger by matter of Record, upon a Grant of the Reversion to him. 3. When a stranger shall bring a Writ of Entry *in casu proviso*, and suppose the Reversion in him, and the Tenant doth confess the Action. 4. If he plead covinously to the disherison of him in Reversion. 5. If a stranger shall bring an Action of Waste, and the Tenant shall plead no Waste done. Or secondly, It may be passively, as when the Tenant shall accept of a Fine *sur cognissance de Droit*, &c. from a stranger. By all these means the Tenant may forfeit his Estate, *Co. upon Lit. 251. 367. Dyer 209. 324. 1 H. 7. 32. 9 H. 7. 20. Co. 3. 15. 3. 3. 1. 66. 10. 44. Flow. 35.*

2. The

2. The particular Estates that may be forfeited hereby, are Estates for life, for ones own or anothers life, that one hath alone in ones own right. So Estates for life by Dower, by the Courtisie, or after possibility of Issue extinct. Also Estates a man hath jointly with his Wife, may be forfeit during their joint lives. So the Estates one hath for life in Jointenancie or in Common with another, may be forfeit: Also Estates for years by *Elegit*; Statute-Merchant or Staple, Co. 2. 15. 3. 3. 1. 66. *Dyer* 324. 362. 377.

3. All Estates that a man hath for his own or anothers life in his own right, are forfeited by Treason or Felony. So are all Estates he hath for life in the right of his Wife, during the life of the Husband and Wife together, but no longer. So also all the Estates a man hath in Jointenancie, or in common with another for life, are forfeit hereby. Also all Estates that the Offender hath for years by Statute or *Elegit*, and all Chattels real besides, as Wardships *in capite*, and the like, that the Offendor hath in his own or in his Wives right, are forfeit by Treason or Felony, *Stanf.* 3. 26. 6 H. 7. 12. Co. upon *Lit.* 42. 351.

4. In case of Felony and Treason, the Offender doth forfeit not only the particular Estates for life which he hath at the time of the Attainder, but also them he had at the time of the offence committed, albeit they be after sold away, 30 H. 6. 5.

5. Leases for years are forfeit by Outlawry or Attainder for Treason or Felony, or *Premunire*, or for killing ones self, or for flying when he is in question for Felony, albeit he be not guilty; or for standing out and refusing to be tried by the Country; or where a man is convicted of Felony only, and no Judgment is given. So also they are forfeit by Petit-Larceny. Also all Interests that any man hath by Wardships, of Tenants by Knights service: And those that have Estates in Lands by Extents, Statutes, or *Elegit*, are forfeit by the causes aforesaid. But Estates for lives are not forfeited by Outlawries, except it be in the cases of Treason or Felony. *Addition to the Treatise of Just. Dodrige. f. 27.*

SeB. 3.

6. Now for the further opening and illustrating of the Forfeitures by Tenants for their particulars and Estates, take these Cases following.

If Tenant for life, in Dower, by the Courtisie, or after possibility of Issue extinct, or any Lessee for years, Tenant by Statute-Merchant, Staple, or *Elegit* of Lands or Tenements which lie in Livery, make any good, absolute or conditional Feoffment in Fee, Gift in tail, or Lease for any other life then the Tenant for life for the life by which he holds the Estate, or levy any Fine *sur conscience de ceu, &c.* or suffer any Common-Recovery; or being impleaded pray in aid of a stranger; or in a Writ of Right brought against him join the *Mise* upon the meer Right, or admit the Reversion to be in another; or in a *Quid juris clamor* brought against him, claim the Fee-simple: By either of these things he doth forfeit his Estate, Co. 2. 15. 3. 3. 1. 66. 8. 144. upon *Lit.* 251. *Dyer* 324. 33. 362. 209. 377. *Plow.* 15.

And if there be Tenant for life of Land, the Remainder for life, the Remainder in Fee, and both the Tenants for life make a Feoffment in Fee to a stranger; this is a Forfeiture of both their Estates.

So if there be Tenant for life, the Remainder in Tail, the Remainder in Tail or in Fee, and the Tenant for life doth make a Feoffment in Fee to him in the second Remainder in Tail or in Fee, this is a Forfeiture for which he in the first Remainder may enter.

So if there be Tenant for life, the Remainder in Tail, the Remainder in Fee to the Tenant for life, and the Tenant for life make a Feoffment in Fee to a stranger; this is a Forfeiture, for which he in the next Remainder may enter. And if there be two Tenants for life, and one of them disseise the other, and he make a Feoffment in Fee, this is a Forfeiture of his Estate, *Dyer* 339. Co. 1. 141. Co. on *Lit.* 251. 302. Co. 3. 86.

If Lessee for life make a Feoffment to a stranger, and make a Letter of Attorney to his Lessor to give Livery of Seisin, and he give Livery of Seisin accordingly; yet it seems this is a Forfeiture. But otherwise it were, if the particular Tenant were a Lessee for years, *Park.* 100. Co. upon *Lit.* f. 52.

pass. But if the Grant be by Fine, or the Reversion be in the King, there haply it may be a Forfeiture. But if Tenant for life or years grant a Rent out of the Land to another in Fee, this is no Forfeiture, 2 H. 5. 7. Co. upon Lit. 251. 15 Ed. 4. 3. *Finches* 17, 113. 44 Ed. 3. 36.

So if Tenant for life levy a Fine *sur Grant & Release* only to the Cognisee for the life that the Convisor hath; this is no Forfeiture. So if Tenant for life or years accept of a Fine *sur Cognissance de Drois come es* from a stranger, this is no Forfeiture. So if he accept of a Fine so, and grant and render back to him for years only; this is no Forfeiture, 44 Ed. 3. 36. 1 H. 7. 22. *Dyer* 148. So if Tenant for anothers life or years of Land, by his Will devise the Land to another in Fee; this is no Forfeiture, *Fitz. Devise* 21. So if a Lease be made to two and the Heirs of one of them, and they two make a Feoffment to a stranger; this is no Forfeiture by the Tenant for life, but his Estate doth pass well enough, *Bro. Forf.* 96.

If one make a Lease for life to one, and after grant to him a Rent also for life, and he grant both in Fee; by this the Rent is not forfeit, but the Land only. So if Tenant for life enfeoff him in Remainder for life; this is no Forfeiture, but a Surrender. So if he make a Lease to him in Reversion or Remainder, for the life of him in Remainder or Reversion; this is no Forfeiture. So if Tenant for life take a Husband, and they two make a Lease to him in Reversion for the life of the Husband; this is no Forfeiture, *Fitz. Dower* 95. Co. upon Lit. 42. See more in *Discontinuance*.

If an Annuity be granted to one for life or otherwise *pro consilio impendendo*, and he refuse to give Counsel to the Grantor upon request; this is cause of Forfeiture of the Annuity. But not giving Counsel, unless it be in the Kings case, is no cause of Forfeiture as Refuser is, *Plow.* 455, 456. See *Forfeiture*.

All the Goods and Chattels a man hath alone, or in Jointure, or in Common with another, to his own use and in his own right, are forfeited by his committing of Treason or Felony; and so are all his Securities and Bonds, and Debts due thereby, and upon Contracts and Accounts. But causes of Action for Trespass, or the like, are not forfeit, *Stamf.* 188.

And in this case of Treason and Felony, in some cases a man may forfeit Goods wherein he hath no property. As for example: If I deliver to another Money, or Corn open, and not in bags, to keep, and redeliver when he shall be required; and he be attainted of Treason or Felony; this Money or Corn is forfeit. So if one steal Goods from divers persons, and is arraigned for one of these Felonies and found guilty; by this he doth forfeit all the rest. So if one steal Goods, and before he be attainted he kill himself, by this he doth forfeit not only his own Goods, but the Goods he stole; *Fitz. Crimes* 317. *Stamf. Pleas of the Crown*, 188. 44 Ed. 3. 44.

If a man suffer himself to be outlawed for Felony, or upon an Indictment for Treason or Felony he confess the Indictment or be attainted, or upon a Traverse be found guilty, or upon his Arraignment refuse to be tried by the Country, or flee for a Felony before or after Arrest, and whether he did the Felony or not, and although he be acquitted of the Felony, or suffer Exigent against him for a Felony; or being arrested for Treason or Felony escape, and will not be conveyed to Prison, but is killed in the pursuit; or will not be taken, but is killed: Then in all these cases he doth forfeit his Goods and Chattels. And though a man after a Felony done get a Pardon for it, yet his Goods are forfeit. And if a man stand mute upon his Trial, or challenge more then Four and twenty upon his Trial, or have his Clergie, and be a Clerk convict or attaint, *Stamf. Pleas of the Crown*, ch. 29, 30, 33, 34. *Plow.* 121. *Relw.* 68.

So that now in case of Treason and Felony, a man doth forfeit not only all his Chattels that he hath in possession, but such also as he hath but a bare right unto only, as Debts and Goods to be accounted for, or wrongfully taken; but not such as for which Damage only is to be recovered, as in Battery, and the like; such things in Action are not forfeited.

But

Sec. 4.

4. Of Goods and Chattels, and what shall be said a cause of Forfeiture thereof, or not; and of what Goods. In case of Treason or Felony.

But in the cases of Goods and Chattels there is no relation to the time of the offence, as there is in the case of Lands. For in that case the Lord that is to have the Land by Escheat, may avoid all Leases, Acts, Statutes and Conveyances made after the offence committed, until the time of the Attainder. But for Goods and Chattels, and Debts, the Kings Title doth look no further back then to the Goods the party hath at the time of the Verdict given, or Confession made, and in case of Outlawry, to the time of the Exigent awarded: And therefore till then the property of the Goods is not altered. And therefore it is held, that till then any sale of Chattels real or personal by the Offender is good, and he is to levy upon them. But in this case the Kings Officers do use, as soon as the Offender is apprehended, to seise and secure all his Goods and Chattels, and give him allowance out of them. *Co. upon Lit.* 380, 381. 29 *Aff. pl.* 63. 50 *Aff.* 5. 8 *Ed.* 4. 4. 7 *H.* 4. 47.

But by a Statute-Law, no Sheriff, Coroner, or other Officer is to seise any mans Goods for Treason or Felony, before he be attained according to Law, under pain to forfeit the double value of the Goods, *Stat.* 1 *R.* 3. *ch.* 3. But for killing a man that would rob him, he doth forfeit nothing. And in any case a man shall not forfeit the Goods that are another mans, and not the Offenders; nor Goods pawned or distrained, nor that one hath as Executor, nor the interest a man hath as Guardian in Socage, *Plow.* 487. *Bro. Pledg.* *M.* 7 *fac.* *Co. B.*

Sett. 6.
5. Who shall take advantage of a Forfeiture by Entry upon the Land, or Seizure of the Goods, or not.
In case of Treason, or Felony.

In case of Forfeiture for Treason, the Lord Protector only is to have all the benefit by Lands and Goods. But in cases of Felony, the Lord Protector is to have the Lands of the Offender for a year and day to make spoil upon them, unless the Lord redeem it. (For this see *Anjour* and *Waste*.) And after this year the Lord of whom the Land is held, is to have it. And all the Goods and Chattels forfeit in the case of Felony, the Lord Protector is to have them, unless any man have had a Grant from the King of them, or can prescribe for them; and his Prescription so ancient, that it hath been allowed in the Kings Bench, or before the Justices in Eyre, *Stamf. Prer.* 190. *F. N. B.* 144. *Mag. Char.* 23. And if a man have an Estate for life, and forfeit by either of these offences; this will not (as some say) escheat to the King; but it seems otherwise. Nor will this go to him that hath *Bona Felonum*, by those words, shall take advantage of it: And if it be a Copihold, the Lord of the Manor, not the Protector will have it. And by the Grant of *Bona Felonum*, this will not pass. *Addition to the Treatise of Just. Doddridge.* f. 27, 28. *Co. 2 par. Inst.* 47: *Brownl.* 2 *par.* 319.

In other cases,

In case of Alienation by a Lessee for life or years, for the most part he in the next Remainder, though he have but a Remainder for life or years, must enter; and if there be divers Remainders, every one in Remainder and in Reversion in his time may take advantage of it. As if there be Tenant for life, the Remainder in tail to one, and the Remainder in tail to another, and Tenant for life make a Feoffment in fee, and he in the first Remainder die without issue and do not enter, then he in the next Remainder may enter for the Forfeiture. *Mears Case, Pasch.* 8 *fac.* *Co. B.* *Ca.* 1. 76. 2. 51. upon *Lit.* 367.

But if a Disseisor make a Lease for life, who makes a Feoffment, and the Disseesee release to the Feoffee of the Tenant for life, the Disseisor can never after enter for the Forfeiture by the Tenant for life.

If an Estate be limited to *J. S.* for life, the Remainder to his Heir-male and the Heir-male of such Heir-male, and *J. S.* make a Feoffment in fee; his Heir apparent cannot enter for this Forfeiture, for he is no Heir whiles the Father lives. So if a Tenant for life make a Feoffment to Husband and Wife, the Reversion being in the Wife, and she die without Heir, and the Land escheat; the Lord to whom it comes by the Escheat, cannot take advantage of this and avoid the Feoffment, *Dyer* 339.

6. Of Offices, and what shall be said the cause of Forfeiture of an Office, or not.

Offices may be forfeit divers ways. Some of them may be forfeit by not using them; some by misusing them, or the Officer by miscarrying himself in them may forfeit them: As if any man hath an Office that is appointed for Administration of Justice or publike good, and he is bound to attend it, and do not; this is a Forfeiture.

feiture. And therefore it is, that if a Clerk of the Market, Sheriff, Felizer, Exigenter, or any such like Officer of any of the Courts at *Westminster* do absent themselves any long time, and not attend their Offices, and do the things that belong to their charges: As if the Sheriff do not keep his Turn, the Clerk of the Market his Circuit, this is a Forfeiture.

The Officer may also forfeit his Office by his miscarriage in his Office, two ways: 1. By doing that he should not. 2. By refusing to do what he ought to do. By doing amiss, called a Misuser or Abuser. So if any one sell an Office he hath, if it be for the Administration of Justice, or concerning the Kings Treasure, Revenue, Account, Customs, Aulnage, or the like, or Clerkship in any Court of Record, as a Felizer, Exigenter, or the like; this is a Forfeiture of his Office. As if a Keeper kill his Deer, or suffer them to die by his negligence, or destroy the Trees or Covert for Deer: Or a Gaoler keep not his Prisoners in safe and freight custody, or keep them in Prison when they should go out, or the like; these are Forfeitures of their Offices. So if a Marshal suffer a voluntary or negligent Escape in one of his Prisoners.

By refusing to do that *ex officio* which a man is bound to do upon request, is in some Offices cause of Forfeiture. And therefore if a Steward be desired by his Master to keep Court, and he refuseth to do it, or doth it not according to the duty of his place for the good of his Master; this is a Forfeiture of the Stewardship. But if it be an Office not relating to the administration of Justice or publike good, but for the private good of some man, and where the Officers personal attendance is not absolutely necessary; there his not attendance for a time, especially in case where the Master hath no great loss by it, is no Forfeiture. And therefore if a Keeper be two or three days absent, and his Game be not killed the while, this is no Forfeiture. And if one be to keep a Court, and he is never requested to keep it, and he never keep it; this is no Forfeiture. And if an Officer do only threaten, or endeavor a Misdemeanor, but doth not act or effect it; this is no Forfeiture. And if one be bound to give Counsel for a Fee, and be never asked advice, and he never give any, he doth not forfeit his Fee.

And it seems that that which will be a cause of Forfeiture in the Master, will be a cause of Forfeiture if it be done by a Deputy. But if an Officer in Fee do grant his Office for life, and the Grantee for life doth forfeit, he shall (as it seems) forfeit his own Estate for life only, and not the Fee. See for all these things, *Co. 9. 47. 50. 99. 119. 11. 98. upon Lit. 233. Stat. 3 H. 7. 12. Dyer 151. 214. 211. 369. Plow. 379. 380. 2 H. 7. 11. 12. Ed. 4. 3. 5. Ed. 4. 26. 39 H. 6. 32. 3 H. 7. 12. Plow. 4. 3. 456. See in Offices, Corone.*

For Forfeiture by a Copiholder, see *Copihold.*

Forfeiture by Outlawry, see in *Outlawry.*

Forfeiture of an Estate by non payment of Rent or Debt, see *Rent, Condition:* And for Forfeiture by Statutes, see in other Titles. *Co. 3. par. Inst. c. 102.*

CHAP. LXXXVIII.

Of Forein and Forrest, and Forcible Entry, and Forging of Deeds.

Forein or
Forein.



His word is used Adjectively in our Law, and is joined with divers Substantives. As, Forein matter doth mean matter triable in another County. Forein Plea, is a Refusal of the Judge as incompetent, because the matter to be tried is out of his Precinct. Forein Answer, is such an Answer as is not triable in the County where it is made. Forein Service, is such a Service whereby a mean Lord holdeth over of another without the compass of his own Fee; or else that which a Tenant performeth either to his own Lord, or to the Lord paramount out of the Fee, or else Knights service, or Escuage uncertain. Forein Attachment, is an Attachment of Foreiners goods found within a Liberty or City, for the satisfaction of some Citizen to whom the Foreiner oweth money, *Kitch. 126. 75. Star. 4 H. 8. c. 2. 22 H. 8. 1. 14. 15 H. 6. 5. Kitch. 209. Bro. Tenure 28. Perk. Refer. 650. Co. 3 par. Inf. c. 75.*

Of Force, and of Forcible Entry.

Force, what.

It is an offence by which unlawful violence is used to persons or things. And it is either implied; as in every Trespass, Rescous and Disseisin, there is a Force implied in Law; or it is actual with weapons, number of persons, &c. which always carryeth some fearful shew or matter of terror with it. The actual Force also is either simple, when it is joined with no other crime, as Entry into Lands only: Or compound, when it is mixed with some other fact which of it self is criminal; as if any by force enter into anothers Possession, and kill a man, or ravish a woman there, &c.

Forcible Entry,
what.

A Forcible Entry is a violent and actual Entry into any Lands, Houses, &c. or taking of any Distress by any person weaponed, whether he offer violence, or fear of hurt to any there, or furiously drive any out of the possession thereof. And sometimes it is taken for a Writ grounded upon the Statute.

Forcible De-
tainer, what.

A Forcible Detainer is a violent act of resistance by a strong hand, of men weaponed with harness, or other action of fear, in the same place or elsewhere, by which the lawful Entry of Justices or others is barred or hindered.

1. What shall
be said to be a
forcible Entry
into, or De-
tainer of lands
or not.
Infant.
Women-covert.

The Statutes of 5 R. 2. 9. 15 R. 2. 2. 8 H. 6. 9. give charge, that none shall enter into any Lands, but where Entry is given them by Law; and then in a mild and a peaceable manner: And that none shall enter into, or hold a possession of Lands with a strong hand, and with force. For the opening whereof, we must know,

1. That one or more may commit this offence.
2. An Infant or a Feme-covert by their own act may commit a forcible Entry or Detainer; but they cannot do it by Commandment, as another man may do.
3. Where divers do come in a company to do this act, and one of them only doth use the violence, they are all guilty. But herein we must take this difference: Where divers come together in one place to do an unlawful thing, and one only doth it, and the rest stand by and do nothing; in this case they are all guilty as principal doers, and the act of one shall be said to be the act of all. So that if divers come to enter into Lands where their Entry is not lawful, and all of them but one do enter and demean themselves peaceably, and he only doth enter with force, and after Entry doth hold with violence: This, albeit it be against their wills, is a forcible Entry. And so it seemeth to be, where some of them do come without an evil intent, if they come together, or if they come after, and be aiding and countenancing to the offenders. But when divers come together to do a lawful act, as to distrain for Rent due,

due, or the like; and in this case some of them, without any intent before, or allowance or countenance then by the rest, especially if they discountenance it, fall to outrage, and commit this or the like offence; in this case it seems the rest are not guilty.

4. A man shall not be guilty of this offence by any counsel or command before, or agreement after, unless he be present at the act done. But for further opening hereof, take these things. 1. If a master come with his servants, his servants knowing nothing of it, and he enter with force; his servants shall not be said to be guilty. 2. If a man enter with force to the use of another person that is not present, or by commandment of another not present who agreeth to it, yet he is not punishable for this force. 3. If many come together, and some of them do only enter by force, and the rest keep it by force; they are all alike guilty both of the forcible Entry and Detainer.

5. Though the King or his Tenant could not be outed of their possession, yet this offence may be committed in this Land of the Kings, and then is punishable as in other cases.

6. Though he get no possession hereby, yet it may be this offence, and punishable.

7. This offence may be committed about a Rent, when one doth distrain with force, (be the Rent due, or not;) or when one is coming to distrain, and the Tenant doth threaten to kill or forcibly resist him, forestall the way, or rescue the Distress, or the like. So about a Common, as when one doth forcibly keep his Cattel where he hath no Common, or forcibly resist another man that hath Common.

8. The expresse Force is that which is forbidden, when it is either with multitude, (i. e.) a greater Company then such persons have usually attending on them; yet one or two, if they be armed, &c. may commit this offence. Or it is with strong hand, (that is) with apparent violence: In word, by threatening speeches, as to say, They will keep the possession, if it cost them their lives, or in spite of the other being in with him; or if he threaten to kill or hurt the body of him that is in, if he will not go out; or out, if he offer to come in; especially if this make them to go out, or keep off. Or deed, by turbulent behavior or actual violence offered to the person of another; or else that they be furnished with some weapons by them not usually borne, as Swords, Bucklers, Pikes, Javelins, Bills, Clubs, Pitchforks, Staves, Halberts, Bows and Arrows, Cross-bows, Guns, Harness, Armor, or the like; or by casting of Stones, Blocks, pouring of hot Coals, scalding Water or Lead, or with any other thing wherewith one may hurt the person of another. And therefore if any enter thus, though no man oppose them, this is a forcible Entry: much more if being entred, they there offer any violence, or fear of hurt to the person of another that is in possession with him; and most of all, if they shall furiously and forcibly expel and drive another out of the possession. For if one enter in at the door being open, peaceably, but then he forcibly puts out them that he finds in possession, this is a forcible Entry.

If a man have a Force laid in another house by the place, this may make him guilty of this offence of forcible Detainer. So if a man after his peaceable Entry get more weapons into the house then were there, or usually he doth bear; or if he make use of the weapons in the house to defend his possession. But the having of them there, if they were there before, is not a Force punishable.

9. If any Justice of Peace come to view the Force in a house, and they refuse to let him in; this of it self is a forcible Detainer in all cases, though it be but by one person, and no weapon shewed. But if a Justice of Peace come not there upon complaint and of purpose, but by accident or to other ends, and the parties refuse to let him in; this is no forcible Detainer. So neither if he refuse to open the door to his Adversary, or to any other besides the Justice of Peace.

So if he finde any multitude of persons, Arms, or the like. So if the Disseisor forestall the way of the disseised with Force, that he dare not come near, but do refuse to open the doors to the other party; this is no forcible Detainer.

And if I be in possession of a house, and another that hath more right would enter; I may keep him out with my ordinary company and weapons, but not otherwise, for fear of the guilt of a forcible Detainer. But if my estate and possession be lawful, and I and my Ancestors have peaceably enjoyed it for three years together before the Indictment brought, if so my Entry were peaceable, not forcible, and I have continued three years possession peaceably and without force, I am in possession by right, and of a lawful estate, and not by wrong: And I have continued this possession all these three years without interruption, and not discontinued, and my estate is not ended; in these cases it seems I may keep my possession with force, and this is no forcible Detainer; which by Plea to the Indictment will avoid Fine, Imprisonment, and Restitution.

But to threaten a man, That if he come to enter, he will burn his house, or spoil his goods therein: To cut trees upon the land, or carry goods out of the house after a man hath entred; the door being open, or only latched, to enter without multitude or offensive weapons. So by fair means to perswade or entice any body out of the house, or by that means to keep them out; to take a man being out of the place and imprison him, and in the mean while to send one to enter into the land or house; or to deny to go out, and by imprisonment keep him out; these things will not make a forcible Entry or Detainer. And therefore if in these cases the other side make a forcible Entry upon them, they may be put out again.

10. Though the party ousted be dead, that no restitution can be made; yet the forcible Entry shall be punished.

11. If one enter into an house or land, with an intent to cut or carry away his goods or corn, &c. or the like trespass, though he do not put him hereby out of possession; this will be a forcible Entry punishable by these Statutes, if it be with strong hand, or with multitude.

12. So if any enter peaceably, and after Entry, by force do any such act.

13. To detain a house mortgaged by force from the Mortgager; is a forcible Detainer.

14. To go over the land with force or multitude to another place or end, is not a forcible Entry: Nor is the Force that is used with the warrant, and in the maintenance of the Law, any offence within these Statutes, but lawful. So is the Force used in the apprehending of Felons by Sheriffs and other Officers, in executing Writs, and in doing their office, in keeping the Peace, in defence of my person and house, and the like.

But for the further opening hereof, these Cases must be heeded. If two or more men be in harness, having also in their hands divers weapons, and they enter into the house of another to have the possession thereof without more doing, and hereupon the other party that was in possession departeth and goeth far off; this is a forcible Entry. But if two men in that manner break in the house, the door being open, and it is not known to what intent, the Tenants being in quiet, and no violence is used to them, but they that keep the possession run away; this is a forcible Entry.

If a man have two houses near adjoining, the one by a defeasible title, the other by a good title, and he keepeth a Force in the house he hath by a good title, to keep out of the other house; this is a forcible Detainer.

If a man putteth another out of his house by Force, leaveth it, and putteth in one of his Servants in a peaceable manner, and keepeth the party put out in Prison; this is not a forcible detaining, though it be a forcible Entry.

If one sole person alone break the house of another, and enter in by the windows against the will of the Owner, and then threateneth the party, and he for fear doth forsake the house; this is a forcible Entry.

If a forcible Entry be made into the house of another, with intent to fight with the party there dwelling, and thereupon the party in possession and they that enter upon him do all depart out of the house; this is no forcible Entry. So if one enter a house to seize a Ward, and is kept out by force; this is no forcible Detainer. So if a Lessor enter with force to see if any Waste be done by the Lessee, this is no Entry by force, although he remain there a whole day and night after. So to enter a house in time of War to fortifie it against Enemies, is no forcible Entry. So if the Lord distrain for Rent where no Rent is due; and he do it with force; this is no forcible Entry. So if one break and enter the house to part an Affray there, or to apprehend a Felon, or one that hath dangerously hurt another, and is escaped and fled into the house: But if the man that is hurt be in no danger, it is otherwise. So if a Gaoler bring his Prisoners into the house, being his own house, for safe keeping, and keep a Guard about them; this is neither forcible Entry, nor forcible Detainer.

If I hear that certain Fellows will come to my house to beat, rob or kill me, and I take in Force to defend my self; this is no forcible Detainer. But if I hear they are coming to take possession, and I gather Force to keep my possession, this is a forcible Detainer.

If one enter forcibly in a house upon another, and imprison in the same house him that was in first, and himself remaineth there with force; this is a forcible Detaining.

If a man claimeth Common to Land, or a Rent out of it, and the Land is detained with force, that he cannot use his Common, or have his Rent by Distress; this is a Detainer with force. But if one have a Warren in anothers Land, and the Land is detained with force when he would use his Warren; or one doth enter into the Park of another to distrain his Game, and the Owner of the Park do keep him out by force, this is no Detainer by force.

If a man make a Lease for life, and after grant the Reversion to the same Lessee upon Condition on the part of the Lessee, which Condition is broken; and the Lessor doth enter with force to get the possession of the land; this is a forcible Entry. So if the Lessee doth alien in Fee, and thereby forfeit the land, and the Lessor die before his Entry, and then his son and heir enter upon the Lessee with force; this shall be a forcible Entry. (All these Cases are in Mr. *Risdens* Reading.)

The party grieved by a forcible Entry or Detainer may be relieved, and the offender punished divers ways, (amongst others) by the help of the Justices of the Peace, who may do it upon the Statute of *Northampton*, which is in the nature of a Commission, wherein they proceed as Ministers only; or by Indictment upon *Stat. 8 H. 6.* at the Quarter-Sessions, which being found there, the party shall be restored to his possession by a Writ of Restitution from the Court to the Sheriff, *Dyer, 187. Crompt. 7. P. 165.*

But the most speedy and common remedy is by complaint to one or more Justices of Peace, who may thereupon go to the place where the Force is; and if it be in an house, he may enter and search; and if any Force of armor or weapon be worn or borne against this Statute, and if any such offenders be found, he may commit them to Prison, and may seize and press the Armor so found with them: And he ought to record all that which he shall do in this behalf, and thereout to send some Estreat into the *Exchequer*, that the Commonwealth may be answered of the Armor, or the value thereof.

But here again the Justice must not make any restitution to the party outed, but must only remove the Force. And concerning the offenders so found and committed by the said Justice of Peace, it seemeth the Justice (at his discretion) may fine them; and upon payment thereof, or Sureties found for the same, the said Justice may deliver the offenders, even as in the former Statutes of *15 R. 2. & 8 H. 6.* Or else the said Justice may record such Force, and commit the offenders, and after certify the Record in the Upper-Bench, or to the Justices of the Gaol-delivery, or to the General Sessions of the Peace.

3. The Remedy; and how they are to be punished that commit this offence.

Commitment, Record.

Restitution.

Fine.

Certificate.

Or else the ſame Juſtice or Juſtices of the Peace may proceed, otherwiſe: For every Juſtice of Peace upon complaint to him made, or upon other notice to him given of any forcible Entry into, or holding, or Detainer of poſſeſſion of any Lands, Tenements, or other Poſſeſſions; (or of any Benefices, or Offices of the Church) contrary to theſe Statutes, by the party grieved, without any examining, queſtioning, or ſtanding upon the Right or Title of either party, may and ought at convenient time (at the coſt of the party grieved) to do execution of the Statutes aforeſaid. And as to the Juſtices duty and power in relation to the Aid he may require, removing the Force, Imprifonment of the Parties, and making Record of the Force; theſe things are to be known.

1. He ought to go to the place where ſuch Force ſhall be to view.

2. He may command and take with him ſufficient Power of the County or Town by diſcretion, and the Sheriff alſo, if need be, to aid him for the better execution of his buſineſs, as well for the arreſting of ſuch Offenders, as alſo for the removing of the Force; and for the conveying of them to the next Gaol. And as to this, theſe things muſt be known.

3. If he require any Men-kind, be they Dukes, Earls, Barons, Lords, or men of lower degree, Apprentices, Servants and others, that are not about the apprehending of Felons, or ſome other publike ſervice: But Women, and Children under fourteen years old, Aliens that are not Denizens, Men that are not *compotes mentis*, and Priſoners are not bound. 2. Theſe he may require by word of mouth, without a Warrant in writing; but ſo can no other Officers. 3. He may arreſt or imprifon, and fine ſuch as reſuſe to aid him.

3. He ought to arreſt and remove all ſuch Offenders as at his coming he ſhall ſee or find continuing the Force, and may take away their weapons, harnels and armor, and preſently cauſe them to be preſſed, and after to be answered to the Common-wealth as forfeited, or the value thereof. And if the doors be ſhut, and they within the houſe ſhall deny the Juſtice to enter, it ſeemeth he may break open the houſe to remove the Force. But if ſuch Offenders being in the houſe at the coming of the Juſtice, ſhall make no reſiſtance, nor make ſhew of any Force, then the Juſtice cannot arreſt or remove them, except upon the enquiry a Force be found. And if the Houſe or Land which is holden with Force, ſhall extend into two Counties, and the Offenders move their Force into that part of the Houſe or Land which is in the other County, when the Juſtice doth come; it is ſaid by ſome, he cannot then remove the Force; but others hold the contrary.

4. He ought to make a Record of ſuch Force by him viewed. Wherein are theſe things to be known. 1. If the Juſtice come to remove the Force, and the Offenders eſcape before they can be arreſted, yet the Juſtice muſt record the forcible Detainer. 2. If the Juſtice be put out of Commiſſion, or made a Sheriff before he come to the place, he cannot then record it. 3. If the Juſtice record a Force, and ſend to Priſon where no Force is, the party is remedileſs. 4. If a Reſcue be made of the Priſoners committed by him, he may record this alſo: But if he record a Murther or Maſſlaughter, this is void. 5. This Record ſhall be a ſufficient conviction of the offenders, and the parties ſhall not be allowed to traaverse it. 6. And this Record (made out of Seſſions by a particular Juſtice) the ſame Juſtice may keep by him; or he may make it indented, and certiſie the one part into the Upper-Bench, or he may leave it with the Clerk of the Peace, and the other part he may keep himſelf.

Commitment.

5. He ought to commit immediately to the next Gaol all ſuch perſons as he ſhall find and ſee continuing the Force at his coming to the place; the ſaid Offenders there to remain convict by his own eye, teſtimony and Record, until they have paid a Fine to the Lord Provoſtor: For this ſight and view of the Force by the Juſtice (being a Judge of Record) maketh his Record thereof (in the judgment of the Law) as ſtrong and effectual, as if the Offenders had confeſſed the Force before him; and (touching the reſtraining of the Traverſe) more effectual then if the Force had been found by a Jury upon the evidence of others. But the Force muſt be in the preſent or view of the Juſtice of Peace, or elſe he can never record it, nor yet commit the

Traverſe.

the offenders: For upon Force found by Enquiry only, (although this Proferment of the Jury be a Conviction of the offenders), it is thought the Justice of Peace can neither fine, nor send to Gaol. But, however he is to remove the offenders that be present, that so he may restore the other, and may bind the offenders to the Good-behaviour. And if they be gone, yet he may make his Warrant to take them and send them to Gaol; until they have found Sureties for their Good-behaviour. But for the further opening of this, these things must be known.

1. The Justice of Peace may not view a Force, or fine or imprison in his own case: And yet if he come there, and they make an assault upon his person, he may send them to Gaol for this offence.

2. If one enter into a House upon another with Force, and when the Justice comes both sides are fighting for the possession; the Justice may remove the Force, but cannot give possession to the Owner of the House.

3. If he that hath entered forcibly, hath driven the Owner to one end or part only; the Justice may remove, and commit them that have so entred.

4. If there be Men in Arms in another House near, though in another County, to beat them that take possession of the House in this County; in this case it is said, the Justices may remove them.

5. If the Justices come there by accident where the Force is newly done, they cannot arrest or imprison, unless there be a forcible Detainer in the view.

6. If the offenders before Arrest escape for that time; and after the same day the Justices meet them in another place; in this case they cannot commit them to Prison.

7. If the Justices coming to the place, meet some of the offenders by the way in harness, or see some going thither in harness, to keep the place; they cannot upon this commit them to Prison.

8. If when the Justices of Peace come, the offenders escape into another County, the Justices of Peace cannot arrest them there, albeit it be upon fresh suit. And yet is said by some, that if in this case before arrest of the parties they flee, the Justices may arrest them, but not commit them to Prison. But I doubt it. And yet if both Houses be in one County, it is out of question. So if they get into a Castle in the same County, the Justices may upon fresh Suit arrest them and commit them.

9. All this is to be done there only where the party grieved (in the sense of the Statute) which is the party that is to have restitution, doth complain, tender the costs, &c. Not where any man doth complain. And for the opening hereof, take these Cases.

If a man have a Rent issuing out of the Land of another, which Land is detained with force when he would disfranchise; he that is so disturbed is not a party grieved, to be relieved by the Statute. And if a man be seised of Land to which Common is appendant, is disseised of the Common, and then aliens the Land to his Son and dieth, after which the Land out of which this Common is issuing is detained with force; in this case the Son is not a party grieved by this Statute. So if after the Fathers death a stranger doth enter by abatement into the Land, and holdeth by force; the Son is not a party grieved within the Statute. So if a man be seised of Land of which such a forcible Entry is made, and dieth before he complain; in this case his Son and Heirs cannot complain for this Entry. So if a man devise his Land by Will and dieth, and before any Entry made by the Devisees, a Force is made; the Devisees is not a party grieved. But if a man make a Lease for five years on Condition that if within the first two years the Lessee pay to him Ten pounds, he shall have the Fee, and Livery is made accordingly; in this case if any such Entry be within the five years, the Lessee is a party grieved, albeit the Condition be not performed. So if a man be possessed of a Term, and make the Heirs of J.S. his Executors and dieth, J.S. being also dead, leaving issue a Daughter, his Wife with child of another Daughter; the first enters, and then the other is born; then such Force is committed: In this case both the Daughters are parties grieved. So if one enters by Disfranchisement to the use of another, who doth after agree to it, and then a forcible Entry is made; in this case neither the

the one nor the other is a party grieved. So if one enter by Disseisin to the use of an Infant, who doth agree to it, and then such a forcible Entry is made; in this case the Infant is not a party grieved. And generally the party to whom Restitution shall be made, he shall be accounted a party grieved within the meaning of this Statute. (*And for this see afterwards.*)

Fine.

Estreat.

Accomptant.

Enquiry.

The same Justices of Peace, or some of them that shall see the Force, (as having best knowledge of the matter, and of the quantity of the offence, and having the custody of this Record) are the proper Judges over this offence, and therefore may assess the Fine upon every such offender. But the Fine must be imposed upon every offender severally, and not upon them jointly. And the Justice ought to estreat the same Fine, and to send the Estreat into the Exchequer; and that from thence the Sheriff may be commanded to levy the said Fine to the Commonwealth's use. But upon the same Fine so assessed and estreated, it seemeth the Justice is to deliver the offender: Also upon payment of the said Fine to the Justice, or upon Sureties bound by Recognisance for the payment thereof, the Justice may deliver the offenders again out of Prison at his pleasure, by some opinions: But *quære*, for that the Sheriff is accomptant for all Fines. Or the Justice of Peace (by some opinions) may record such Force, and commit the offenders, and after certifie the Record to the Justices of Assize and Gaol-delivery, or else to the General Sessions of the Peace, and there the offenders may be fined: For the Statute doth not say, that the Fine shall be assessed by them that record the Force; but rather the Justices of Peace may certifie or deliver the Record by them made, and refer the Fine and further proceeding therein to the Upper-Bench; which is thought to be the safest course. Also the Justice of Peace, notwithstanding his own view of the Force, may and ought in some good Town or place near where the Force was, to enquire by a sufficient Jury of the same County to be returned by the Sheriff, as well of those which made such forcible Entry, as of those which made such forcible Detainer. Wherein these things must be observed.

1. That one Justice of Peace alone out of Sessions may make an Enquiry; whereas otherwise to hold a Sessions, there must be two at the least, and one of them must be of the *Quorum*.

2. This Enquiry may be made within a moneth after the time.

3. It may be made, whether the offenders be present or gone, at the coming of the Justice of Peace.

4. This Enquiry may be made, albeit the Justice go out to see the place where the Force is, and upon his view make a Record: But he must take care the Records do not differ; for if the Enquest find contrary to the Justices Record, the last Record is void.

5. One Justice may make the View, and another Justice may make the Enquiry.

6. If several Enquiries be made by several Justices upon the Force, every one of them is a good Enquiry.

7. If the Record of Inquisition say the Jury was sworn, and indeed it was not sworn, yet it is a good Enquiry.

8. If the Jury be under twelve, or any of them have been attaint of a false Oath upon a *Decies tantum*, or are Ambodexters, the Jury is not good, unless there be twelve of the Jury besides those men.

Warrant to the Sheriff.

9. This Enquiry must be made by men of good Estates. And therefore the Justice of Peace is to send his Warrant to the Sheriff, to command him in the behalf of the Lord Protector, to cause to come before him four and twenty sufficient and indifferent persons, near about the place where the Force is supposed to be; and every of them so returned must have Forty shillings by the year at least in Lands and Tenements. And the Sheriff is to return Issues upon every man so summoned, the first day Twenty shillings, the second day Forty shillings, and the third day Fifty shillings; and at every day after double. And upon default of appearance of the Jurors, the Justice may grant an *Alias*, and after that *Pluries* infinite, till they come. And if any Sheriff or Bailiff of Franchise that hath the Return of such Writ, shall

be negligent, he shall forfeit Forty pounds. But if such Jurors have not Forty shillings Land *per annum*, yet their Presentment of such Force is good for the Commonwealth, so as the offenders shall fine therefore. And if the Sheriff return smaller Issues upon the Enquiries than the Statute doth appoint; yet the party indicted shall not impeach the Enquiry thereof. But these defaults in the Sheriff for not returning sufficient men, may be punished by the Justice of Peace, who may hear and determine these offences by Bill or Indictment, wherein shall go the like Process as against men indicted for Trespass.

10. It is convenient upon such Enquiry, that the Evidence be given openly to the Jury, so the intent it may appear to the Justice of Peace or Court, whether there be reasonable cause to stay Restitution, or not, after the Indictment found.

11. If upon such Enquiry, such forcible Entry, or such forcible holding or Detainer shall be found by the oaths of the Enquirers, then the said Justice of Peace shall release the Lands or Tenements so entered upon or holden, and thereof put the party in possession again, which in such sort was put or holden out. As touching which point, these things are to be known.

1. Any one or more Justices of Peace before whom the Force is found, and not any other Justice of Peace in or out of Sessions, Justices of Oyer and Terminer, or Gaol-delivery, may in person put the party put out or kept out, in possession again, or may award his or their Precept under his or their own Seal to the Sheriff to do it. And if the Justice before whom it be taken be dead, or otherwise the Record being before the Justices at their Sessions, they may award Execution by Writ, but not without a Writ, as the Justice of Peace himself that took the Inquisition may do. Also the Justices of the Upper-Bench, upon a Certificate by the Justices of Peace of the Force found before them, or upon removal of the Indictment by *Certiorari*, may by Warrant to the Sheriff, (not in person) award Restitution. And to do this, the Justice or Sheriff may break open any house, and take *Posse Comitatus*; and if the Sheriff return, He cannot do it for resistance, he will be amerced.

Restitution.

2. The Restitution must be made to him that is put out, not to his Heirs, Executor, or any other after his death; but the parties in this case may be fined and imprisoned: Co. 3 *par. Inst.* f 142, 143.

3. No Restitution shall be made, but where the forcible Entry or Detainer is first found by Inquisition, and that upon sufficient Indictment also. For if the Indictment or Inquisition be qualified for insufficiency, no Restitution can be had upon it. For this cause the Indictment must express: 1. A putting out, *Expulsionem*. 2. The quality of the thing entered into, as Messuage, Cottage, &c. Therefore they entered the Tenement; is void for incertainty. 3. A keeping out; it must say, Yet they keep out. 4. It must be with strong hand, or with multitude; except it be implied by reciting *Stat. 8 H. 6.* and conclude, Against the form of the Statute aforesaid, or by some other such words. And if one be restored upon an insufficient Indictment, and it be removed into the Upper-Bench, the Court will cause the party to be restored. And if upon an insufficient Indictment the Justices grant Restitution before it be done, the same Justices, or other, may grant a *Superfideas* to stay it.

Indictment.

4. Restitution is only where a man is put or held out of Land, or the like; not of Rent, or the like.

5. The Justice may make Restitution, notwithstanding any offer of Traverse: Yet in this case the safest way is to send the Indictment into the Upper-Bench. But in touching Restitution, Inquisition, and the three years Possession, and for the clearing of the Law touching them, these things are to be known.

1. To whom Restitution shall be made, and upon what Inquisition.
2. If it be found that *J. S.* was seized, until he was disseised by *J. D.* by force, or that *J. D.* entered upon him by force; in this case Restitution shall be made to *J. S.* So if it be found that *J. S.* was seized until disseised by *J. D.* peaceably, which *J. D.* holdeth with force; in this case Restitution shall be made to *J. S.* And if it be found that the Father die, and a stranger enter by abatement, and detaineth with force; in this case Restitution may not be made to the Sons. If it be found that the Father made

made

made a Lease for years and die, the years expired, and before such an Entry made by the Son, such a Force is committed; in this case the Son shall not have Restitution.

If it be found that a man is seised of Land, and hath issue a Daughter and dieth, his Wife with child of a Son; the Daughter is ousted with Force, and then a Son is born; in this case the Daughter, and not the Son shall have Restitution.

If it be found that *J. S.* was seised until he was disseised by *J. D.* and that *J. S.* ousted *J. D.* with force; in this case the Restitution shall be made to *J. D.* and not to *J. S.* If it be found that *J. S.* was seised until *J. D.* ousted him with force, and also that *J. D.* was so seised until by *J. N.* disseised by force; by this Inquisition *J. D.* the first Disseisor will have Restitution against *J. N.* and thereupon *J. S.* shall have Restitution against *J. D.* and all upon the same Verdict.

If it be found by several Enquiries, that a man is ousted by force by several persons at sundry times of one and the same thing; each Inquest is good, and he may have Restitution upon any of them, but he shall have but one Restitution.

If it be found by several Enquiries, (*i.*) by one Inquest, that *J. S.* is ousted by force; and by another Inquest, that *J. D.* is ousted by force, and both of the same Land; in this case each of them may have Restitution.

If it be found that *J. S.* was seised for the life of *A.* and he is ousted with force by *B.* and that *A.* is now dead; in this case *J. S.* shall have Restitution upon this Inquisition.

If it be found that two Jointenants be ousted by force; in this case one of them may have Restitution, without the other. So if it be found that the Father was seised until he was ousted with force, and he die before Entry or Restitution, the Son shall not be restored. So of the Executors of a Lessee for years ousted before his death. If it be found there is Lessee for life, the Remainder in fee, and the Lessee for life is ousted by force; in this case he in Remainder shall not be restored.

If it be found that *J. S.* was seised, until by *J. D.* he was ousted by force, and the Enquiry doth not say, At the request of *J. S.* yet he shall have Restitution.

If it be found that one is ousted by force, and thereupon he is restored, and after he is ousted by force again by the same party; in this case he shall not have Restitution the second time upon the same Inquisition.

If Lessee for life upon Condition be ousted by force, and the Lessor enter for the Condition broken, and this be found; in this case the Lessee shall be restored.

If Husband and Wife before issue had are ousted with force, and then they have issue between them, and the Wife dieth, and this be found; the Husband shall have Restitution.

If it be found that the Land out of which one hath Rent or Common is detained with force, so that he cannot have his Rent or Common; in this case he cannot have Restitution. And finally it is so for the most part, that he that is the party grieved, that must complain; he is the party to whom Restitution shall be made. And as touching the three years possession, these things are to be known.

That if a Disseisor continue the possession quietly for one year, and then maketh a Feoffment, and taketh back an estate again, and then he continueth for two years more; this is not a good possession for three years within the Statute. So if Lessee for years continue in possession for two years, and then his Term expireth, and after this he holdeth for another year; this is not a good continuance in possession for three years. But if a man make a Lease at will and dieth, after whose death the Lessee doth continue in possession three years; this is a good continuance of possession within the Statute.

If a Disseisor do continue in possession two years, and then is disseised by his eldest Son; the Father dieth, and the Son continueth in possession for one year more; this is not a continuance of possession for three years, within the Proviso of the Statute. The same Law is, if the Father disseiseth his eldest Son and continueth in possession three years, and the Son after his death for one year more; this is not a continuance of possession by three years within the Statute. But if the Disseisor con-

continue the possession for two years in his own life-time, and dieth seised, and his Son and Heir entred and continueth the possession for one whole year; this is a Continuance of possession within the Proviso. The same Law is, if the Disseisor continue possession for two years in the life-time of the Dissee, and one year after his death; this is a Continuance of possession for three years within the Statute.

If the Dissee make a continual Claim within three years, but make no Entry, this is not a Continuance in possession for three years within the Statute. The same Law is, if the Disseisor continue possession by two years, and his Feoffee by one year, this is a Continuance of possession for three years. If one recovereth against another in a *Præcipe quod reddat* by Covin, and he against whom he recovereth hath quiet possession thereof for three years; this is a possession within the Statute.

If one make a Lease to another for the life of *J. S.* and the Lessee doth continue the possession for two years, and then *J. S.* die, and the Lessee doth continue the possession one year after his death; this is no Continuance of possession within the Statute. But if he continue the possession for three years after the death of *J. S.* this is a good Continuance of possession. If the Disseisor make a Lease for life, the Remainder over in fee, and the Lessee holdeth for a year and dieth, after whose death he in Remainder entred and continueth the possession for two years more, this is not a Continuance of possession within the Proviso of the Statute.

In these cases a man may alleage to stay Restitution any of these things.

Causes of stay,
of Restitution.

1. His quiet possession for three years: For there shall be no Restitution awarded, in case where the party indicted hath been in quiet possession by the space of three whole years together, next before the day of Indictment found, if his estate be not ended. And this the party may alleage; and upon this Restitution shall be staid by the Justice of Peace until it be tried, if the other will deny or traverse the same.

2. He may deliver to the Justice of Peace or Court a *Certiorari*, and this is a *Superfedeas* to them. And therefore if a man have committed such a Force, and be in doubt that he shall be indicted therefore before the Justices of Peace, upon the Statute of 8 H. 6. and that thereupon Restitution will be awarded against him, he may have a *Certiorari* out of the Upper-Bench ready; and when the Bill of Indictment is found, he may presently deliver it to the Justice of Peace, or Court; and this is a *Superfedeas* to them; for hereupon the Indictment shall be removed unto the Upper-Bench. And although the Indictment be found after the Test of the *Certiorari*, it is not material. But if a *Certiorari* come to remove an Indictment taken before a Justice of Peace in the Country, and the party will not sue to remove it, but doth suffer it to lie still; some think the Justice may proceed to grant Restitution. But it seems the Justices *ex officio* are to send the Indictment away, because they are commanded so by the Writ, and this Writ is a *Superfedeas* of it self. And after Restitution made by the Justice of Peace, if the other party do remove the Indictment by a *Certiorari* of a more eigne date, then is the Indictment, the Justices of the Upper-Bench may award Restitution back again; for upon the matter the Justice of Peace had no power to make Restitution, for that the *Certiorari* had relation from the date after Restitution granted from the Sessions, and delivered to the Sheriff; the other party having a *Certiorari*, delivereth it also to the Sheriff; after the Sessions, the Sheriff shall not surcease thereupon, for he hath no authority to allow thereof. But if the *Certiorari* were delivered to any Justice of Peace, he may thereupon grant a *Superfedeas* to the Sheriff; and if Restitution were made by the Sheriff before the said *Superfedeas* came to his hand, then the other party shall have Restitution back again in the Upper-Bench, upon Indictment removed thither.

Certiorari.
Superfedeas.

3. He may tender a Traverse; but some doubt whether he may be admitted to a Traverse before the same Justice of Peace. But this tender of Traverse (to an Indictment of a forcible Entry) upon *St. 8. H. 6.* is no *Superfedeas* but in discretion, so as the Justice of Peace or Court may grant or stay the Restitution at their discretion, according as the truth of the right or title shall appear to them: And so is the use of the Upper-Bench. Or else the Justices of Peace before whom the Indictment was found, may after Traverse tendered certify or deliver the Indictment into the Upper-Bench, and so refer the further proceeding thereof to the Justices of that Court.

But

But if the party indicted shall tender a Traverse presently, whereupon Restitution is stayed, and after he shall not pursue his Traverse with effect, (but discontinueth it) and after doth tender another Traverse, upon Restitution prayed, at another time, the Justice of Peace or Court shall do well to proceed to grant Restitution, notwithstanding such Traverse tendered. And it is the course in the Upper-Bench, that he that tendered the Traverse there (upon such an Indictment) shall bear all the charges of the Trial, and not the Lord Protector, nor he at whose suit the Indictment was found. And the same reason seemeth upon an Indictment traversed before the Justices of Peace.

4. He may shew Insufficiencie of the Indictment, for the causes before alledged.

5. And some have thought he may plead the Insufficiencie of any of the Jurors, for not having Forty shillings *per annum*. And some think that the Justices of Peace ought to stay Restitution, save only in case where three years quiet possession is alledged, or by removing the Record. The Mayors and Officers of Cities having Franchise, have like authority therein as Justices of Peace have within their County, 8 H. 9. c. 9. And if the Justices of Peace be negligent in their offices upon these Statutes, they may be punished.

Forging a Deed.

Forging of a
Deed, what.

Forging of a Deed is, where a man doth make and publish any false Deed, Writing or Will, to the prejudice of another mans right, *Kelv.* 112. *Plow.* 186.

What is such a
Forgery, or
not.

To forge a Will in writing, is such a Forgery, *March* 26. *pl.* 245:

If a Copiholder make and publish a Customary for a Usage, and put Seals to it to the Lords prejudice, this is a Forgery. *Dyer* 302. 322.

If one forge a Testament by which a Lease for years is given; this is such a Forgery.

But the making, and not publishing and using of any such Writing or Deed, is no Forgery, nor punishable at all. See what shall be such a Forgery, more in *Kelv.* 112. *Plow.* 88. *Co.* 4. 17. *Dyer* 302. 322. 288. *Plow.* 88.

If any one alone or with others forge any such Deed, Charter, Court-Roll, or Will in writing, with intent to trouble, defeat, or charge the Freehold or Inheritance, the Right or Title of Land of another, or publish or give in evidence any such Writing, knowing it to be false; he shall pay to the party grieved double costs and damages, be set upon the Pillory in some Market-Town or open place, and have both his ears cut off, his nostrils slit, and seared with an hot iron, forfeit the profits of his land, and be imprisoned all the days of his life.

If it be the forging of a Lease for years, of Land only (not Copihold) or of an Annuity, Obligation, Bill, Acquittance, Release, or other Discharge of any personal thing; he shall pay the party grieved double costs and damages, be set so on the Pillory, lose one of his ears, and suffer a years imprisonment without Bail. The second offence is Felony without Clergy; also the party grieved may for this Forgery have an Action of the Case at the Common-Law; *St.* 5 *Eliz.* 14.

of

Of a Forrest.

A Forrest is a great vast Wood or piece of ground, where wild Beasts did use to live. But more largely it is thus described: It is a certain Territory of woody ground and fruitful Pastures, priviledged for wild Beasts and Fowls of the Forrest, Chase, and Wairren to rest and abide in, in the safe protection of the King, for his Princely delight and pleasure. Which Territory of ground so priviledged, is meered and bounded with unremoveable Marks, Meers and Boundaries, either known by matter of Record, or else by Prescription. And these Forrests now are, or have been replenished with wild Beasts of Veneries or Chase, and with great Coverts of Vert for the succor of the wild Beasts to have their abode in. For the preservation and continuance whereof and the Vert, and Venison therein, there are certain particular Laws, Courts, Priviledges and Officers belonging to the same, meet for that purpose, that are only proper to a Forrest, and not to any other place. Of these there have been many in England, but most of them are gone and destroyed. See for this, and how they began, in *Manwood of Forrest-Laws*.

The properties of a Forrest are these.

1. None can have it but the King;
2. The Courts must be there, the Justice-seat, Eyre, or General-Sessions of the Forrest, which must be held every three years, the Swanimote thrice a year, and the Attachment-Court once every forty days.

3. The Officers must belong to it for preservation of Vert and Venison: As first, the Justices of the Forrest, sometimes called Justices in Eyre of the Forrest, who have the hearing and determining of all offences committed therein against Vert and Venison, who did judg by the Laws of the Forrest, 9 H. 3. For which see *Justices, Manwood Forrest-Laws*.

The Warden or Keeper of the Forrest; for which see *Officers*.

The next Officer is the Constable of the Forrest, (*Manwood*.)

The Verderers or Verdours, who are Judicial Officers of the Forrest chosen by the Kings Writ to the Sheriff, and sworn in the County-Court of the Shire, by the Freeholders there within the Forrest where they dwell, to maintain and keep the Affises of the Forrest, and also to view, receive, and inroll the Attachments and Presentments of all manner of Trespasses of the Forrest of Vert and Venison, and to oversee, correct and punish other Officers beneath them, *Crompt. Jur. 164. Manwood*.

The Forrester is a sworn Officer appointed by the Kings Letters-Parents to walk the Forrest early and late, to look to the Vert and Venison there, attaching and presenting all Trespassors against them within their own Bailiwick or Walk. They were called Walkers, *Crompt. Jur. f. 201. Manwood*.

Agistors are such as tack in and receive the money for the rack of the Cattel going in the Forrest. *Manwood*.

Regardors are such Officers as are to view and enquire of all offences of the Forrest as well of Vert as of Venison, and of all concealments of any offences or defaults of the Forresters, and of all other Officers of the Forrest, concerning the execution of their Office. *Crompt. Jur. 153. Manwood*.

Bailiffs of the Forrest and Beadles are Officers that do make all manner of garnishments of the Courts, and all manner of Proclamations as well within the Courts of the Forrest as without, and also do execute all the Process of the Forrest, and are like to the Bailiffs errant of the Sheriff within the County.

Woodmen are such as look to the Woods there, *Manwood*.

Woodwards are not only to see to the Woods, but to all other matters; and if any do any offence there in Vert and Venison, they are to present it to the Verderors at the next Swanimote or Attachment-Court. *Manwood, and Crompt. Jur. 201*.

Rangers are such as have the care of the Purliewes annexed to the Forrest, to drive back the game. *Idem*.

Forcery, what.

Self. 1.
The properties of it.

Court of
Justice-seat,
Swanimote,
Attachment.
Justices of the
Forrest, what.

Warden of the
Forrest, what.
Verderer or
Verdour, what.

Forresters or
Walkers, what.

Agistors, what.

Regardors,
what.

Bailiffs, what.
Beadle, what.

Self. 2.
Woodmen,
Woodwards,
what.

Ranger, what.

Chafe, what.

A Chace seemeth to be nothing but the ground which was a Forrest in the Kings hands, and hath lost the properties of a Forrest, or is in the hands of a Subject. And this must always be open, and not inclosed: But a Park must be always inclosed, and not lie open. And if this be inclosed, it is forfeit to, and may be seized by the King. And to recover this Chafe being denied, there lieth a Writ called

Free-chafe.

*Libera chafca
habenda, what.
Warren, what.*

Libera Chafca habenda. See more in *Franchise*.
A Warren is a Franchise or privileged place of pleasure, only for those Beasts and Fowls that are Beasts and Fowls of Warren, as Hares and Conies, and Pheasants and Partridges. And some of these lie open, and some are inclosed. These were made at first by the Kings grant, and so may be now within a mans own ground, no where else; and then no man may hunt or fowl there without my licence; and if any man hunt or hawk there, he may be punished, *Crompt. Jur.* 148. *Stat. de Malefactoribus in Parcibus*, 21 Ed. 3.

Park, what.

A Park is a piece of ground inclosed and stored with wild Beasts of Chafe; or a privileged place for wild Beasts of Venerie, and for other wild Beasts that are Beasts of the Forrest and of the Chafe, the which are to be in peace there, so that no man in that place may hurt or chafe them without leave of the Owner. And this must be inclosed and may not lie open; for if it do, it is cause of Forfeiture to, and seizure by the King as a thing forfeit. Nor can the Owner have an Action against such as hunt in his Park, if it lie open. *Crompt. Jur.* 148. *Manwood* of his *Forrest-Laws*.

*Self. 3.
Woodgeld, what.*

There are divers Terms used in the Forrest-Laws, now to be opened.
Woodgeld seemeth to be the gathering or cutting of Wood in the Forrest, or the money paid for the same to the use of the Forresters; or an Immunity from this by the Kings grant, *Crompt. Jur.* 146.

Regard, what.

Regard hath two significations: The one for the Regarders office; 2. The other for the compass of ground belonging to his Office. For the first, they are before the Courts of the Forrest to make their Regard, (that is) go through all the Bailiwicks of the Forrest to see what offences be done in Vert and Venison, and take Notes thereof, and certify it to the next Court. And for the other, the Compass of his Office is all the ground which is parcel of the Forrest; for there may be Woods within the limits of the Forrest that be no parcel thereof, and those are without the Regard, *Crompt. Jur.* 175. *Manwood*.

Range, what.

A *Range* seemeth to be the Office of the Ranger, and the Circuit thereof. For in some Forrests there are twelve Rangers, who are only to look to the Purlicues of the same upon the Borders of the Forrests, which were certain Circuits of ground near unto the Forrests, which were made Forrest by *Hen. 2. Rich. 1. or King John*, and were after by Perambulations granted by *Hen. 3.* severed again from the same. And these were to hunt back the Deer into the Forrest, and to present all offenders within or without his Purlieu. He was made by the Kings Letters-Patents, and had a Fee out of the Exchequer, and certain Fee-Deer, *Manwood*.

*Purlicue or
Purlicue.*

Purlicue-man is he that hath ground within the Purlicue, and hath Forty shillings a year Freehold; and such a one with some cautions may hunt within his own Purlicue. *Manwood. Crompt. Jur.* 153.

*Purly or Pur-
licue-man,
what.*

*Self. 4.
Frank chafe,
what.*

Franchafe is a Liberty of Free-chafe in a Circuit annexed to a Forrest, whereby all men that have ground within that Circuit are prohibited to cut down Wood, or discover, &c. within the view of the Forrester, though it be his own Demesne, *Crompt. Jur.* 187.

*Backberond,
Dog-draw,
Stable-stand,
what.
Bloody hand.*

These are Terms to note a man that is an offender against Vert or Venison, and taken in the manner, in these cases. When he hath taken up his stand with a Cross-bow ready to shoot, as he were stabled, which is called *Stable-stand*: Or when he doth draw after some hurt Deer with his Dog, which is called *Dog-draw*: Or when he beareth the Deer on his back, which is called *Back-bear*: Or when his hand is bloody with the blood of the Deer. In all these cases the Forrester may arrest the body of the offender. *Manwood*.

*Triss or Trissie
what.*

This *Trissie* is a Freedom that one hath from holding a Greyhound in his hand, when the Lord of the Forrest is hunting there, or else to be amerced for his default, *Manwood.*

Vert is every thing that doth grow and bear green leaf within the Forreſt, that may cover and hide a Deer. And this is *Overt-vert*, which is High-wood; and *Nether-vert*, which is Under-wood: Or general, which is all the High-wood; and ſpecial, which is every Tree and Buſh within the Forreſt to feed the Deer withall, as Pear-trees, Crab-trees, Hawthorns, Blackbuſh, and ſuch like; and Bruſhwood is called *Cabliſh*. *Manwood. Cromp. Jur. 163.*

Vert, what.

Cabliſh, what.

Fence-moneth, what.

Fence-moneth is a moneth wherein it is unlawful to hunt in the Forreſt, which beginneth fifteen days before Midſomer, and endeth fifteen days after Midſomer: So that in this moneth are one and thirty days, wherein they are not to hunt, becauſe in this time the Female-Deer doth fawn. *Manwood.*

Fongeld is an Amerciament upon men living in the Forreſt, for not cutting out the balls of their great Dogs feet. It doth alſo ſignifie a Privilege to keep Dogs there unlawed, without puniſhment or controulment. *Manwood. Cromp. Jur. 197.*

Seſt. 3.

Fongeld, what.

Horngeld ſignifieth a Taxe within the Forreſt, to be paid for horned Beaſts, *Cromp. Jur.*

Horngeld, what.

Minovary doth ſignifie ſome Treſpaſs or offence committed by ſome Engine ſet up in the Forreſt to catch Deer, or the like. *St. 7 R. 2. c. 4.*

Minovary, what.

This was an antient great Officer of *Windſor-Forreſt*, that had power of life and death.

Protoforreſtarius, what.

Walkers, theſe are thoſe that are called Forreſters. *See before.*

An *Aſſart* is an offence committed in the Forreſt by grubbing up the Woods, Coverts or Thickets, and making them plain as arable Land, or the like. And this is a very great offence. *Manwood.*

Walkers, what: Aſſart or Aſſert, what.

Agiſment is the tacking in of Cattel in the Forreſt, and receipt of the Tack-money to the Kings uſe.

Agiſment or Pannage, what.

See more for theſe things, in the Statutes of 9 H. 3. 10. 56. 8. 16. 9. 1 H. 7. 7.

1 Ed. 3. 8. 7 R. 2. 4. 3 Ed. 1. 10. 21 Ed. 1. 8 H. 3. 3. 32 H. 8. 35. 3 Jac. 13. 7 Jac. 3.

22 Ed. 4. 7. 19 H. 7. 11. 27 H. 8. 6. 13 Ed. 1. 5.

CHAP. LXXXIX.

Of Fowling and Fowl; Foreſtalling, Regrating and Ingroſſing.



Or Fowling and Fowl, ſee *Warren* and other Titles, *St. 1 Jac. 27.*

Fowling.

The penalty for killing or taking of old Hierons, ſaving by Hawking or Long-bow, ſee in *Stat. 19 H. 7. c. 11.* And for taking of young Hierons out of their neſts without leave of the Owner, *St. 19 H. 7. c. 11. 1 Jac. 27.*

Hieron.

Who may have and keep, or take a game of Swans from another, ſee *St. 22 Ed. 4. c. 6.*

Swans.

The danger of taking Swans eggs, ſee *St. 11 H. 7. c. 17.*

There is no Law againſt the taking of Wild-fowl, as Ducks, &c. Swans, or the like with Nets or Engines. But for ſhooting in a Gun at them, the penalty is the ſame as for ſhooting at other things. But if any man take away from another, or kill his tame Swans or Hierons, he may have an Action of Treſpaſs for this, *14 H. 8. 3: 18 H. 8. 2.*

of

Of Forestalling, Regrating and Ingrossing.

Forestalling,
Regrating, and
Ingrossing, what.

TO buy or agree for any thing coming towards a Market or great Town, or to move the Seller to raise the price, or to dissuade him from bringing in his Commodities in those places, is Forestalling.

To buy up Commodities, as Corn, Wine, Butter, Cheese, Fish, Candles, Tallow, Sheep, Lambs, Calves, Swine, Pigs, Geese, Capons, Hens, Chickens, Pigeons, Conies, or other dead victuals whatsoever in any Fair or Market, and sell them again there, or in any other place within four miles thereof, is Regrating.

To get by buying or promise-taking, otherwise then by Devise of Land or Tythe, any Corn or Grain, or dead victuals into a mans hands, with intent to sell the same again, this is Ingrossing. And so it is, if one by himself or another directly or indirectly buy any Wheat or other Grain, with intent to sell the same in Meal, Flower, or otherwise, but by Licence of five Justices had in Sessions. But the buying of Barley and Oats without forestalling, to make Malt and Oatmeal; and such Victuallers of all sorts, as Butchers, Fishers, and the like, as buy Victuals without Forestalling, and sell it again by Retail according to their Trades; the buying of Victuals by Inholders and Victuallers, and spending it in their houses; the reserving of Rent-Corn on a Lease for Land; the buying of Victuals to victual a Ship or Fort; the buying of Seed-Corn, when one doth sell or offer to sale as much again; the transportation of Corn from one Port to another by water; the buying of Corn, Fish, Butter or Cheese by a Badger, so he sell it again within a moneth; nor the buying and selling of Cattel by Drovers licensed, and not abusing their Licence, so they sell them forty miles off, are not against the Laws, nor punishable.

The punish-
ment of it.

He that is within two years after any such offence done, convict of it, shall suffer for the first offence Imprisonment two moneths without Bail, and the value of the things bought or had: For the second offence after he hath been once convict, Imprisonment half a year, and the double value of the things: And for the third offence, be set on the Pillory in the place where he dwells, forfeit all his goods, and be imprisoned during the Kings pleasure. See for this *St. 5 & 6 E. 6. c. 6. 14. 1 Jac. 25. 21 Jac. 28. Act of Parl. 23 Oct. 1650.*

If any within two years of the offence be convict for buying any Oxen, Runts, Kine, Steer, Heifers, Lambs, Sheep, Goats or Kids living, and selling them again within five weeks, he shall suffer the loss of the double value thereof, *Stat. 3 Ed. 6. ch. 14.*

If any buy any Hide of Beasts out of a Market or Fair, unless it be of such as killed the Beast for their own provision, he forfeits Six shillings and eight pence, *St. 1 Jac. ch. 22.*

If any out of London, Westminster, or Southwark buy to sell again Butter or Cheese, unless he sell it again by Retail, and then not above a Weigh of Cheese, or Barrel of Butter, he loseth the double value of the goods, *21 Jac. 22.*

The getting of Oak-bark into ones hand with intent to sell the same again, is punishable also. But for this, see the Statute of *1 Jac. 22. 13 Eliz. 25. Co. 3 par. Inst. cap. 90. and Brownl. 2 par. 108.*

CHAP. XC.

Of Frank-law, Frank-pledg, Freehold, Frank-tenement,
Free-chappel, Fresh-suit, Friars, and Fustians.

E that loseth his Frank-law, as for Conspiracie and some offences a man shall do, doth fall into these mischiefs. Frank law.

1. He shall never be empanelled upon any Jury or Assise, or otherwise used as a Witness to testifie Truth.

2. If he have any thing to do in the Kings Courts, he may not come there in person, but must appear by Attorney.

3. His lands, goods and chattels must be seised into the Kings hands, spoiled, and his body imprisoned, 24 Ed. 3. 34.

Frankpledges are Sureties for Freemen: For heretofore every freeborn Subject at fourteen years old was to be sworne, and to fall into one Tything or other, and be bound one for another, as they all were: If any offended, he was to be brought in by the rest to answer his offence, or they were to make amends for his offence: And they did commonly engage by Ten households. See *Tything-man*. Frank pledges, what.

A Franktenement or Freehold is an Estate for life at least; and it is either in deed, or in Law. In deed, when one is actually seised of it: Or in Law before his Entry, when it is cast upon a man by a course of Law; as when it comes to an Heir by the death of an Ancestor, or to him in Remainder by the death of the particular Tenant. Or where one doth levy a Fine *sur consauance de droit come ceo, &c.* or *sur consauance de droit tantum*, (the which are Feoffments of Record;) in these cases the Conusee hath a Freehold in him before his Entry. Frank-tenement or Freehold, what. The kinds.

So if Tenant for life, by agreement with him in Reversion, surrender to him; by this he hath a Freehold in Law before his Entry. So where a man doth bargain and sell Land by Deed indented and inrolled, or when Uses are raised by Covenant upon good considerations; in these cases the Freehold in Law doth pass presently. But upon an Exchange or Partition, or Livery within the view, no Freehold is vested or removed until the parties enter, *Finches ley* 114, 115. *Co. upon Lit.* 266. But see more to this purpose in *Estates*. For this there is one special Rule here to be remembered; That a Franktenement by way of Interest-passing cannot commence *in futuro*: And therefore if one make a Feoffment in fee, a Lease for life of Land, or grant a Rent or Common in fee or for life, to begin at a day to come, the Estate is void. As if a man by Deed in consideration of Marriage give and grant his Land to his Son and his Heirs after his Fathers death, and Livery is not made; there passeth no Estate by this. But by way of Surrender of a Copihold, Bargain and Sale, Devise or Covenant to stand seised to Uses, such a Conveyance and Estate may be good, *March* 50. pl. 78. *Plow.* 301. *Co.* 8. 94. 7. 40. *Dyer* 96. 202. But this is sometimes holpen by a Livery of Seisin, as in 36 *Eliz. Callards Case*: He being on the Land with his Son, said to him, Stand forth *q. s.* reserving an Estate to me and my wife, I do give thee this Land. By the better opinion, this was good. See *March* 177. 216.

A Free-Chappel is a Chappel founded in some Parish for the service of God, by the devotion and liberality of some good man, over and above the Mother Church; unto which it was free for the Parishioners to come, or not to come; and endowed it with a maintenance from the Founder, and thereupon called free. Or (as some say) those only are Free-Chappels that are of the Kings founding, and by him exempted from the jurisdiction of the Ordinary. And the Lord Protector at this day may license a Subject to found such a Chappel, and by his Charter exempt it from the Ordinaries jurisdiction also, *Regist. f.* 40. 41. Free-chappel, what.

Fresh-suit is such a present and earnest following of an offender, as never ceaseth from the time of the offence committed or espied, until he be apprehended. And this may be within, or without the view. And the effect of it is this in pursuit of a Felon, that Fresh-suit, what.

that the party pursuing shall have his goods restored to him again, whereas otherwise they would be forfeit to the King. *Co. 3. Highways Case. Stamf. Pl. Cor. 3. 10.*

Friars.

There were of these Friars, when they were here, four principal Orders: *Minor, Augustines, Preachers, and Carmelites*; of which all the rest came. The Friars observant were not of any Cloister, Covent or Corporation combined together as the rest, but tied themselves to observe the Rites of their Order, and more strictly than the Conventuals did, and out of singularity of zeal did separate themselves from them, living in places and companies of their own choosing. *Stat. 4 H. 4. 17. 25 H. 8. 12.*

Fustians.

For the true making of Fustians, see *Stat. 11 H. 7. c. 27.*

What Fustians shall be made in *Norwich*, see *1 & 2 P. & M. 14.*

Who may search their houses, and oversee their Fustians, *39 Eliz. 23.*

CHAP. XCI.

Of Franchises and Liberties.

Franchise, what it is.



Franchise is a Royal Privilege in the hand of a Subject; or some Benefit, Power or Freedom, that some persons and places have above others, which originally was derived from the Crown, but now at last by continuance of time is claimed and taken in some cases by Prescription. And of these Franchises there are many sorts.

The kinds. Fairs and Markets.

Some whereof do stand in having; as the goods of Felons, of Fugitives, and of outlawed persons, Waifs, Strays, Deodons, Treasure-trove, Wreck, Markets, Fairs, Warrens, Leets, Courts, and the Customs of divers Villages, Burroughs and Corporations, Conuance of Pleas, Hundreds, and the like, *Dyer 44. Plow. 169.* And for Fairs and Markets, see the Statutes of *2 Ed. 3. 15. 5 Ed. 3. 5. 27 H. 6. 5. 17 Ed. 4. 2. 2 & 3 P. & M. 7. 31 Eliz. 12.*

Señ. 1.

Some of them do stand in doing; as to make Justices of the Peace to pardon Felonies, and the power of Corporations, and divers other places, and the like.

Some of them do consist in discharge; as to be exempt from serving in Juries, from payment of Subsidies, from the jurisdiction of other Courts, from payment of Toll, and the like.

And amongst all these some are more Royal, as the Franchises of the Principality of *Wales*, and Counties Palatine; also goods of Felons, of Fugitives, and of outlawed persons; power to pardon Treason or Felonies, or to make Justices pardon Felony or Treason, and the like. And these it seems are so appropriate to the places and persons, as that they are not grantable over to any other place or person. But others are less Royal, as Markets, Fairs, and such like; and these it seems are grantable over, unless they be real and annexed inseparably unto some place, *St. 27 H. 8. ch. 25.*

Amongst these also some are real, i. inseparably annexed to some place, as divers Customs of divers places, Burroughs and Corporations, the Jurisdiction and Privileges of the Principality of *Wales* and Counties Palatine, Warrens, and the like; and these be not grantable to any other place by them that do enjoy them: 1. Some are personal; and these are sometimes inseparable from the person, and not grantable to another by him; as exemption of Juries, exemption of Toll, and the like. But the most of these, as Waifs, Strays, Courts, and the like, are grantable from one to another, as other things are: For which see *Grants*. Some of these may be claimed by Prescription, and some not: For which see *Prescription*.

Goods

Goods of Felons, Fugitives, or of Outlawed persons, are the goods of one that is attached or outlawed for Felony, or outlawed otherwise, or doth lie for Felony, which by Law are forfeited for Waifs, Strays, Dependants, Treasure-trove, Wreck. (See their several Titles.)

Goods of Felons, what.

Markets and Fairs are public meetings for Trading and Traffick. For which see Stat. 2. Ed. 3. 15. 5 Ed. 3. 1.

Warren is a Franchise, or privileged place of pleasures by grant of the King, or Prescription, for the preservation of those Beasts and Fowls which are Beasts and Fowls of Warreds, as Hares, Conies, Pheasants and Partridges. And this a man may have by grant of the King, or Prescription, and it may be in a mans own ground, or another mans. And if another do chase or kill any Beasts, or Fowl of a Warren, the Owner may have an Action of Trespass against him. And this may lie open, and need not be inclosed, as a Park must. See more in Parks and Forrests, which it seems is in a manner all one with this, Cap. upon Litt. 23. b. Plow. 430. See more in Forrests.

Warren, what.

Prescription.
Trespass.

It is a privilege that some Town or place have by the Kings grant, by which they have ability to hear and determine matters and causes amongst themselves, and to call their causes out of other Courts, if they be there questioned, or impleaded, by motion to the Court, and a request of Conscience, that the matter may be heard and determined by them in their own Court. Which must be at the beginning of the Suit, for if once the Court be possessed of the Suit, it is too late to demand Conscience for that Suit. And therefore such as have this Franchise, are used to have Attornies or Bailiffs at Westminster to demand Conscience (if any Suit come into the Court there) at the very beginning. And this a man must have the Kings grant for, for he cannot prescribe for it, but yet it seems one may prescribe, *tenere placita* in his own Court before his Bailiff in such a place. But Conscience of Pleas lieth always in demand, and is of Record. See Stat. 6 H. 6. ch. 26. Dyer 202. 9 H. 7. 11. For Leets, view of Frankpledge, and Court-Baron, see Courts.

Conscience of Pleas, what.

Prescription.
Tenere placita.
Court-Baron.

This is a Franchise that some Hundreds and places have, that the Sheriff cannot come there to do any Execution, or execute any Writ without wrong to the Lord of the Franchise: And therefore they use to send their Warrants to the Bailiffs of those Franchises to do it. See Stat. of Lincoln. 9 Ed. 2. But if the Bailiffs of those Franchises do not their office, then the Sheriff may do it by a *Non omittas*. 13 Ed. 1. 39. Lit. ch. Burgage. 40 Ass. pl. 37.

Retains Breviary, or Return of Writs, what.

Non omittas.

Burroughs are ancient Villages incorporate, from whence do come Burgesses of Parliament: And these have divers Franchises, Freedoms and Exemptions that other places have not; as to hold Pleas, and to do divers other things. Amongst which Burroughs, London, Chester, Canterbury, and divers others have divers and sundry Franchises annexed to their Corporations.

Places of Priviledge.
Burroughs.

The Principality in Wales are certain Shires in Wales which did belong unto the Kings eldest son, that have certain Franchises; of which read Stat. 38 H. 8. ch. 2. 27 H. 8. 26. Cromp. Jur. f. 137, 138. Plow. 123. 20 Jac. 1. 27 Eliz. 9. 3 Eliz. 23. 34 & 35 H. 8. 36.

Stat. 2.
Principality of Wales, what.

The Counties-Palatine are four, *Palatines*, (i.) Lancaster, Chester, Durham, and Ely, which have special exemption and jurisdiction: For they have jurisdiction of all causes that do arise within their own limits and Counties, and the Kings Writ doth not come there; and they have the same authority in a manner that the Palace of the Kings Royal Court hath. For which see the Statute of 37 H. 8. c. 5; whereby their power is somewhat abridged. 27 H. 8. 24. 33 H. 8. 39.

Counties Palatine, what.

The Cinque-Ports are five Haven-Towns, *Romney, Hythe, Dover, Hastings, Sandwich*; which because they lie (being Eastward towards France) upon the Narrow-Seas, and are dangerous for an Invasion, therefore they have had antiently, and so still have allowed to them divers Franchises and Priviledges which are upon Record and well known: As to be quit of Subsidies, to be freed and exempted from the jurisdiction of any other Courts, and to have their causes heard and determined among themselves; to have a special Governor, who is called Lord Warden de Cinque-Ports, and divers other things. St. 2 H. 5. 6. Mag. char. c. 9.

Cinque-Ports, what.

Tribute or Custom, Impost, what.

Tribute, Impost, Toll and Custom, seem to be one thing; a payment from private men to public use. But Custom properly is the profit which the King maketh of Wares transported; and Impost is the Tax received by the King for the Wares that are imported from other Nations in to us at any Haven here, *Stat. 31 Ed. 3.*

Toll or Tonnage, what.
Turn-Toll, what.

It seems there are three kinds of Toll, Tributes or Customs paid for passage. There is Turn-Toll, which is a sum of money that is to be paid by every one that doth buy any Beasts or Cattel in any Fair or Market; which the Buyer, and not the Seller (unless it be the custom of the place) must pay: And if the custom be that one must pay for it, though he do not sell it, then it must be paid accordingly; and if he refuse to pay in, they may distrain the Beasts or Cattel, unless the party be exempted from the payment of Toll, as one may be; (Of which see after Exemption from Toll.) And this one may claim and have by the Kings grant; or by Custom or Prescription. See *Toll, Chap.*

Toll-travers, what.
Toll-through, what.

Toll-travers is, where one doth claim to have something for all the Beasts that are driven over his ground.

Toll-through is, where any Town doth prescribe to have somewhat for every Beast that doth go through the Town; which it seems hath been given most commonly for the repairing of some Bridge, or some High-way, *Stat. 2 & 3 Ph. & M. ch. 7.*

Stallage, Pickage, what.

Stallage is money paid for pitching of Stalls in Markets or Fairs; and Pickage is money paid for breaking the ground to do it. This is a kind of Toll. See *Toll in Chap.*

Exemption of Toll, what.
Breve essendi quietum de tollonio, what.

Exemption of Toll is, where the King hath granted to any man to be free from paying Toll. In this case if any body shall distrain him, he may have an Action of the Case; or if any one require it, he may have a Writ to the Sheriff, *De essendi quietum de Tollonio.* And this one may have by the Kings grant; or Prescription.

Tonnage, what.

Tonnage is a Custom or Impost for Merchandise brought or carried in Tons and such like Vessels from or to other Nations after a certain Rate in every Ton, *Stat. 14 Ed. 4. ch. 3.*

Some also say, it is taken sometimes for a Duty due to the Mariners for unlading their Ship arrived in any Haven after the Rate of every Ton, *St. 1 Jac. 33. 3 Car. 1. Act March 11. 1650.* This is always set by Parliament.

Poundage, what.

Poundage is a Subsidy granted to the King of all manner of Merchandise of every Merchant-Denizen and Alien carried out of this Realm, or brought into the same by way of Merchandise, to the value of Twelve pence in every pound, *11 Ed. 6. ch. 13.* Or (as others have it) a Duty due from Mariners for unlading their Ship arrived in any Haven after the Rate of every Ton, *Stat. 1 Jac. 33. Act March 11. 1650.*

2. What Franchises may be claimed by Prescription, and what not.

Any man may make title to, claim, and have Treasure-trove, Waifs, Strays, Wreck, Commons de Pleas, Courts of Leets, Hundreds, &c. Infangtheef, Outfangtheef, to have a Park, Warren, Royal Fishes, Fairs, Markets, Frankfoldage, the keeping of a Gaol, and the like, by usage and prescription; and these may be gained and kept without matter of Record. But so he cannot for such Franchises as cannot be seized before the cause be of Record; as the Goods and Chattels of Traitors and Felons, Outlawed persons, Fugitives, of those that be put in Exigents, Deodands, to make a Corporation, Conservators of the Peace, or a Coroner; and these cannot be claimed by Usage in the Country without matter of Record, as without Charrer, or the like; unless it be by a mean as incident to a County-Palatine, which one may have and claim by Prescription, *Co. upon Lit. f. 114.*

Sec. 3.
3. When, and what Franchises shall be forfeit, and how:
By Non-user,
Abuser,
Refuser.

Some Franchises may be forfeited by a Non-user, some by Refuser, and most by Abuser. Of which see somewhat in *Forfeiture de Offices*: As if a Clerk of the Market do not use his Office, he doth forfeit it, *Co. 9. 99.*

If one have a Fair or a Market one day, and he keep it another; as if his Grant or Prescription be for Wednesday, and he keep it Thursday, by this he doth forfeit it, *Co. 9. 50.* So if a Fair or Market be granted a man for one day in the week, and

and he keep it two days, 22 *Aff.* 34. But in this last case he forfeits only that which he hath usurped.

If one keep a Fair or Market two days, and being questioned by the King, he claimeth both days by the Kings grant, and afterwards it is found he hath but one day; by this he doth forfeit both days, *St.* 3 *Ed.* 3. c. 15. 2 *H.* 7. 11.

If one have Assise of Bread and Beer, and Pillory-Tumbrel, and he do not use it, he forfeits his Franchise.

A Lord of a Franchise may lose it for default in pursuit or arresting of Felons, *St.* 3 *Ed.* 1. c. 9. See *Crompt. Jur.* in all. Where Franchises are incident of common right, there the Forfeiture of the one is the Forfeiture of the other; as the abuse of the Court of *Pipowders*, is the Forfeiture of the Fair. So where they are subordinate one to the other. But where they are contradistinct *Species*, or by several Titles or Patents, it is otherwise. *Hil.* 17 *Jac.* B. R. *Court.*

In some cases for the Abuser of a Franchise a man shall be fined, but shall not forfeit his Franchise. So for usurping a Franchise a man shall be fined, or for usurping more then one ought to have: But if one take less Franchises then he hath right to, this is no Forfeiture, *Bra. Franch.* 37.

If one have a Fair or Market-day by Grant or Prescription granted to him *Wednesday*, and he keep it on that day, and another also, his Market or Fair on *Wednesday* is not forfeit, 22 *Aff.* 3. 4.

If one claim one day by Patent, and another by Prescription, and the last be found against him, this is no Forfeiture of that he hath by Grant. So that not using of a Fair or Market, it seems, is no Forfeiture, *C.* 9. 50. 2 *H.* 7. 1. c. 30.

A Market or Fair is not forfeit by taking of Toll where none is due, or taking more then is due, *Hil.* 17 *Jac.* B. R. by the Court: Or by keeping it longer then the time, *Stat.* 1 *Ed.* 3. 15.

An Abbot had a Franchise of Gaol-delivery, and he kept the Prisoners too long, and would not be at charge to make deliverance, it was adjudged a cause of Forfeiture, 8 *H.* 4. 18.

A man had a Prison, and he kept Prisoners for Felony after they were acquitted and had paid their Fees; it was adjudged a Forfeiture of the Franchise for ever, 20 *Ed.* 4. 6.

If a Franchise of taking Toll be abused, as if excessive Toll be taken, it is a Forfeiture, *Westm.* 1: 30. So if they take for Murage more then they ought to take by their Grant, (*Idem.*) If the Town be the Kings, he may seize the Franchise. So if it be another Lords, and be done by his consent. If it be a Bailiff or other Officer, he shall restore as much more as was taken, and suffer forty days Imprisonment, (*Idem.*)

No Subject shall have power to pardon Felonies or the Accessories, or any Outlawry for such offences; nor to make any Justices of Eyre, Assise, Peace, Gaol-delivery. But other Franchises a Subject may have, such as the goods of Felons, of Fugitives, of outlawed persons, Waifs, Estrays, Deodands, Treasure-trove, Wreck, Markets, Fairs, Leets, and the like. But some of these may be had by Prescription, some must be had by Patent from the Lord Protector. See *Brownlow*, 2 *par.* 219.

Ad quod damnum, is a Writ which ought to be sued before the King grant certain Liberties, as a Market, Fair, or the like, that may be prejudicial to others; and by this it may be enquired of. *Terms of the Law.*

It is a Writ lying, where a Sheriff doth return upon a Writ to him directed against a person dwelling in a Franchise; That he hath sent unto the Bailiff of the Franchise that hath the Return of Writs, and he hath made him no answer, or hath not served the Writ: Then the party may have this Writ to command the Sheriff to enter upon the Liberty, and to execute the Writ himself, which otherwise he could not do without subjecting himself to an Action of the Case. And withall the Bailiff of the Franchise is to be warned; and if he come not at the Return of the Writ, then all the Writs that go forth afterwards in that Suit, shall be with a *Non omittas*. 13 *Ed.* 1. 39. *St. Lincoln*, 9 *Ed.* 2. 2 *Ed.* 3. 5.

4. What Franchises a Subject may have, or not, and how.

Ad quod damnum, what, Non omittas, what.

Self. 4.
Quo Warranto,
what,

It is a Writ for the King, lying where one hath no title to a Franchise, as having never any, or having forfeited what he had, to recover it into his hands. For by this Writ the party that doth take the Franchise, is required to shew by what title he doth hold it; and if he do not appear, then the King may seize the Franchise *more districtionis*, by the Sheriff; and then the party hath a time by a *Replevin* to avoid that Seizure; and if he doth it not within the time, then he doth lose the Franchise for ever. And if it be found that he do use the Franchise without the Title, then the Judgment is, he shall be ousted of it. If it be found he hath abused it, then the Judgment shall be, that he hath forfeited it. And this is to be brought before the Justices of Eyre or of Assize; and therefore the allowance of a Franchise before them bindeth the King: Otherwise upon a Suit in the Common-Pleas. See *Crompt. Jur.* 144, 145. *Bro. Quo Warranto*, 5. 7.

When Franchises shall be said to be extinct, and how.

If the King grant any Privilege, Liberty or Franchise, which be in his own hands as parcel of the Flowers of his Crown; as the Goods and Chattels of Felons, Fugitives, or outlawed persons, Waifs, Estrays, Deodands, Wrecks, and the like: If these come again to the King, they are extinct, and the King hath them in right of his Crown; and if they were appendant before, the appendantie is now gone. *Contra* of Fairs, Markets, Hundreds, Leets, Parks, Warrens, and the like, be they appendant to Manors or otherwise in gross, they are not extinct by unity in the Kings hand, *Co.* 9. 25, 26. *Dyer* 44. *Plow.* 219: 15 *Ed.* 4. 7.

For the duty, office, and charge of Bailiffs of Franchises in making Retorns, &c. and how they are to be punished for their misdemeanor herein, See *Stat.* 5 *H. 6. c. 2*: 42 *Ed.* 3. *ch.* 11. 2 *H.* 5. 3. 13 *Ed.* 1. 39. 12 *Ed.* 1. 5. 1 *Ed.* 3. 5. 27 *H.* 3. 24, 25.

For the Power of the Sheriff and others within Franchises and privileged places, See *Stat.* 27 *H.* 3. *c.* 24.

What things Lords of Franchises may do, and have within their Franchises, See *Stat.* 1 *Jac.* 22. 27 *H.* 6. 5.

See more of these things in *Prescription*, *Extinguishment*, *Grant*, *Toll*, *Forfeiture*, *Priviledges*.

For Liberties and Franchises in general, these things are further to be known out of the old Statutes of *Mag. charta*, 1. 9. 37. *St. de quo Warranto*, 18 *Ed.* 1. and 30 *Ed.* 1. *De tallagio non concedendo*. Time of *Ed.* 1. *c.* 4. 1 *Ed.* 3. 2. 9. 14 *Ed.* 3. 1. 1. 25 *Ed.* 3. 3. 1. 6 *R.* 2. 1. 1. 2 *H.* 4. 1. 27 *H.* 8. 24. 32 *H.* 8. 10.

1. That the people of the Nation are to have and enjoy their antient Liberties without impeachment.

2. The Citie of London, and other antient Cities and places are to have and enjoy their antient Liberties and Priviledges.

3. The Clergie, and all others of every rank and order, are to enjoy their Liberties, and the King was not to impeach them in any sort by *Quo Warranto*, or otherwise.

4. Men that claimed Franchises, were to have shewed them, and had allowance of them before the Justices of Assize, or they were to be seised.

CHAP. XCII.

Of Games and Playes.



S to Playes and Games, these things are to be known.

Playes and Games.

1. None may keep or maintain a house or place of unlawful Games, under pain of Forty shillings; and none may haunt or use such places, in pain of Six shillings eight pence.

2. Justices of Peace without, and Head-Officers within Corporations, may search for them that keep, or such as haunt such houses suspect; and finding any, put them in Prison until they put in good Security never to keep or use such Games again.

3. No Artificer or his Journyman, Husbandman, Apprentice, Labourer, Servant at Husbandry, Mariner, Fisherman, Waterman, or Servingman shall play at Tables, Tennis, Dice, Cards, Bowls, Closh, (i.) casting of a Bowl at nine Pins of wood, or nine Shank-bones of an Oxe or a Horse, Coiting, Logating, or any other unlawful Game our of Christmasts, or then out of their Masters house or presence. in pain of Twenty shillings. And none may play at Bowls in open place out of his Garden or Orchard, in pain of Six shillings eight pence.

Closh, what.

4. The Servant by his Masters leave and with him, or other Gentleman resorting to his Masters house, may play at Cards, Dice or Tables.

5. The Master that hath an Hundred pounds, may license his Servant to play at Bowls or Tennis.

6. All Licences of the King to keep such houses and places are void, *St. 33 H. 8. Archery.*

6.9. 2 & 3 P. & M. 6.9.

7. Parents and Masters must provide for their Sons and Servants, betwixt seven and seventeen years old, a Bow and two Shafts, and cause them to exercise shooting in pain of Six shillings eight pence.

8. Sons and Men-servants betwixt seventeen and sixty years old, shall be furnished with a Bow and two Arrows, and use to shoot therewith, under pain of Six shillings eight pence.

Buts.

9. The Inhabitants of every Town shall continue their Buts in good repair, in pain of Twenty shillings for every three moneths default.

See other things of Bows, Bow-staves, Arrow-heads, and Fletchers, *St. 33 H. 8.*

6.9. 8 Eliz. 10. 13 Eliz. 14. 1 R. 3. 11. 12 Ed. 4. 2. See Arrow-heads.

May-poles.

10. No May-Poles may be set up or continued, *Ord. 6 April 1644.*

Cock-matches.

11. No Cock-matches, nor meetings for Cock-fighting may be; but it may be punished for an unlawful Assembly, *Ord. March 17. 1653. See more in Guns, Hawking, Hunting, and my Justice of Peace Book, 2 par. in the Charge.*

12. Bear-baitings, Bull-baitings, Enterludes, Common-Playes, are declared to be unlawful Games by the Statute of 1 *Car. 1.* and therefore to be punished by 33 *H. 8. 9. Stage-Playes.*

Cock-matches are forbidden by *Ord. 31 March, 1654.*

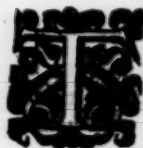
13. All Stage-Players are to be whipped as Rogues, and enter into Recognisances with Sureties not to do so again: And he that is present at such a Play, forfeits five shillings. *Ord. Feb. 11. 1647. St. 3 Jac. 21.*

14. How all sports are forbidden on the Lords day, See *Lords day.* And for Playes and Games, *Stat. 2 & 3 Ed. 6. ch. 14. St. 12 R. 2. ch. 6. 2 & 3 Ph. & M. 9.*

CHAP. XCIII.

Of Gard or Ward, Gift and Grant.

SECT. 1.
Gard or Ward.



His word *Gard* in French signifieth a Custody. And sometimes it is applied to them that attend upon the safety of the Lord Protector. Sometimes it is applied to them that have the Education of Children under age, or of an Idiot. And sometimes also it is taken for a Writ of Ward, of which there are three sorts; A Writ of *Rights of Ward*, *Ejectment of Ward*, and *Ravishment of Ward*. In the second signification also it is most commonly applied to the Wardship of such an Infant, whose Ancestor held his Land by the Tenure of *Capite* or Knights service; and by reason of that Tenure, his Child, be it male or female, must be in the custody of his Lord during its minority.

Gardein, what.

The kinds.
Gardein in Chivalry, what.

And hence it is, that he that hath the protection and education of such an Infant, is called a Gardein. For a Gardein is one that hath the wardship or keeping of any person, or that which is his, or both. And of Gardeins there have been divers kinds; as Gardein in Chivalry, which was one that had the wardship and custody of an Heir, an Infant, whose Ancestor died seised of Land held of the King in *capite*, or of a common person by Knights service. Both which kind of Wardships are taken away by an Order of the Lords and Commons in Parliament, 24 Febr. 1645. in these words:

It is this day Ordered by the Lords and Commons assembled in Parliament, That the Court of Wards and Liveries, and all Wardships, Liveries, Primer-Seisins, and Ousterlemains, and all other charges incident or arising for or by reason of Wardships, Livery, Primer-Seisin, or Ousterlemain, be from this day taken away: And that all Tenures by Homage, and all Fines, Licences, Seisures, and Pardons for Alienation, and all other charges incident thereunto be taken away: And that all Tenures by Knights service either of the King or others, or by Knights service or Socage in Capite of the King, be turned into free and common Socage.

And therefore we shall not need to say any thing to them. There are other Gardeins that do yet continue; as Gardeins in Socage, Gardeins in Nurture, Gardeins in Nature. Some make more, and distinguish Gardeins into Gardeins by Common-Law; so were Gardeins in Chivalry: By Nature, as the Father to his eldest Son: By Socage and because of Nurture, as Father or Mother, without assignation: Or appointed by Will or by Custom, as Orphans in Cities. So that some Gardeins are made by the Law, and some by the Will of the Ancestor. See for these Divisions, Co. upon Lit. 76. 88. D. & S. 149. Co. 5. 126. 6. 71.

Grantee of a
Ward, what.
Committee of a
Ward, what.

He that had a Wardship by a Tenure in *capite* committed to him by the King, was called the Grantee of a Ward: And if it had been committed by the King, he was called a Committee of the Ward.

SECT. 2.

The Wardship by Tenures in *capite* and by Knights service being gone, we shall not stay upon them to shew the office and duty of the Gardeins; nor where such Heirs of Ancestors that do hold Lands by these Tenures shall be in Ward, or not; nor where there shall be a Wardship for a third part, upon the Statutes of 32. and 34 H. 8. Nor where the Heir shall be out of Ward, or not; or of Marriage, Forfeiture, or value of Marriage: But we shall pass it over, and say no more but this, That these Tenures had many Incidents annexed to them; as Wardship of Body, Marriage, Aid, Homage, Escuage, Primer-Seisin, and drew to them the body, lands, and disposal and profit of the marriage of the Infant, which was so much as the Lord tendered in marriage: And this the Heir at his full age was to pay the Lord, or the Lord was to keep the Land for it; or he might have had a Writ called *à valore maritagii*. And if the Heir had married himself during his Minority, being of years of consent, without the consent of his Guardian, he had forfeited to his Gardein the double value of his Marriage. See for all this, Co 6. 70. Merton, ch. 7. Dyer 255. 2 H. 7. 9. Co. 5. 127. Westm 1. 22. Co upon Lit. 76. 81, 82, 83. Co. 2. 93. 10. 83. 11. 24. 8. 371. and many other Books.

Aid.
Marriage.
Escuage.
Valore maritagii, what.

Forfeiture of
Marriage,
what.

A Gardein in Socage, is he that hath the Wardship or Custody of an Heir an Infant, whose Ancestor died seised of Land held of the King, or any common person by Socage-tenure, or in that nature, as by Petit-Serjeanty, Copy of Court-Roll, or the like. And as to this, these things are to be known.

Gardein in Socage, what.

1. This Wardship is by reason of Tenure also, and shall go to the next of kin unto whom the heritage by his death may not descend: As if Land descend on the part of the Father, then the next of kin on the part of the Mother shall have the Wardship, and so on the other side; and not such a Kinsman as may have or hope for any benefit by his death.

The nature of this Wardship, and the power and duty of this Gardein.

2. This Wardship doth differ from the Wardship of Heirs of *Capite* and Knights-service land. For, 1. The Gardein in Chivalry and by Knights-service had all to his own use, and was to hold it till the Heir, if he were a Son, were one and twenty years old. But this Gardein is to hold and take all the profits of the Land till the Heir be fourteen years old only, and then he must account for and pay all the profits to the Heir. And after fourteen years of age, the Ward or his Executors or Administrators may call the Guardian to an Account, by a special Action of Account given in the Case; for which see *Accounts*. 2. If the Gardein in Chivalry or by Knights-service had died during the minority of the Heir, the Executors or Administrators of the Gardein must have had it as a Chattel. But in this case, not the Executor or Administrator, but the next of kin to the Heir: And if it were a Woman Covert that had it, not her Husband, as in the former case, but the next of kin to whom the heritage may not descend, shall have it. 3. A Gardein in Chivalry or Knights-service might have sold or granted away his Wardship; but this Gardein in Socage cannot grant away this Wardship to another. And if the Wife be this Gardein, and she and her Husband let the Land, and the Husband die; the Wife may enter and avoid the Lease. 4. If the Gardein in *capite* or Knights-service had married the Heir within age, the Gardein should have had the benefit of it. But if Gardein in Socage marry his Ward within fourteen years of age, he must account to the Heir for the Marriage also, and pay so much as any man *bona fide* had offered, or would have given in Marriage.

Account.

Chattel.

5. But in this they both agree; that the Gardeins duty and office is to give the Heir education, and to preserve his Inheritance and the Writings of his Land, and not to make any waste or destruction upon the Land.

6. If an Ancestor be seised of Rent-charge, Rent-service, or Common, or such things which lie not in Tenure, and die, his Heir within fourteen years old; in this case the Heir may choose his Guardian. But if he be so tender of years as not able to choose, it were fit the next of kin to whom the heritage may not descend did dispose him and it, unless the Father by will otherwise appoint it. But if there be a Gardein in Socage for other Land, it were fit he were Gardein for all. But whoever shall receive these Rents, must be accountable to the Heir in an Action of Account for them. See for all these things, 28 Ed. 1. Stat. 1. *Martb. c. 17. Co. upon Lit. 87. Lk. 1. c. 4. Plow. 196. Co. upon Lit. 87. 89.* And the danger of such a Guardians betraying of his Trust in the marrying of his Ward, See *Infant and Marriage*.

7. Guardian in Nurture, is he that is made so by Will; which is where a man holdeth goods or lands not held in *capite*, Knights-service, or in Socage, and giveth them to his Child; and doth by his Will appoint a Guardian to the body of his Child till such a time: And this being confirmed by the Ordinary, was wont to be admitted by our Law. And if the Father did not appoint one till his age of fourteen years, then the Ordinary did appoint one.

See 3. Tutor or Gardein in Nurture what.

8. But now the Law will do the same without the Ordinary, that then it did with the Ordinary. At fourteen years old and after, the Infant may choose his own Guardian. Also the Father by his Will may appoint what Guardian he please for his goods or lands held in Socage; but for Copihold-lands, the Custom of the place must be observed. See for these things, *Co. of Copihold, fess. 22. Nay*

The

Gardein in Nature, what.

The *Gardein* in nature is the Father, who is to have the Wardship of his Son and Heir apparent so long as he liveth; for during the Fathers life, the body of such Son was not to be in Ward to any other body, but in special cases. See *Plow.* 295. 304. *F.N.B.* 90. 143. 33 *H.* 6. 55. See *Infant*.

Gard by cause of Gard, what.

This is where one hath the Wardship of a Minor, because he is *Gardein* to his Lord, being likewise in his Minority. *Old N.B.* 94.

Droit de Gard, what.

Right of *Gard* is a personal Action, or a Writ to recover the Body or Land of an Heir that should be in Ward to him, by reason of a Tenure in *capite* or Knights service. It is called also (as it seems) *Droit de custodia terra & hereditatis*, or *de communis custodia*. *F.N.B.* 139. *Old N.B.* 89. And if it be for the Body, this Writ lieth for a Guardian in Socage, *Merton* c. 6. *Co.* 9. 129.

Droit de custodia terra & hereditatis; or, *de communis custodia*.

This is a personal Action or a Writ lying for a *Gardein* in Chivalry or Socage, where he is put out of the Land, and not out of the Body, for his relief hereof. *F.N.B.* 141.

Ejection of a Gard, or *Ejectione custodia* what.

This is a Writ lying where the Body is taken away, and not the Land; and by this the *Gardein* will recover the Body, if he be not married; and if he be, he shall recover damages. *Co.* upon *Lit.* 89. *F.N.B.* 139.

Revisement del Gard, what.

This is where the Heir before his age, and before he hath satisfied, the Lord doth enter upon him and put him out, being Guardian in Chivalry or by Knights service. *F.N.B.* 197.

Intrusion del Gard, what.

Etate probanda, was a Writ of Office to enquire again of the full age of an Heir, being found to be within age by one Officer, when he is able to prove he is of full age. *F.N.B.* 157.

Disparagement, what.

This was taken for a wrong done by the Guardian in Chivalry to his Ward, by marrying him or her within age of consent to any unworthy person, and make for him or her: For by this means the Guardian might have lost his Ward and all the profits of his Wardship. *Merton* c. 6. 7. *Co.* on *Lit.* 80.

Señ. 4.

Livery was, where the Kings Tenant in *capite* is dead, and his Heir is of full age at the time of his death, or he hath been in Ward, and is now become of full age: in this case he had the possession delivered unto him by a Writ out of the Kings hands, which was called a Writ of Livery. And Primer-Seisin was the right the King had to the first possession of Lands and Tenements held of him in chief, whereof his Tenant died seised, until the Heir had performed the Service due for it. These Liveries and Primer-Seisins, and all charges incident and arising thereby being taken away by the same Parliament-Order, we pass them by.

Primer-Seisin, what.

Ouster le main, did signifie a Judgment given to him that tendered a Traverse, or sued a *Monstrans de droit*, or a Petition. For when it did appear upon the matter discussed, that the King had no right to the Wardship he seised, then Judgment was given in Chancery, that the Kings hands should be removed; and thereupon an *Amoveas manum* was awarded to the Exchequer, that the Heir should have his Land again. For after the death of the Kings Tenant, the course was to enquire by office, and by Inquest of Office the death and Tenure was found, and so the King was entitled to the Wardship. And this Office found, if it had been false, might have been avoided by a Traverse, *Monstrans de Droit*, Petition or Pleading. Of which you may read, *Stamf. prer.* 73. 42. *Finches ley* 324. *Plow.* 488. and in many other places. This also by the general Order aforesaid is taken away, and therefore we pass it over. So also Licence for Alienation, Esuage, Aid, Homage, Fealty, and the rest of the things incident to this Tenure is gone.

Ouster le main, or *Amoveas manum*, what.

Aid, Homage.

Mesne-profits or Rates, or Issues.

Mesne-Rates, Profits or Issues of Lands, was nothing else but the Profit of Land which the King was to have for a time, until he were satisfied some duties: As when the Heir of his Tenant in *capite* being of full age did die before tender of his Livery, the time of his death. And so in some cases he was to be answered from the time of the Title found; as upon an Alienation in Mortmain, from the time of the Alienation as it is found by Office; and upon Letters-Patents annulled for insufficiency, from the time of the Grant, as it is found by Office. See for this, 43 *Ed.* 3. 11. 11 *H.* 4. 5. 33 *Ed.* 1. *de Escheatoribus*. 28 *Ed.* 3. c. 4. *Dyer* 308.

Diem clausit extremum is a Writ that did lie where the Kings Tenant, that held of the Crown in *Capite*, or by Knights Service, or in Socage died, then this Writ was directed to the Escheator to enquire of what Estate he died seised, who was his next Heir, and his Age, and the certainty of the Land, the value, and of whom it was held, and who took the profits. And this Writ was to be sued out within a year after the death of the party, and could not be had after that time, but then there must be had the Writ called a *Mandamus*, which is of the same nature. And in case where the Ancestor had died the Kings Ward, there must have been sued out the Writ called a *Devenerunt*, which is of the same nature, and differeth in circumstance onely. But all these Writs are now useless, the Tenure in *Capite* being taken away.

Señ. 5.
Diem clausit extremum, what.

Mandamus, what.

Devenerunt, what.

Que plura, what.

Melius Inquirendum, what.
Datum est nobis intelligi, what.

Que plura was a Writ used onely where an Office was found by a former Writ, and some of the Land was left out of the Office, then this was given to supply it. So also was the *Melius Inquirendum* to supply a Defect in a former Office, found by virtue of another Writ. And the *Datum est nobis intelligi*, was a Writ that did lie where upon a former Office the Land was found to be held of another Lord, and not of the King. And there were Records to shew they were held of the King, that it might be again enquired of. But all these Writs are laid aside at this day.

Of a Gift.

THis word importing no more, then the transferring of the 'property of a thing from one to another, is of larger extent then a Feoffment, which is always applied to an immovable thing; for this is often applied to movable things also, as Trees, Cattle, Household-stuff, &c. The property whereof is, and may be altered as well by Gift, as by Sale or Grant. And in this sense, a Gift is sometimes by the Act of the Party, as when one man doth give a thing to another. And this is, or may be either by word or by writing: And sometimes it is by Act of Law, as when a Woman is married to a Husband, or one is made Executor to another; in these cases by the marriage onely, and taking of the Executorship, the Law gives all the Goods of the Woman to the Husband, and of the Testator to his Executor. So where one doth take my Goods as a Trespasser, and I recover damages for them upon a Sute in Law; in this case the Law doth give him the property of the Goods, because he hath paid for them. But this word Gift is sometimes taken more strictly, and applied to a conveyance or passing of an Estate of Lands or Tenements to another in Tail, wherein this word *Dedi* is most commonly used. And then he which doth so give the Land, is called the Donor, and he to whom it is given, the Donee. And this for the most part is by Deed, though it may be otherwise. And for these Deeds of Gift of immovable or movable things; see *Deed and Grant in toto*, wherein all the Learning touching this matter is involved. And so we pass to a Grant.

Gift, what.

Donor, Donee.

Of a Grant.

THis word taken largely, is where any thing is granted or passed from one to another: And in this sense it doth comprehend Feoffments, Bargains, and Sales, Gifts, Leases, Charges, and the like; for he that doth give, or sell, doth grant also. And thus it is sometimes in writing, or by Deed, and sometimes it is by word without writing. But the word being taken more strictly and properly, it is the Grant, Conveyance, or Gift by writing of such an Incorporeal thing as lieth in Grant, and not in Livery, and cannot be given or granted by word onely without Deed: Or it is the Grant of such persons as cannot pass any thing from them but by Deed, as the King, Bodies Corporate, &c. And this albeit it may be made by other words, yet it is most commonly made by this word [*Grant*] as being most proper to this purpose. *Co. super Littl. 172. 9. Finches Ley 29.*

Grant, what.

Know therefore that amongst Hereditaments, some are such as are said to lie in Livery, i. such as whereof Livery of Seisin may be made, as Manors, Houses, Lands, &c. And some are such as do not lie in Livery, i. whereof no Livery of Seisin can, nor need to be made, but they pass by the Delivery of the Deed, without

Grantor Grantee.
The Kinds.

any more, and of this sort are Rents, Reversions, Services, Advowsons in gross, and the like; which things cannot pass from man to man without Deed or matter of record, which is of a higher nature than a deed.

And he that makes this grant is called the Grantor, and he to whom it is made is called the Grantee, *Co. super Lit. 49.*

It is taken here in the largest sense, as that which doth comprehend both. And so some grants are of the land or soile it self, and some are of some profit to be taken out of or from the soile, as Rent, Common, &c. And some are of goods and Chattels, and some are of other things, as Authorities, elections, &c. And they are made sometimes by matter of Record, and sometimes by Deed or writing in the country, and sometimes by word without either. Some grants also tend to charge the grantor with something he was not charged with before, and some to pass something out of him to the Grantee, and some tend to discharge the Grantee, of something wherewith he was charged or chargeable before, and whereof he is now hereby discharged.

3. Things necessarily requisite to every good grant.

Regularly these things are requisite in every good grant or gift. 1. That there be a Grantor, Donor, &c. and that he be a person able to grant, and not disabled by any legall or naturall impediment. 2. That there be a Grantee, Donee, &c. and that he be a person capable of the thing granted, and not disabled to receive it. 3. That there be a thing granted, and that the thing be such a thing as is grantable. 4. That it be granted in that order and manner that Law requireth; as where the thing is not grantable without Deed, that it be done by Deed. And if it be by Deed, that the Deed have apt words to describe and set forth the person of the Grantor, and Grantee, and thing granted, &c. and that all necessary circumstances, as sealing, and delivery, and livery of seisin, and attornment where it is needfull, be observed. 5. That there be an agreement to, and acceptance of the grant or thing granted by him to whom it is made, and for default in either of these particulars a grant may be void: *In acquirendo rerum dominio, scilicet quod donationes non valent, licet sint incepte, nisi sint perfectae.* But if grants be very ancient, and the things granted have been enjoyed according to the grant ever since the making of it; in this case the grant may be good, notwithstanding some legall defect in some of these particulars. *Co. 11. 73. Plow. 555. Perk. sect. 1. Bro. Grant. 89.*

4. What shall be said a good and sufficient grant, gift, or sale. Or not.
1. For the manner of it. And what may be granted without Deed Or not. And how. Rents, Services &c.

Corporations, as Dean and Chapter, Major and Communalty, and such like, regularly can neither grant Lands, Goods, or chattels, but it must be by Deed. But the Grantees of such persons, and all other common persons may grant or give any thing which doth lie in livery, as Manors, Houses, Lands, and such like things in Fee-simple, Fee-tail, for life, for years, or at will, by word without Deed. And if a Lease be made of any such thing for life or years, with a remainder over in Fee-simple, Fee-tail, or for life, it is good, albeit the same be done by word without any Deed in writing. *Perk. sect. 64. 4 H. 7. 17. Plow. 150. 16 H. 7. 3. Litt. sect. 60.*

Such things as are said to lie in Grant & not in Livery, generally cannot be granted or given, had or taken without Deed unless it be in some speciall cases. And therefore Rents and services, and such like things which are in gross, and not incident to some other thing, may not be granted without a Deed. And therefore if a Rent-Charge be granted unto me for years, I may not grant this Rent over without Deed. And if there be Lord and Tenant of errable Land by fealty, and the service of yielding the tenth sheaf of Corn before it be sowed; the Lord cannot grant this service for years without Deed. But if a Rent, or any service be parcell of, or incident to a manor or any other thing which is Grantable without Deed; in this case by the grant of the principall by which this thing may pass as belonging thereunto without any Deed. Also Rents or services may be granted upon a partition by one coparcenor to another without Deed. *Brownl. 1 part 40. Co. super Lit. 49. Dyer. 139. Perk. sect. 61. 60. 63. Brown. Grant 59.*

Reversion or Remainder.

A reversion cannot be granted in Fee-simple, Fee-tail, for life, or years without Deed, unless it be in case where it is parcell of a Manor. But a reversion may be granted upon a partition by one coparcenor to another without any Deed. And the same Law is of a remainder. And therefore if one make a Lease for life or years

to one, the Remainder in fee-simple, fee-tail, or for life, to another without deed, howsoever this be a good remainder in the first creation without deed, yet this remainder cannot be granted over without deed. *Perk. Sess. 61. Dier. 174. Plow. 433.*

Bro. Grant. 104.

A Parsonage or Rectory, albeit it consist of nothing but Tithes, and the like, besides the Church and Church-yard, and it hath no house nor glebe belonging to it, yet may be granted without deed in fee-simple, for life, or years: and then the Tithes and offerings will passe as incident. But the Tithes alone, or a portion of Tithes, oblations, mortuaries, or obventions are not grantable by themselves without deed. And therefore a lease paroll of Tithes, albeit it be but for years, is not good. And if the Parson agree with one of his Parishioners, that he shall have his own Tithes; this is not a good grant of the Tithes, neither may it be pleaded or used so; but perhaps by way of agreement a Parishioner may retain his Tithes. And if a Lessee for years of Tithes will grant it over to another at will only, it cannot be done without deed, as was held by Baron Denham, 2 Car. at Sarum Assises. And yet it is held that a Parson may grant his Tithes from year to year to him that is to pay them without any Deed, but this is by way of retainer. But this grant or agreement must be made to and with the party himself that is to pay the Tithe, and not with another: neither can this interest bee assigned or a stranger take advantage of it, as hath been agreed in the case of *Hawks and Brasfield, Pasch. 3. Jac. B. R. See Brownl. 1 part. 98: 2 part. 11. 15 H. 7. 8. 16 H. 7. 3. 19 H. 8. 12. 21 H. 6. 43.* All this was agreed 36 *El. B. R. 21. Jac. B. Mich. 8. Jac. Dr. Longworths case.*

Advowson,
Tithes &c.

By way of Agreement Tithes may pass for years without deed, but not by way of lease without a deed, but a lease for one year may be of Tithes without a deed.

An Advowson in grosse cannot be granted without deed; yea the grantee of the grantee of an Advowson is to shew both the deeds. But an Advowson is grantable upon a partition between coparceners without deed. And an Advowson incident to a manor, or peece of Land is grantable with the manor or land without any deed. The next avoidance to a Church is not grantable without deed. *Plow. 150. 9 Ed. 4. 47. 11. Ed. 3. 38. 11 H. 4. 3. Dier. 29. 10. Co. 11.*

Common of Pasture, of Estovers, turbary, Fishing, &c. cannot be granted in fee-simple, fee-tail, for life, or years, unlesse it be in case of partition, or of appendancy as incident to some corporall thing without deed. And therefore if a man grant by word of mouth to me Common for twenty beasts in his manor; this is not good. Neither if it be granted to me by deed, may I grant this over to another without deed.

Common of
pasture &c.

But if a man have Common of Pasture appendant or appurtenant to his Land; in this case he may grant his Land with the Common appendant by word only without any deed. Franchises, as Fairs, Markets, Courts, Warrens, and the like, or the profits thereof are not grantable without deed. But it seems a Hundred is grantable without deed, for that is *liberum tenementum*. The profits of a Mill, County, Ferry, Corody, or the like, are not grantable without deed. *Perk. Sess. 61. 15 H. 7. 8.*

Franchises, and
such like
things.

Things in action, as a right or title of action that doth only depend in action, and things of that nature, as rights and titles of entrie to any reall or personall thing are not grantable at all, but by way of release to the tenant of the land &c. by which means it may be extinguished: but this may not be neither without deed. And therefore if a man take my goods as a trespassor, or I deliver him my goods to keep, and after I will give these goods to him; I cannot do this without deed. *Brownl. 1 part. 40 6 H. 7. 9. Dier. 91. 126. Dett. & S. 16.*

Things in acti-
on, & such like
things.

An election, Condition, covenant, assent, Licence, or liberty cannot be created and annexed to an estate of inheritance or freehold without deed. *Dier. 281.*

A privilege to hold Land for life without impeachment of waste, is not grantable without deed. Offices for the most part are not grantable without deed. And yet some inferior offices, as Stewardships, Bailiwicks, and the like are, for such officers a Lord of a Manor may retain by word without deed. *Ca. 9. 9.*

Offices.

Chattels.

Most Chattels reall and personall, may be given and granted without deed. And therefore if a man by word of mouth grant, give, or sell me his Lease for years, the Wardship of body and Land, or the Wardship of Land that he hath by reason of a Tenure by Knights service, or by grant from the King, or grant or sell me the trees standing upon his ground, the Corn growing upon his Land, his horse, sword, plate, or other household-stuffe; this is a good grant or gift. But the Wardship of the body of an heir onely, cannot be granted without deed. So a next presentation cannot be granted without deed. *Park. Sess. 57. 60. Bro. Dant. i. Dier. 370. 5 H. 7. 35, 36. Plow. 150.*

What by the same deed.

If one grant his reversion of land to one, and by the same deed granteth a rent out of the same land to another, and delivereth the deed to both of them at one time; this is good, and shall enure first as a grant of the rent to one, and then as a grant of the reversion to the other. *Plow. 540.*

If one convey Land to another, and the grantee by the same deed doth grant a rent or common to the grantor out of the same land conveyed; this is as good as if it were by another deed. *Dier. 6.*

By what words of grant.

Dedi & Concessi be the most apt words for all kind of grants, yet it may be by other words, and the grant is good as by those words. *Co. super Litt.*

The best way in Grants is to grant by words of present time in the present tense as well as in the preterperfect tense. But a grant by words of the preterperfect tense only, as by *Dedi & Concessi* only without words of the present tense is good. *35 H. 6. 11.*

2. In respect of the person of the grantor &c. and the naming of him. And who may be a grantor. And how.

Touching this part two things are requisite.

1. That the grantor be a person able.

2. That if the Grant be by Deed, that he be sufficiently described and set forth either by his proper names, or else by some other matter of distinction. Note therefore that whosoever may be a feoffor, may be a grantor. And any natural, politique, or corporate body (not prohibited by Law, as Monke, Frier, Woman covert, infant, and such like) may be a grantor, donor &c. And the grants of such persons will be good. *See Feoffment Numb. 4. Park. Sess. 3.*

Alien.

An Alien may, and is able to grant or give any thing that he is capable of, to have or take by grant or gift.

Person strait or outlawed.

A person attainted of treason or felony may give or grant his land; and this is good against all others besides the King, and the Lord of whom his Land is held. And he may grant or give his goods to relieve himself in prison, and this will be good against all others, and the King and Lord also. A person outlawed in a personall Action may give or grant his goods or chattels, and the gift or grant will be good against all others but the King. *Park. Sess. 26.*

Woman covert.

The Queen may without the agreement of the King make grants, gifts &c. of her Lands or goods, but another woman that hath a husband cannot give, or grant her Lands or goods without her husbands consent, unless it be in some speciall cases:

And albeit she doe recite by the deed that she is sole and not covert, yet this will not help. And if the case be so that by agreement between her and her husband there be a certain portion of her husbands Lands or goods allotted unto her to dispose of, and manage at her pleasure, yet she alone without her husband can make no good grant or gift of any part of these Lands or goods. But if she grant any thing by fine, and the husband doe not avoid it during the coverture; this grant will binde her after his death. And if she make a gift or grant of her husbands goods, it is thought this is not good untill her husband agree to it. *Co. super Litt. 3. Park. Sess. 8. 20.*

An infant cannot make any gift or grant &c. that is good but in speciall cases, for if he maketh any grant or gift that taketh effect by the delivery of the deed onely, as if he grant a rent-charge out of his land, or make a feoffment with a letter of Attorney to give livery of seisin, or give or sell his horse, and the buyer or donee take him himselfe; these are void *ab initio*. And if the grant, or gift take effect by the delivery of his own hand, as if he make a feoffment and give livery of seisin himselfe,

himselfe, or sell a horse and deliver him with his owne hands; this is voidable by the Infant himselfe, or others that shall have his right &c. But if an Infant grant any thing by Fine; this must be avoided during his minority, or else it cannot be avoided at all. 9 H. 7. 24. 26. H. 8. 2. *Perk. Sess.* 12, 13, 14, 19. 7 H. 4. 5: See *cha. 2. Numb. 6.*

All Grants that are made by Duesse, are voidable by the parties themselves that make it, or others that have their estates &c. But if it be done by Fine, it is good and unavoidable. *Perk. Sess.* 16. Duesse.

All Gifts, Grants, &c. made by deed in the Country by those that are *de non sane memoria* are good against themselves, but voidable by those that are their heires, executors, or have their estate. But if it be by Fine, it is good and unavoidable. Co. 123. 124. See *cap. 2. Number 6.* Non sane memoria.

A man that is borne dumbe, or dumbe and deafe, if he have understanding, may by delivery of the Deed and making of signes make a good Grant, Gift, &c. But a man that is borne deafe, dumbe and blind cannot. *Perk. Sess.* 25.

A Bastard may give or grant as well as any other man, after he hath gotten a name by reputation. *Perk. Sess.* 26. Bastard.

A Parson may grant any thing belonging to his Parsonage for no longer time then for his owne life, and therein likewise but during his residency, albeit he have the consent of the Patron and ordinary. See *Lease.* Parson.

Neither the head without the members of a Corporation, nor the members without the head, as Dean without the Chapter, or Chapter without the Dean, may give or grant any of the Lands belonging to their Corporation. *Perk. Sess.* 31, 32, 33. Corporation.

One executor or Administrator may give or sell any of the goods of the deceased, and this is good to bind all the rest. See *Executors.* Executors.

What Grants Ecclesiasticall persons may make of their Ecclesiasticall Lands, husbands of the Lands of their wives, and tenants in taile of their Lands intailed, See in *Lease.*

The name of the persons in Grants is set downe, only to distinguish persons and to make the person intended certain: and therefore howsoever it be best and most safe to describe the person by his true and proper name of Baptisme, and also by his Surname, and if it be a Corporation, by the true name whereby the Corporation is made; yet mistakes in this case unlesse they be very grosse, will not make void the grant. Mithaming.

Nihil facit error nominis, cum de corpore constat. And therefore if one that is a Bastard hath gotten a name by reputation in the place where he doth live, or another man hath gotten another name by common esteeme then his own right name, or is usually called by another name then his true name in the place where he lives, in these cases they may grant by this name, and the grant is good. And if a man be baptized by one name, and after be confirmed by another, some have said he may grant by either of these names. See *Quere.* And if John at Stile grant by the name of John at Stile, this grant is good. See *de similibus* Co. 6. 36. 37. *Perk. Sess.* 23, Co. super *Litt.* 3. *Perk. Sess.* 39. Co. super *Litt.* 3. And these grants are good, especially when there is some other addition to make it more certain, as when a Duke, Marquess, Earle, or Bishop, grant by their names of honour or dignity, and grant without any name, or with a false name of baptisme, as when the Duke of Suffolke by the name of the Duke of Suffolke, without any more words, or by the name of William Duke of Suffolke, when his name is John, or the Bishop of Norwich grant, &c. these are good grants, because there is but one such Duke, and one such Bishop within the kingdom. See *grant.* *Perk. Sess.* 42. So if a Dean and Chapter, Mayor and Community grant by the name of their Corporation without any addition of Christian or Surname, it is good. And especially then also are these grants good, when the true name doth appear in some other part of the deed. *Perk. Sess.* 40. As when John at Stile reciteth by his deed that his name is John at Stile, and by the same deed doth grant by the name of Thomas at Stile, Or Alice at Stile reciting by her deed that she is a feme covert, when in truth she is sole.

But if an ordinary man grant by his Surname only without any name of baptisme,

or

or by his name of baptisme without any Sirname at all; in these and such like cases for the most part the grant will be void for incertainty, unless there be some other matter in the deed to help it, or some matter done *ex post-Facto* to supply it; for in some cases where the thing granted doth lie in livery, such a mistake or incertainty in the grant may be holpen by the livery of seisin upon the deed afterwards. And so also it is in the names of Corporations: for if the variance and mistake by omission or alteration be only in some small matter so as it is literall and verball only, the grant will not be hurt by it. But if the mistake or omission be in the substance of the name; the grant may be void by it. And therefore if *Decanus & Capitulum ecclesie cathed. Sancte Trin. in Caerlil.* grant by the name of *Decanus ecclesie cathed. Sancte Trin. in Caerlil. & totum capitulum ecclesie pradiit.* this is good: *Et sic de similibus* for if the sense doth still remaine either expressly or by necessary implication, and the description be such as doth import a sufficient and certaine demonstration of the true name of the Corporation according to the foundation thereof, it sufficeth. But if any of the substance or essence of the name be omitted, *contra.* And therefore if a Corporation incorporate by the name of *Prapofiti & collegii regalis coll. beate Mariae de Eaton juxta Windsor,* grant by the name of *Prap. & sociorum Colleg. regalis de Eaton &c.* leaving out *Collegium beatae Mariae;* this grant is void. 3 H.6. 26. *Perk. Sess. 38: 42. Co. 6. 65, 10. 122. 11. 19. Dir. 150. Co. 10. 124.*

Touching this part, three things are requisite. 1. That the grantee be a person capable. 2. That he be a person in being at the time of the grant made, and not disabled by any legal impediment to take by the grant. *Co. super List. 2. 3. Perk. Sess. 43. See in feoffments. cap 9. Numb. 4.*

2. That if the grant be by deed, he grantee be sufficiently named, or at the least set forth and distinguished by some circumstantiall matter, and that he be so named or described, as that he may be capable by that name whereby he is set forth.

3. That he himself and not a stranger doe take by the same grant. Note therefore that all naturall and politique or corporate bodies that are not disabled by law may be grantees. And all persons that may be grantors may be grantees: And some others that cannot grant or give, yet may take or receive. And a grant made to one, two, three, or twenty such persons is good. A Grant of land or rent in possession to the right heires of *I. S.* *I. S.* being then living is void, for there is nor can be any such person *in rerum natura*, for no man can be an heire to another that is living. But such a grant to one in remainder is good, if so be that *I. S.* die before the particular estate end and before the remainder happen. So if a grant be to him or her that shall be the first child of *I. S.* and he have no child at the time of the grant, this is void.

So if a grant be made to the wife or child of *I. S.* when there is none such, it is void.

As if a grant be to *I. S.* and to his first borne son, or to *J. S.* and her that shall be his wife, and he hath at the time of the grant neither wife nor son; in these cases the grant is void as to the wife and son, and *J. S.* shall have all by the grant. *Co. 110. Perk. Sess. 32, 54. Co. 31.*

An Alien may be a grantee; but if any thing be granted unto him whereof he is incapable, as any estate of lands in fee simple, for life, or years, he cannot hold it, but the King will have it from him. *Co. super List.*

A person attainted of treason or felony before or after attainder may be a grantee, but he cannot hold the thing granted; for if the King or Lord will he may have it from him. So also persons outlawed in personall actions may be grantees of lands, or goods, but the King will have the profits of the Lands and property of the goods. *Co. super List. Perk. Sess. 48.*

A woman covert may be a grantee; but her husband may by his disagreement avoid the grant. And yet if he doe not avoid it in his life time, the grant will be good: and he that will have the grant to be void, must shew that the husband did disagree to it. *Perk. Sess. 43. Co. super List.*

An infant may be a grantee, for this is presumed to be for his advantage:

3. In respect of the grantee & the naming of him. And who may be a grantee &c. And how.

Alien.

Pre rogative.
Persons attaint

Woman
covert.

Infant.

And

And yet at his full age he may agree to it and perfect it, or disagree to it and avoid it without any cause shewed. *Perk. sect. 4. Co. super Lit. 2.*

A man *de non sane memorie* may be a Grantee as well as any other man, and it seems these grants cannot be afterwards avoided. But such men may not be Grantees of Offices of trust and such like things. *Co. Idem.*

A Bastard, persons deformed having humane shape, leapers, and such like may be Grantees of Lands or Goods, &c. as other men may be. *Co. Idem.*

An Hermaphrodite may be a Grantee according to the most prevailing Sex. *Co. Idem.*

A Clerk convict, and a man imprisoned may be a Grantee as well as any other. And so also may a villaine of the King or of a common person, but he cannot retain the thing granted, for the King or Lord may have it from him if he will.

But Monkes, Friars, and such like persons cannot be Grantees, for they are utterly disabled. *Co. super Lit. 3. Perk. sect. 48. 51:*

Regularly it is requisite that the Grantee be named by his names of Baptisme and Sirname, and so it is most safe; and speciall heed must be taken to the name of Baptisme, for that a man cannot have two or more names of Baptisme as he may of Surnames. *Co. super Lit. 3.* And yet in some cases though the name be mistaken, the grant is good. As if a grant be to *I. S.* and *Em* his wife and her name is *Emelin Bro. Nofm.* 9. Or a grant is made to *Afred Fitzjames* by the name of *Esbeldred Fitzjames Bro. Confirmation.* 30. Or a grant be to *Robert Earle of Penbrooke* where his name is *Henry*; or to *George Bishop of Norwich* where his name is *Iohn*; *Ca. 6. 65. 27 E. 3. 85.* Or a grant be to a Mayor and Communalty, or a Deane and Chapter, and Mayor or Deane is not named by his proper name, *Co. super Lit. 3.* Or a grant be to *I. S.* wife of *W. S.* where she is sole; all these and such like grants are good, for in this case the rule doth hold, *utile per inutile non vitiatur.* *Dyer 119.* And if one be baptized by one name, and after confirmed by another; yet a grant to him by his first is good, *Co. super Lit. 3.* And so also some think of a grant to him by his second name. *Sed Quare* of this. Also when a Bastard hath gotten a name by reputation, a grant may be made to him by that name, and it is good.

If a grant be made to *W.* at *Stile* by the name of *W.* at *Gappe*; this is a good grant notwithstanding this mistake. *9 E. 4. 43. Fitz Grant 23.*

But where a grant doth intend to describe the person of the Grantee by his proper name and doth omit or mistake his Christian name or surname; in this case for the most part the grant is void unless there be some speciall matter to help it, as in the cases before. And yet if the grant doe not intend to describe the Grantee by his known name, but by some other matter, there it may be good by a certain description of the person without either surname or name of Baptism. And therefore a grant to the wife of *I. S.* or *primogenito filio*, or to the second son, or to the youngest son, or *Seniori puero*, or *omnibus filiis*, or *filiabus I. S.* or *omnibus liberis I. S.* or *omnibus existibus I. S.* or to the right Heirs of *I. S.* or to the next of blood of *I. S.* in these cases grants made to these persons in these words are good, for the person is certainly enough described. And if a Lease be made to *I. S.* for life, the remainder to him that shall come first to Pauls such a day, or to him that *I. S.* shall name in three daies; if in these cases any one doe come to Pauls that day, or be named by *I. S.* within three daies, and the particular estate doth so long continue; this is a good grant of the remainder, *Id. certum est quod certum reddi potest.* But if a grant be made in these words, *viz.*

To foure of the parishioners of Dale; or *Dea & ecclesia de D.* or to two of the sons of *I. S.* and he hath many sons; or to *I. S.* or *W. S.* in the disjunctive; these and such like Grants as these are utterly void for uncertainty.

And if a gift or grant of goods be to the parishioners of Dale in these words; it seems this is good; but if a grant or gift of Land be made to them by these words, it seems this is void. And so also it is of a grant of goods to the Churchwardens of a parish, this is held to be good: but otherwise it is of a grant of Land to them. A bastard is capable by that name whereby he is usually called, and therefore a grant to him by that name is good. And a right heire,

or

Men de non sane memorie,

Bastard.

Hermaphro-
dite;
Clerk convict.
Villaine.Misnaming or
not naming.

Uncertainty.

or one that shall be the first issue of *I. S.* that hath no child, is capable of a remainder by that name, but of Land in possession he is not capable by that name. And a bastard is the reputed Son of *I. S.* may take by a grant to *I. S.* and his issue. A Bishop may take by the name of a Bishop without any other name. But if a grant be made to the parishioners or inhabitants of Dale, or *pro his hominibus de Dale*, or to the commoners of such a wist, or to the Lord and his Tenants: bond and free; these are not good grants; for albeit these persons are capable, yet are they not capable by these names.

If a Grant be to Christs Church in Oxford, this is good to the Corporation albeit the name of the Corporation be *Ecclesia Christi in Universitate Oxford. Co. Super Lit. 3. Perk. fell. 34. Bro. Grant 65. Done 17. Dyw 337. Perk. fell. 35. 56. Bro. Don. 31. Grant. 172. Done 50. Fitz. Done. Perk. fell. 53. 52.*

If there be two Grantees and one of them doe take by the Deed it is sufficient, but if the grant be to one that is no party to the Deed and not to the Grantee himself; in this case albeit the Grantee and he to whom the grant is made be capable and never so well described by their names yet is the grant void; for no grant can be made but to him that is party to the Deed, except it be by way of remainder.

And therefore if a man make a lease for term of life, and after the Lessor grant to a stranger that the Tenant for life shall have the Land to him and his Heirs; this Grant is void. *Et sic de similibus.* And yet it seems in some cases if one of the grantees be party to the Deed that another Grantee that is no party to the Deed may take with him. And therefore the case was: *Roberts* gave the reversion of Lands which *Aenes* his Wife did hold for her life to *Stephan de la More, Habendum post mortem illius Agnetis in liberum maritagium cum Johanna filia ejusdem Roberti*; in this case it was adjudged that albeit *Jane* were not named before the *Habendum*, yet that she should take in Tail with her Husband: *Doff. & Sind. 94. Cal. 25. Super Lit. 231. New Terms of the Law. 231. 232. 5 E. 3. 17. Co. Super Lit. 21.*

4. In respect of matter touching the thing granted, charged, &c.

1. In respect of the nature of the thing granted. And what things are grantable over or chargeable. Or not.

1. In respect of the nature of the thing it selfe.

Rents, Services,

Touthing this point these things are requisite.

1. That the thing whereof the grant is made be grantable, and that both in respect of the nature of the thing it self, and also of his estate that doth grant it, for in some cases albeit the thing for the quality of it be grantable, yet in respect of the estate and property that the owner hath in it, it is not grantable.

2. That if it be by Deed, it be sufficiently distinguished and named.

Amongst things that are grantable some are grantable *de novo* and in their first creation, but not transmissible nor assignable afterwards. And some are grantable at first in their original creation, and assignable over afterwards from man to man in *infinitum*.

All things that may be granted by Fine and whereof a fine may be levied, may be granted over from man to man. *See Fine Numb. 6. part. 3. See in exposition of the Terms of Grants Supra. cap. 5 Numb. 15. Bro. Done 10.*

All the things that are before observed to be grantable by or without Deed, are grantable over from man to man. And therefore all corporal and immovable things that lie in livery, as Manors, Messuages, Cottages, Lands, Meadows, Pastures, Woods and the like are grantable in Fee-simple, for life, or years as first and assignable over again at the pleasure of the Grantee. Also trees and Emblements are grantable. And a man may grant the vesture or herbage, i. the grass of his ground and not the ground it self. And a man that is seised in Fee of a house may give or sell the timber, stone, &c. of the house, and the Donee or Grantee may take it after the death of the Donor. Also all incorporeall things that lie in Grant, as Rents, services and the like, are grantable over in Fee-simple, for life, or years, and therefore Rents or Services reserved upon any estate and Rents granted out of Lands are grantable over in *infinitum*. And if a man have a Rent reserved on a particular estate, he may grant over partcell of it. But a Rent or Service suspended cannot be granted. Neither can a man grant a Rent issuing out of a Rent. If a Rent be granted to me, I may grant it over to a stranger before I be seised of it; and this grant is void.

But

But an Annuity it seemes is not grantable over after the first creation, of it. And yet if an Annuity be granted to *I. S.* and his assignes *pro consilio*; it seemes this Annuity is grantable over. Advowsons are grantable in fee-simple, for life, or years, from man to man in *infinitum*. Also the presentation to a Church before the Church is void is grantable; but when the Church is void, that Turne is not grantable, for it is then in the nature of a thing in Action. Also Rectories, and tithes, and portions of tithes, and pensions are grantable from man to man in *infinitum*. *Stat. 34 H. 8. cap. 7. Perk. sect. 90.*

Reversions and Remainders are grantable from man to man in fee-simple, fee-tail, for life or years. And if I have a tenant for life of three houses; I may grant the reversion of two of them. And if I have the reversion of three houses and four acres of land; I may grant the reversion of two houses and of two acres of land. And if tenant in taile be of an acre of land the remainder to his right heires, he may grant over this remainder by it self; and yet it is such a thing as the tenant in taile himself may bar by a common recovery. But if a grant be of land to *I. S.* for years the remainder to the right heires *I. D.* and *I. D.* is living; this remainder is not grantable so long as *I. D.* doth live. *Perk. sect. 73. 88. 87.*

Commons, of pasture, of turbary of fishing, of estovers, are grantable in fee, for life or years, from man to man in *infinitum*. And yet if a common in gross and without number be granted to a man and his heires; it seemes this is not grantable over to another man. But if common for a certain number of beasts be so granted, it seemes the law is otherwise, and that this is grantable over in case where the first grant is to the grantee only, and not the grantee and his assignes. See *Brownl. 1 part 32. 42. 43. 2 part. 226. 227. Perk. sect. 103. Per 2 Judges against one Hil. 16; Jac. B. R.*

Offices are grantable at first; but the great Judiciall Offices of the Kingdome, as the Offices of the Lord Keeper, Chief Justices, or chiefe Baron, or of other of the Justices or Barons, and such like, are not grantable over to others, neither may they be Executed by deputies. But the Sheriffes office albeit it be not grantable over, yet may it be executed by deputy. *Perk. sect. 101.* The reversion of an office is not grantable by a Subject as it is by the King; yet a Subject may grant an office *Habendum* after the death of the present officer; and this is good. *Per Lord Keeper & a Chief Just. M. 5, Car. in cancellaria, Co. super Litt. 233. Perk. sect. 101.* The inferior offices also that are offices of trust, especially if they concern the person of the grantor, howsoever they are grantable at first, yet are they not grantable over by the officer to any other, unlesse they be granted to them and their assignes; and of this sort are the offices of Steward, Bailife, Receiver, Sewer, Chamberlaine, Carver, and the like: neither may these be executed by deputy, but where the grant is so.

Licences, and authorities are grantable at first for the lives of the parties, or for years. But the grantees of them cannot assigne them over. And therefore if power be given to me to make an award or livery of seisin, I may not grant over this power to another. And if licence be granted me to walke in another mans garden, or to goe through another mans ground; I may not give or grant this to another. *11 B. 7. 25. 13 H. 7. 13.*

A bare possibility of an interest which is incertaine, is not grantable. And therefore if one have a terme of years in land, and by his will devise it to *I. S.* for his life; and afterwards to me for the residue of the years; or devise it to *I. S.* if he live so long as the terme shall last; and if he die before the Terme end, the remainder to me; in these cases so long as *I. S.* doth live, I cannot grant over this possibility. So if a lease be made to me and my wife for life, the remainder to the survivor of us; I may not grant this remainder over to another man. But such a possibility being coupled with some present interest is grantable over. And therefore if *A.* have four houses in execution upon a statute; and by course of time it will endure thirtie years; and after two of the houses are evicted by Elegit for fifteen years; in this case he that hath this execution upon the statute may assigne over his interest in these two houses; for after the execution by the Elegit is satisfied, *A.* shall have

Reversions & Remainders.

Offices.

Prerogative.

Licences, Authorities, &c.

Possibilities.

have the two houses againe untill he be satisfied. *Co. 4. 66. 5. m. Dir. 244. C. 10. 51.*

Incidents.

The Lord cannot grant the wardship of the heire of his tenant whiles the tenant is living. *Perk. Sect. 10.* Those things that are inseparably incident to others are not grantable without the thing to which they are so incident and belonging. And therefore a Court Baron which is evermore incident to a Manor is not grantable without the manor it self: common appendant to land is not grantable without the land it self to which it doth belong: and common of estovers appendant to a house is not grantable without the house it self to which it doth belong. *1 E. 4. 10. Perk. Sect. 104. 5 H. 7. 7.*

Suspended things.

A rent, service, or other thing whiles it is wholly in suspense, is not grantable. And therefore if the Lord disseise the tenant, or the tenant enfeoffe the Lord upon condition the Lord cannot grant over the Seigniorie during this suspension. But if one have a rent in fee out of my land, and he purchase the same land for life or years; in this case it seemes the rent is grantable, even whiles the estate of the land doth continue. So if the tenant make a lease for years or life of the tenancy to the Lord; in this case the Lord may grant the Seigniorie notwithstanding. And yet if the tenant make a lease to another man for life, and the Lord grant the Seigniorie to this tenant for life in fee; in this case it seemes the grantee of the Seigniorie cannot grant it over, because it was never in *esse*. *16 H. 7. 4. Co. super Litt. 314. Bro. Grant. 173. Perk. Sect. 88. 89.*

Franchises.

Franchises, as views of Frank pledge, Perquisites of Courts, Leets, Conuance of Pleas, Paires, Markets, goods of felons, waifes, estrayes, Hundreds, Ferries, or Passages, Warrens, and the like, are grantable over from man to man in fee, for life or years, *in infinitum*.

Things in action.

Things in action, and things of that nature, as causes of suit, rights and titles of entry are not grantable over to strangers but in special cases, nor in judgment assignable. *Brownl. 1. part. 33.* And therefore if a man have disseised me of my land or taken away my goods; I may not grant over this land or these goods untill I have seisin of them againe. Neither can I grant the Suit which the law doth give to me for my reliefe in the cases to another man. So if I make a feoffment to another man on condition that if I doe such a thing I shall have the land againe; in this case I may not before or after the time of performance of the condition, grant over the condition to another. But all these things I may release to the parties themselves, for it is a maxime in law, that every right title, or interest in *presenti* or in *future* by the joint act of all them that may claime any such right, title or interest, may be barred or extinguished: *Co. 5. 24. 16. 48. Co. super Lin. 214. Dir. 244. Perk. Sect. 86. 87. 85. Bro. Dom. 37. 84. 48. C. 6. 50.* And in some cases a grantee of a reversion may take advantage of a condition annexed to an estate for life or years. If a man owe me money on an obligation, or the like, I cannot grant this debt to another: but I may grant a letter of attorney to another man to sue for it and receive it; or I may grant the writing it self to another, and he may cancell it or give it to the obligor. *See Condition Co. super 231. Perk. Sect. 86.* A presentation to a Church after the Church is become void is not grantable, for it is in the nature of a thing in action. *Dir. 283.* And if a man take my goods from me, or from another man in whose hands they are, or I buy goods of another man and suffer them in his possession and a stranger taketh them from him; it seemes in these cases I may give the goods to the trespassor, because the property of them is still in me. *Perk. Sect. 92. Fitz. Dene. 3. 7.*

Personall things.

Trosts and confidences which are personall things for the most part, are not grantable over to others. And hence it is also that offices of trust and confidence are not grantable over but in some special cases where they are granted to a man and his assigns or where they are granted to a man and his heirs, *Perk. 99. Pl. 379.* And hence it is also that a Wardship by reason of a crime in socage, which by the law is given to the next of kin is not grantable over to any other person by the Guardian in Socage. *Plow. 393.*

Entire things.

Some things are so entire, that they cannot be severed by grant. And therefore if a man hold three acres of land of me by twelve pence rent, and I grant the services of the third Acre; this is void; and he shall have all or none, for I cannot sever the tenure: But if a man hold land of me by homage, fealty, escuage, and

a certain rent in this case I may grant the rent & keep the seigniorie. *Fitz. Grant. 19. 76*

A villaine is grantable for life, or years; and if the villaine during the estate of the grantee purchase land in fee, the grantee shall have it for ever as a Perquisite, albeit he have but an estate for life in the villaine it selfe. *Park. Sess. 94.*

All chartrels real and personall regularly are grantable from man to man in infinitum, as leases for years be they present or future, wardships of tenants in Capite, or by Knights service, trees, Oxen, horses, plate, household stuffe, and the like. Also trees, grasse and corne growing and standing upon the ground, fruit upon the trees, wooll upon the sheeps back is grantable. *Dier. 38. Plow. 143. 147. Park. Sess. 91. Dier. 301. Park. Sess. 90.*

If a man sell me ten loads of wood in his wood to be taken by his assignment; or sell me three acres of wood towards the north side of the wood; by this grant in these words, I have such an interest as is grantable over. If I make a lease by deed of a house to another, and therein it is agreed between us, that if the rent be not paid me by such a time I shall enter into the house and take and sell the goods there as mine own to pay the rent; it seemes this is a good grant of the goods and that I may doe according to the agreement. And if one that doth hold land of the grant to me by deed indented that I shall distrain for my service in all his land, this is a good grant. *Co. 3. 24. Fitz. Bar. 280.*

A man may give or grant money, As if I deliver one monee on condition that if he assure me of such land he shall have it, otherwise that he shall redeliver it to me again; in this case if he make the assurance he shall have the monee, If not, I may have an accompt for it. *Fitz. Grant. 61. Fitz. Dene. 11.*

Such things as are *fera natura*, as Conies, Hares, Deere, and such like, are not grantable at all. *Bro. Dene. 24.*

A Parson of a church may grant his tithes for years, and yet they are not in him. *Park. Sess. 90.*

A man may give or grant his Deeds, & the parchment, paper and wax to another at his pleasure, and the Grantee may keep or cancel them. And therefore if a man have an obligation; he may give or grant it away and so sever the Debt and it. So Tenant in Fee-simple may give or grant away the Deeds of his Land, and the Executor in the first case, and the heir in the last case hath no remedy. But a Tenant in Tail of Land cannot give or grant any of the Deeds belonging to the Land inailed no more then the land it selfe. One may give or grant Apparell, and it is said if one make apparell for another, and put it upon him to use and wear; this is a gift or grant of the apparell it self. *Co. super Litt. 23. 2. Trin. 38. El. B. R. 25 H. 8. 5. 1 H. 7. Dever case. 1 H. 4. 31. Fitz. Bar. 179.*

If one grant to another all the wooll of his sheep for seven years; this is a good grant. *Park. Sess. 90.*

If one being a Parson give to another all the wooll he shall have for tithe the next year; this is a good grant. *Fitz. Grant. 40.*

If one grant to another his horse or his cow in the disjunctive; this is a good grant notwithstanding this incertainty, and the donee shall have election, and by that make the grant good. See *Certainty. Bro. Dene. 19.*

Any estate that a man hath in fee-simple, fee-tail, for life, or years in any Lands &c. or any rent, or profit appender out of the same is grantable from man to man in infinitum. And he that hath any such estate of any lands may charge it with any rent or profit to be taken out of it as long as the estate of the land doth last. But an estate at will is not grantable over. And if an estate be made to a man and his heires without the word Assignes, yet he may assigne it at his pleasure, for Assignes is included within Heires.

An *Interesse termini*, i. a lease for years to commence in future is grantable before the terme doth begin, whether it be a lease of the land it self, or any rent or other profit out of it. *23 E. 4. 37. Park. Sess. 91.*

The interest or estate that a man hath by extent, is assignable from man to man at pleasure. *Co. 4. 64.*

The reversion upon an estate tail is grantable. And yet the tenant in tail in possession

session by the suffering of a common recovery may bar him in reversion of any fruit of it. *Co. 65, Gov. Cursons case Co. 1. Almonds case.*

If an estate be made of land upon condition, as if *A.* make a feoffment to *B.* on condition that if *A.* pay twenty pound he shall have the land againe: in this case *A.* and *B.* together may at any time before the performance of the condition joine together and grant this land, or charge it with any rent &c. and this will be good, for it is a maxime in law, Fee-simple land may be charged one way or other. And in this case *B.* may grant over his estate as freely but it will be subject to the condition. And if *B.* grant a rent out of the land to a stranger, and after the condition is performed and the feoffor enter; in this case he shall avoid the rent. But in this case *A.* cannot grant, for he hath nothing but a possibility. If one enfeoffe divers to the use of his son and heirs upon condition and before the time of performance of the condition the father and son joine to grant or charge the land, this is a good grant or charge. *Co. 1. 147. 10. 48, 49. Lit. chap. Confirmation. Co. 1. 147.*

If the tenant in tail and he that is next in remainder in fee joine in the grant of a rent charge in fee, and after the tenant in tail doth die without issue; in this case this is a good grant and charge against him in remainder. And if *A.* doth bargain and sell land to *B.* by indenture and before enrolment they doe joine to grant a rent charge to *C.* by deed; in this case this is a good charge and grant whether there be any enrolment or not. And so if donor and donee in tail grant a rent charge out of the land, and then the donee die without issue; in this case the grant is good to bind the donor. *Co. super Litt. 45. Co. 10. 48. 49.*

If Land be granted to two men & to the Heirs of their two bodies begotten in this case albeit they have several inheritances after their death, yet neither of them can grant away his estate after his life, for they are divided only in supposition of law. *Co. super Litt. 182.*

A lease is made to the Father during his life and the lives of 2. of his sons, in this case, this lease shall continue after the death of the father, and the father may assigne away all the estate. *Goldb. 387.*

If one grant me a hundred Coards of wood to be taken by his Assignement, it seems before Assignement I may not grant away this wood over to another. *Goldb. 184.* And if the grantee dye before Assignement, the grant is void, and his executor shall not have it.

One Coparcener of a feignory may grant his part to a stranger.

If two Jointenants be of a plow land, and one of them doth grant to a stranger common of pasture for beasts without number to be taken in the same land, this is void. *Perk. Sess. 73. Perk. Sess. 103.*

Jointenants. If two Jointenants be of a reversion, and one of them grant the whol, this is void for a moiety. If a man grant, or charge that which is none of his, and that wherein he hath no property, it being in the grantee or a stranger; the grant is void. And therefore if a man grant a rent charge out of the Manor of Dale, or grant a reversion of land, and in truth the grantor hath nothing in the manor of Dale, or in the land, in this case the grant is void. And albeit the grantor doe afterward purchase the Manor, or the land, yet this will not make the grant good. But if the grant be by Fine, or by indenture, there in some cases it shall be good by way of Estoppel. And in this case albeit the party recite that it is his owne, yet this will not mend the cases.

Estoppel.

And therefore if a man recite that he hath a rent of ten pound a year, and then grant five pound a yeare parcell of it; in this case if he have no such rent, the grant is void. *Perk. Sess. 80. Perk. Sess. 65. Dier. 11. 33.*

Servant.

A Shepherd, Bailif, or Parker cannot give or grant away the goods of his master without authority. And yet it seemes the servant of a Taverner or Mercer may give or grant his Masters Wines or Wares. And if a wife give or grant the goods of her husband; this is a good gift or grant untill the husband disagree to it, and by his agreement it is made good for ever. *Bra. Dona. 36.4.*

Husband and Wife.

If a man have a lease for years of land, and make a lease for life of it or charge it for longer time than the lease for years doth last; in this the grant is good

good for so long as the Lease for years doth last, and no longer. But if he make a Lease for life and give livery of seisin, he doth forfeit his estate. *Plow. 525.*

Regularly a man cannot grant, or charge that which is not in his own possession albeit he have a right to it. And therefore if a man be disseised of his Land, and before he hath entred into or recovered the land he doth grant or give the land or his right to the Land to a stranger, or grant a rent charge out of the Land to a stranger; in these cases the grants are not good. And yet such grants by fine may be good by way of Estoppel. And by a release also the right may be extinct. But if one that hath a reversion upon an estate for life, and he grant a rent issuing out of this Land; in this case the grant is good, and the charge shall fasten upon the Land after the estate of the Tenant for life is ended. And if a man grant Common, or Rent, notwithstanding that a stranger take the Rent or use the Common at the time of the Grant, yet this grant is good, for a man cannot be out of possession of these things but at his pleasure. And if a Lease for years be made to me, I may grant away my estate before my entry. And if the Lease be to begin at a day to come; I may assign over my interest before the day come, for in this case the interest is in me from the time of making of the lease. Also I may give or sell my goods that I have not in possession, and therefore if a man take my goods out of mine or another mans possession; I may afterward give or grant these goods to him or another man, and this grant or gift is good. *Perk. Sess. 92. 98. Co. super Litt. 45. Hil. 18. Jac. B. R. per. 2 Justices. Perk. Sess. 92. 93. Fitz. Domes 3. Bro. Doms 13. Dyer 90. 30. Co. 4. 62. 63. Dyer 305. 20 H. 6. 21. Perk. Sess. 59. Co. 11. 50.*

E. Koppel.

A Lessor cannot give or grant the trees growing on the ground of his Lessee for life or years without the licence of the Lessor, except they be first cut down by the Lessee or some other, for then he may. And if there be lessee for life, and the Lessor give the trees growing on the ground, and after the Lessee for life dieth; in this case the Donee cannot take them, for that at the time of the gift a property of them was in the Lessee. But if a Tenant in Fee-simple give or grant the houses standing, or trees growing on the ground he hath in his possession; in this case the Grantee or Donee may take them after the death of the grantor, and that albeit they be not cut or taken down before his death. And yet if the Tenant in Tail give or grant the trees grown upon his intailed Land, and the Donor die before the trees be cut; in this case the Donee or Grantee cannot cut them afterwards. Howbeit if such a Tenant in Tail give or grant his emblements of Corn growing on the ground, the Donee may cut and take them after the death of the Tenant in Tail. And if the Tenant in Tail give or grant his trees, and die before they be cut, and afterwards before the issue in Tail enter into the Land the Donee or Grantee cut them and take them away, in this case the issue in Tail can bring no action of trespass against the Donee or Grantee for the trees. But perhaps if the trees be not removed off the ground, he may take them.

Tenant for life.
Trees.Tenant in Tail.
Emblements.

If two Coparceners be of an advowson, and the one doth present, and then he doth grant the next presentation; this is a good grant: but by this grant doth not pass the next he hath to grant, for his companion must have the next. So if one be seised in Fee of an advowson, and he hath a wife, and he grant the third presentation; this is a good grant: but it shall be taken for the third: he may grant what is the fourth, for the wife is to have the third for her dower, *Dyer 35. 15 H. 7.*

Presentation.

If a man have granted a thing once, he cannot afterwards grant it again: And therefore if a man give or grant me a horse first by word of mouth, & after grant him to me by Deed; this second grant is void, and therefore if there be any fault in this grant in writing, it is not materiall. And if a man grant to me common of pasture without number in his ground, and after make the like grant to another; this second grant is void as to me, albeit it be good against the Grantor. And if one grant the next presentation to a Church after the death of the present Incumbent, and after grant the same to another; or make a Lease of Land to one for ten years, and after make a Lease of the same Land to another for the same ten years; or give a horse to one, and after give the same horse to another; in all these cases the second grant is void. But if the first grant or gift be only of part of the thing granted afterwards,

3. In respect of a former grant of the same thing.

or

or of part of the time onely, the second grant will be good for the overplus. And therefore if one be seised of a manor and demise ten acres of the demesne to ten years, and after demise the whole Manor to another for twenty years, this is a good grant for the overplus of the Manor besides the ten acres, presently, and for the whole Manor for the last ten years.

So if the second grant be to begin after the first is determined; it is good. And if the second be such as may be satisfied and not impeach the former, both shall stand good. And therefore if one that hath an Advowson grant the next presentation to one, and after he doth grant the next Presentation to another, and doth not say [after the death of the Incumbent;] in this case the second grant is good, and the Grantee thereby shall have the second avoidance after the death of the present Incumbent. *Perk. selt. Dyer 35. 378. Litt. Bro. selt. 298. Perk. selt. 101.*

4. In respect of naming or description of the thing granted. Misnaming or Misrecital.

By the grant of an acre of Land or of any other thing by the name whereby it is called the reversion of that thing, if the grantor have no more but a reversion, will pass, and this mistake will not hurt. But it is not so *à converso*. And yet some have said, if one grant a thing in possession, by the name of the reversion of the thing, this is good to pass the possession. *Quod non est lex*. For if one make a lease for years, and before the Lessee enter, the Lessor grant the Land by the name of the reversion or the Land, this grant is void. If one make a Lease for life of the Demesne of a Manor rendring Rent, and after he doth grant the Manor by the name of the Manor, this is a good grant for the reversion of the Demesne as well as for the residue of the Manor. But if one grant common by the name of the reversion of the common, it seems this is not good. And yet if one have common and grant it for life, and during that estate he doth grant the Common by the name of *totam illam Communiam suam*, &c. some doe hold this grant to be good, *See Bro. selt. 1. part 20. 42. 84. 184. Co. 4. 121. Perk. selt. 114. 116. Co. 10. 106. 107. 11. 47. Plow. 190. Co. super Litt. 46. See also Co. 2 in Lanes Case, which doth seem to warrant this opinion also. Dyer. the grant is good in a common persons case. Bro. Grant.*

Any thing may be granted by the name whereby it is and hath been usually called of latter times within nine or ten years or thereabouts, albeit it be an improper name, and not the ancient name of the thing, but a name newly gotten. And so a Manor may pass by the name of a messuage or Farm, or a Farme or Manor by the name of a messuage if it be so usually called & reputed. So the great books in *London* called *Excester* and *Dorset* houses may be granted by those names. And if a man grant that which in deed is a pasture ground, by the name of a wood; Or grant that which in deed is a wood by the name of a pasture ground, & the things are called by those names; these are good grants of those things. And if one grant by the name of a great field that which in deed is but a little close, but it is usually called by the name of a great field, this is a good grant of this thing. So if one grant by the name of a plow land that which in truth is but an acre of Land, or grant by the name of a Manor that which is but a plow Land; these grants are good. And so as it seems, it is *à converso*. But if a man grant a house, or a messuage; by this grant, an acre of Land will not pass. *Co. 6. 65. 45 E. 3. 6. Bro. grant. 7. Perk. selt. 116. 14 H. 8. 1. 27 H. 6. 1.*

By the Grant of services, a Rent reserved upon an estate tail will pass. *Co. super Litt. 153. Mic. 7. Jac. Curia. B. R.*

If a man make a Lease of one house to another for years, and the Lessee divide it and make two houses of it, and after the Lessor doth grant the reversion of it by the name of one house; this is a good grant to pass it. And if one Lease three houses to three severall men at severall times, and they divide them into twenty nine Tenements and households in them all; and the first Lessor doth grant them by the name of three messuages; this is a good grant to pass them all. But if he grant by the name of fifteen messuages or Tenements only; it seems this is good for no more but for fifteen of the subdivided Tenements.

If one recite that he hath a Rent charge issuing out of black acre and white acre, and then grant the same Rent, and in truth it doth issue out of black acre only; or if he do recite that it doth issue out of one acre when in truth it doth issue out

out of both : in both, in these cases the grant is good notwithstanding these mistakes, *Perk. sect. 72:*

If one be Patron of the Church of *S. Peter* and *Paul* in *D.* and he grant the next Presentation of the Church of *S. Peter*, or of the Church of *S. Paul* : these are void grants to pass the Presentation, *Bro. Grant 12.*

If one grant a Rent out of white acre by the name of a Rent out of black acre, this grant is void as to charge white acre. *Perk. sect. 79. Per Ch. Justice Huston & Telverton, Co. B. Mic. 3. Car. in the case of Edward Crew.*

If one have a Manor called *Steeple Lavington*, and he grant it by the name of *west Lavington* alias *Steeple Lavington* by the [alias] especially if the grant say [lying in *Lavington*] and the Manor of *Steeple Lavington* doth lie in that parish, and the grantor hath no other Land there.

If one grant all his Lands which he hath in *D.* in this manner, [All my Lands in *D.* which I had of the grant of *I. S.*] this is a good grant of all his Lands in *D.* albeit he had them not of the grant of *I. S.* but of the grant of another. But if the words be [all my Lands which I had by the grant of *I. S.* in *D.*] in this case the grant is not good to carry any other Lands in *D.* but such as he had of the grant of *I. S.* So if one grant in this manner [all my Manor of *Sale* in *Dale* which I had by descent] and in truth he had it not by descent but by purchase; this is a good grant of the manor. So if one grant all his Lands in *Dale*, and say no more; this is a good grant to pass all his Lands there.

But if one grant in this manner, [all my Lands in *Dale* which I had by descent from my father,] and in truth I had them not by descent but by purchase, this grant is void and will not pass those Lands. So if I grant in this manner [all my Lands that I had by the attainder of *I. S.*] and in truth I had no Land by that means, this grant is void. And if I grant after this manner [all my Lands in *B.* in the tenure of *D.* which I had of the gift of *I. S.*] and in truth it doth lie in *B.* and is in the Tenure of *D.* but it was not purchased of *I. S.*; this is a good grant to pass the Land, *Mic. 2 fac. in Brownes case agreed. Plow. 169. 395. And so was the opinion of Ch. Justice Popham 2 fac. B. R. Dyer. 87. Mic. 2 fac. Adjudge Brownes case.*

If a parish lie in two Counties, viz. *Berk.* and *Wilt.*, and one grant in this manner [all his close called *Callis* in the parish of *Hurst* in the county of *Berk.*] and in truth the close doth lie in the county of *Wilt.*; this is a good grant to pass the close.

But if one grant in this manner [All his houses in the parish of *S. Batolphs extra Aldgate* late in the tenure of *R.*] where in truth he hath no houses there, but he hath some houses in *S. Batolphs extra Aldersgate*; this is a void grant. And yet if the grant be in this manner [All that my house in the occupation of *I. S.* in *S. Andrew* parish] whereas in truth it is in the parish of *K.* but in the occupation of *I. S.* it seems this grant is good to pass the house. But if it be thus [All that my house in *S. Andrew* parish is *Holborne* in the occupation of *I. S.*] and in truth it is in another parish but in his occupation : this grant is not good to pass the house. *Dyer 299. Co. 3. 10.*

If I grant all and singular my Lands in the Tenure of *I. D.* which I purchased of *I. N.* specified in an Indenture of demise made to *I. N.*, and I have land wherein some of these references are true and the rest false, and no land wherein they are all true; in this case nothing passeth, as if I have land in the Tenure of *I. S.* and purchased of *I. N.* but not specified in the Indenture to *I. B.* or if I have Land which I purchased of *I. N.* and specified in the Indenture to *I. B.* but not in the Tenure of *I. D.* But if I have some Land wherein this is true, and some wherein part of them are true, and part false, then doe they pass those wherein all the circumstances are true.

If one grant in this manner [my manor of *Dale* which appeareth by Office found to be of the value of Ten pound *per Annum*] and in truth in the Office it is found at twenty pound *per Annum*; this grant is good notwithstanding this mispension. *HH. 2. fac. B. R. per Tanfield.*

If one grant in this manner [all my manor of *W* late parcell of the possession of the Abbot of *S*. and late in the possession of *K*.] and in truth it was never in the possession of *K*. this grant is good notwithstanding. But if the grant be thus [omnia illa terra &c. in tenura I. S. jacen. in W. nuper prioratus de *S*. spectan.] and in truth the Land doth lie in *S*. and not in *W*. this is no good grant to pass the Lands in *S*. And if the Lands doe lie in *W*. but are in the Tenure of *I*. D. and not in the Tenure of *I*. S. the grant is void to pass the Lands in the occupation of *I*. S. *Pasc.* 7 *Jac.* 8: *R. Co.* 2. 32.

If one purchase Land of *I*. S. in *T* and have no other Land there, and he grant his Land in *T* late the Land of *R*. S. or late the Land of *S*. and mistake or omit the christian name; this grant is good, notwithstanding this mistake. And so also it is where there is a blank left for the christian name. And if in this case he grant all his Land in *T* and say no more, this is a good grant to pass the Land. And if one grant [all his Lands in *D* called *N* which were the Lands of *I*. S.] this is a good grant to pass the Lands called *N* though they were never the Lands of *I*. S. But if the grant be [of all his Lands in *D* which were the Lands of *I*. S.] by this none but those Lands that were the Lands of *I*. S. will pass. *Dyer* 376. *Bro. Grant* 92.

If one grant in this manner [all my meadow in *D* containing ten acres] whereas in truth his meadow there doth contain twenty acres, it seems this is a good grant for the whole twenty acres. So if one grant thus [All those forty seven acres of Land by the Sleight whereof fifteen lie in *D*, twenty in *E*, and twenty five in *F*] and in truth all of them doe lie in *F* and none of them in *D* or *E*: this is a good grant to cary the whole forty seven acres. *Dyer* 80.

If one grant twenty load of Wood and say in his grant [of which twenty load of wood he had sixteen load by the grant of his father *I*. S.] and in truth *I*. S. did not grant any wood to him at all, or did not grant unto him sixteen load only: this is a good grant of the twenty load of wood notwithstanding this false recital. *Bro. Grant* 69.

If one grant his Manor of *D* and doth not say in what Town or Towns it doth lie, this is a good grant. But it is best to say in what Towns the Manor doth lie, for if it lie in divers places (as it may) and any of the places into which it goeth be omitted and the rest are set down; no part of the Manor lying in the Town that is not expressed will pass. *Br. Grant* 53. *7 H.* 4. 41.

If one grant a Manor and that which in truth is but one Manor by the name of the Manor of *A* and *B*; this is a good grant of the Manor. And so also it is if be two Manors, as if a man be seised of the Manors of *Ryton* and *Condor* in the county of *Salop.* and he grant in this manner [totum illud Manerium de *Ryton* & *Condor* cum pertinent. in Com. *Salopia*]; this is a good grant of both the Manors. Otherwise it is in case of the King. *Co.* 1. 46.

Prerogative.

If one have a farme of Land, Meadow, &c. by lease called *Hodges* lying within the parishes of *S. Stephen* and *S. Peter* in *S. Albons*, and he reciting the said lease grant to *C*. his terme and interest in the house, lands, &c. called *Hodges* in the parish of *S. Peter* and *S. Albons*; this grant is good only for so much as doth lie in the parish of *S. Peter*, and not for that which doth lie in *S. Stephens*. But if he grant the farme; and doth not say in what parish it doth lie; this is a good grant of the whole farme. As in the case before of a Manor that doth lie in divers parishes. And if in the case here the farme lie within the parish of *S. Peter* only; the grant is good for the whole farme. If one recite that whereas he hath such lands by forfeiture, or whereas such a one hath an estate of his Land, or whereas the grantee hath paid him ten pound or done him such service, or the like, and these things are not true, and afterwards he doth grant the Land by apt words; this mistake in these cases will not hurt the grant. But otherwise it is in case of the King in some of these cases. *Curia. Co.* B. *Pasc.* 9 *Jac.* *Inter Plas. & Sleeps.* *Bro. Grant* 53.

Prerogative:

If one have a Manor in which he hath Parkes and Fishponds, and he grant the Manor for life except the game and fish, and after grant the reversion of the Manor; this is a good grant of the game and fish also. *Co.* 1. 50.

If a grant be of [Centum libras terra, or 50 libras terra, or of Centum solidi

terms it seems these are good Grants, and that hereby doth pass Land of that value, and so of more or less. *Co. super Litt. 5.*

If a Grant be of an Acre of Land covered with water, this is a good Grant; *Co. super Litt. 4.*

If a Grant be of a certain portion of Land or Tithes, or of the fourth part of Land or Tithes, and there be a sufficient certainty in the description of it, this Grant is good. And therefore if the Grant be of the fourth part of the Tithes, and of the offerings of the Church of St. Peter, this is a good Grant. *Dyer 84. 34 Ed 3.*

If one leased of an Advowson in Fee, grant to J. S. that as oft as the Church is void, he shall name the Clerk to the Grantor, and he shall present him to the Ordinary; this is a good Grant of the Advowson. *Bro. Grants 101. 121.*

A Reversion may be granted by the name of a Remainder, or a Remainder by the name of a Reversion, and such a Grant is good. As if one grant Land to J. S. the Reversion to J. D. this is a good Grant of the Remainder. *Dyer 46. Plow. in Hills and Granges case.*

If one make a Lease of Land to Husband and Wife for their lives, and after grant the Reversion of this by the name of the Reversion of the Land, which the Wife doth hold for life; this Grant is void. So if one grant to two for life, and after grant the Reversion of one of them, this is void. *Fitz. Grant 63.*

A Felling or Grist Mill may be granted by the name of a Mill only. *21 Ass. Incertainty. plow.*

If one grant in this manner [All that his Messuage, &c. And all the Lands, Meadows, and Pastures thereunto belonging;] this is a good Grant, and certain enough to pass all the Lands, Meadows, and Pastures usually occupied therewith. *27 H. 6. 2. Plow. 164. Bro. Lease 35.*

If the Lord grant his Manor by the name of [His Manor, with the Reversion of all his Tenants,] or by the name of [the Reversion of all his Tenants, bond and free which hold for life or years] and do not name them by their particular names; these Grants are good in these cases, and certain enough. *Fitz. Grant 8. Perk. sect. 68.*

If one grant Land, and say not in what Parish, or County, or Village it doth lie, yet if there be any other matter to describe it; it seems the grant is good enough, and it may be averred where it lieth. But if there be no circumstantial matter in the grant to denote and decipher out where it doth lie, it seems the Grant is void for Incertainty. And therefore if one grant his Manor of Dale, or his Lands in the occupation of J. S. or his Lands that descended to J. S. or his Lands that did belong to the Priory of S. or the like; these are good Grants and certain enough. *Id. certum est quod certum reddi potest. Bro. Grant 53. Co. 9. 47.*

If there be Tenant for life of three Houses and four Acres of Land, and he in Reversion, grant the Reversion of two houses and of two Acres of this Land; this is a good Grant, and hath sufficient Certainty in it. *Perk. sect. 73.*

If a Grant be Incertain altogether, and have not sufficient Certainty in it, and cannot be made certain by some matter *Ex post facto*, it is void. And therefore if there be Lord and Tenant of three Acres of Land by Fealty, and twelve pence Rent, and the Lord grant [the Services of the third Acre] to a stranger; this Grant is merely void. So if Husband and Wife hold an Acre of Land jointly of J. S. for their lives, and J. S. grant the Reversion of the Acre of Land which the Husband alone doth hold for his life; this Grant is void. So if there be Lord and three Joynntenants, and the Lord grant the Services of one of them to a stranger, this Grant is void. So if one have twenty Tenants that do pay him twelve pence a peece Rent, and he grant five shillings yearly out of these Rents, and doth not say of which Tenants, this Grant is void for Incertainty. So if Consuance of Pleas be granted, and it is not said before whom, this is utterly void. So if one have two Tenants, and doth grant the Reversion of one of them, and doth not say which, this is void for Incertainty. So if one grant Etowens to another, and say not what, nor how; this is void. So if one grant me so many of his trees, or of his horses as may be reasonably spared, this grant is void. And yet if one grant me so many of his trees as J. S. shall think fit, it seems this grant is good. And if one grant me one hundred load of Wood to be taken by the

Assignment of the Grantor, or to be taken by the Assignment of *J. S.* these are good Grants. So if one grant me three Acres of Wood toward the North-side of the Wood; this is a good Grant, and certain enough. *Perk. felf. 67. & 68, 69: 9 H.6.12. 44 Ed.3. 17. Bro. Grant 52. Dyer 91. Co.5. 24.*

If one Grant to one of the Children of *J. S.* and *J. S.* hath more then one, and he doth not describe which he doth intend; this Grant is void for incertainty. *Bro. Domes 31.*

If one Grant to me a Rent or a Robe, twenty shillings or forty shillings, or Common of Pasture or Rent, in the Disjunctive which is at first very incertain; yet this Grant may become good; for if I make my Election, or he pay the Rent, or perform the Grant in either part, the Grant is now become good. *9 Ed.4.36. Perk. felf. 74.* So if one be seised of two Acres of Land, and he doth Lease them for life, the Remainder of one of them, and doth not say of which to *J. S.* in this case, if *J. S.* make his Election which Acre he will have, the Grant of the Remainder to him will be good. *Perk. felf. 76.* So it is when a man hath six horses in his Stable, and he doth grant me one of his horses, but doth not say which of them; in this case I may chuse which I will have, and in these cases, when I have made my election, and not before the Grant, is good. And if in these cases the Grantee do not make his election, during his life, it seems the Grant will never be good. If one be seised of Land, and Lease it for years, rendring ten shillings rent, and after he doth grant a rent of ten shillings out of this Land to a stranger; in this case, albeit, there be some incertainty in the Grant, yet this is a good Grant of a Rent of ten shillings, but it shall be taken a Grant of a new, and not of the old Rent, and therefore shall not take effect, until the particular estate be ended. *Bro. Grant 77. 249 91 Domes*

See more to this point in *Deeds*, and their *Exposition*, chap.5. Numb.15. and *Fine* chap.2. Numb.7.

5. In respect of matter in some other parts of the Grant.

1. In the Commencement of the Estate.

In some cases albeit there be in a Grant, a good Grantor, and a good Grantee, and a thing granted, and all these are duly and certainly described, yet the Grant may be void for some fault, in some other thing, touching the Grant.

1. In the Commencement of the Estate: For if a man be possessed of a Term of years, albeit it be one hundred years or upwards, and grant to another all the Residue of this term of years that shall be to come at the time of his death; this Grant is void for incertainty: And yet if a man possessed of such a term in Land, grant the Land to another, To have and to hold to him after the death of the Grantor for fifty years, or for two hundred years; these are good Grants, and in the first case the Grantee shall have fifty years, if there be so many to come of the term of one hundred years, at the death of the Grantor; and in the last case the Grantee shall have the Land for the whole one hundred years, or so many of them as are to come at the death of the Grantor. *Bro. Grant 154. Co.1. 155. Plow. 520.* So if one Grant any thing that doth lie in Livery or in Grant, and that is in esse at the time of the Grant in Fee-simple, Fee-tail, or for life, and the estate is to begin at a day to come; this for the most, is void; howbeit in some cases the Livery of Seisin will help it: But a Lease for years to begin *in futuro*, is good enough. And if a Lease be made to one for years, or for years determinable upon lives, and after a Lease is made to another of the same thing, To have and to hold from the end of the former Lease; this is a good Lease, and the Commencement certain enough. So if a Lease be made of Land to one for life, and after the Reversion thereof, is granted to another for life, *Cum post mortem vel alio modo vacare contigeris*, this is good. *Dyer 58. Co.5.1. Pasche, 7 Jac. Dennis case.* So if a Lease be made to one for twenty years, if he live so long, and after a Lease is made to another *Habendum*, after the end of the Term granted to the Lessee for twenty years to be accompted from the date of the Deed last made; this is a good Grant for twenty years after the first Lease ended, and the words [*to be accompted, &c.*] shall be rejected. *Craddock; case. Pasche, 7 Jac. Co. B.* And if one grant a Rent to me *Habendum*, from the time of my full age for my life, and I am of full age at the time of the Grant, this Grant is good for my life. *Co. 9.* If a Woman-sole have a Lease for years, and take a Husband, and then he in Reversion Grant the Land to another

Incertainy.

another *Habendum* after the terme granted to the husband &c. where in truth it was never granted to the husband but by an Act of law, viz. the marriage, yet this is a good Lease. *Plow.* 192. *Co.* 6. 26.

2. In the limitation of the estate. For if a grant be to two & *hereditus*, without *et*, this is void for incertainty, and cannot be made good by Averment. And yet a grant to one & *hereditus*, is good. And if a man grant two Acres to have and to hold the one in fee-simple and the other in fee-taile, or the one in fee-simple and the other for life, and doth not set downe which in fee-simple &c. in certaine, yet this grant is good, and the grantee hath the election. And yet if one grant two acres to two men, *Habendum* the one to the one, and the other to the other, and say not which either of them shall have, this is void for incertainty. And if one have a reversion of land after a lease for yeares, and grant the land *Habendum* the reversion, or grant the reversion *Habendum* the land, this is good. 22 H. 6. 15. *Plow.* 28. *Perk. Sect.* 75. 77. *Plow.* 152. *Co.* 12. 107. *Plow.* 147.

In some cases a grant or gift may be void at least to some persons and purposes when there are none of the defects aforesaid in it, as when it is made upon a corrupt contract, or to the end to defraud creditors of their debts, or purchasers of their lands bought, or the like, whereof see before in *Deed chap.* 4. *Numb.* 5.

And in some cases albeit there be no other fault in the grant, yet it may become void for want of some other matter that ought to be done, as inrolment, livery of seisin, attornment, &c. for where these things are requisite the grant is not good untill it be had, neither for that thing which will not passe without that ceremony, nor yet for that which otherwise would pass by the deed. And therefore if a feoffment be made of a Manor to which an Advowson is appendant, and no livery is made so that the Manor doth not passe; the Advowson will not passe neither. Where a grant may be void by the refusall or waiver of the grantee, See before in *Deed Numb.* 6. *chap.* 4. 21 H. 7. 5. *Co super Litts.*

If one make a feoffment with warranty, and after the feoffee doth grant to the feoffor that neither he nor his heires shall vouch the warrantor or his heires upon the warranty; this is a good discharge of the benefit of voucher, and doth bar the feoffee of it. And yet he may bring a *Warrantia Charta* still. So if one grant to mee a rent-charge, and afterwards I grant to him that he shall not bee sued for this rent; this is a good grant to bar me of bringing an annuity for the rent. And yet I may distrain for the rent still. And so *à converso* if I grant to the grantor he shall not be distrained for the rent, by this I am barred of a distresse, but not of bringing an annuity for the rent. So if the Lord doth grant to his tenant holding by Knights service, that his heires shall not be in ward &c. or a man doth grant to his debtor that he will not sue him for the Debt at all, or untill such a time; or one grant to his Lessee for life or yeares, that he shall not be impeached for waste; all these are good discharges, and may be pleaded by way of bar to avoid circuity of Action. 7 H. 6. 43. 21 H. 7. 23. *Perk. Sect.* 69. *Bro. Grant.* 175. *Kelw.* 88.

How a grant shall be used and taken *Brownlows Rep.* 1 part. 32. 2 part. 57. 193.

2. In the limitation of the estate. Or in the *Habendum* of the Grant.

Incertainty.

6. In respect of the end or ground of the Grant.

7 In respect of omission of some ceremony &c.

5. What shall be said a good grant in the nature of a release or discharge. Or not.

CHAP. XCIV.

Of Gig-Mills, Goldsmiths, Guns, Heresie, Hemp, Honor, Horns, Horners, Hops, Horses, Apostate.

Gig-Mills,
what.

Goldsmiths,
Gold and Sil-
ver.



Guns and Cross-
bows,
Dag.

Haque and De-
mi-Haque.

Heresie and He-
retick, what.
Apostate.

Hemp and Flax.
Honor and Ho-
nor-Court,
what.

Horns and
Horners.
Hops.
Horses.

Gig-Mills were Mills used in the making of Cloath, which with Iron-Cards, are forbidden by the Statutes of 3 *Edw.* 6. 2. 5 *Ed.* 6. 22.

For Goldsmiths, Gold, and Silver. See the Statutes of 4 *H.* 7. 2. 2 *H.* 6. 14. 18 *Eliz.* 15. 2 *H.* 5. 4. 8 *H.* 5. 3. 5 *H.* 4. 13. 37 *Ed.* 3. 7. 28 *Ed.* 2. 20. 25 *Ed.* 3. 12. 5 *Ed.* 6. 16. 4 *H.* 7. 28. 2 *H.* 4. 5. 9 *Ed.* 3. 1. 5 *R.* 2. 2. 2 *H.* 6. 6. 27 *Ed.* 3. 14.

The Hand-Gun is an Engine prohibited to be used and carried about; and within this word is included a Dag, though it were invented since the Statute: As within the word Cross-bow is included a Stone-bow; and a Hag-but, Haque, or Haque-but, is a Hand-gun of about three Quarters of a yard long: And there is also the half Haque or Demy-haque. But for all these, and for shooting, See 33 *H.* 8. 6. 2; 3 *Ed.* 6. 24. *Co.* 5. 71, 72. 1 *Jac.* 25. 27. 5 *Eliz.* 2. 5.

Gun-powder and Salt-Peter may be brought in from beyond Sea; and it may be made freely in this Realm, 16, 17 *Car.* 22.

An Heretick (by our Law) it was one that did wilfully oppose some principal Head or Article of Christian Faith, evidently against the Scripture and Doctrine of the Church, he was to be dealt with by the Bishop, if obstinate to be excommunicate; and if he did not submit, to be burned. So also, if he did conform, and then fall away, and become Apostate. These things are gone, and changed with the times. But of them read, *F.N.B.* 209. *Bro.* 458. *Doff. & Stud.* 29. 2 *H.* 4. 15. 31 *H.* 8. 14. 1 *Eliz.* 1. 8 *H.* 8. 14. 2 *H.* 5. 7. *Coupon Littl.* 281. 3 *part. Inst.* 4. See *Services of God.*

For this see Statutes, 33 *H.* 8. 17. 21 *H.* 8. 12.

Honor doth signifie sometimes the most noble sort of Lordships, whereof the Inferiour Lordships or Manors do depend by performance of some Customs or Services to those that are Lords of them. And it seems there are none of these, but such as did originally belong to the King, and have since been given in Fee to Noblemen. And in these places are the Courts called Honor Courts, 37 *H.* 8. 18. 31 *H.* 8. 5. 33 *H.* 8. 37, 38.

For Horns and Horners. See 4 *Ed.* 4. 8. 7 *Jac.* 14.

For Hops, and the punishment of them that bring into us, or use bad Hops. See 1 *Jac.* 18.

For Stone-horses, Mares, and other Horses. See 27 *H.* 8. 6. 32 *H.* 8. 13. 8 *Eliz.* 8. 1 *Ed.* 6. 5. 5 *Eliz.* 19. 11 *H.* 7. 13. 2, 3 *Phil. & Ma.* 7. 31 *Eliz.* 12. 21 *Jac.* 28. 20 *R.* 2. 5.

CHAP. XCV.

Of House-boot, Fire-boot, Plough-boot, Hedg-boot,
and Hay-boot.

House-boot is sufficient Timber and Wood for reparation of the housing: Fire-boot is sufficient and necessary fuel to burn: Plough-boot is sufficient and necessary Timber and Wood to make and amend Sallows and Wains, and the rest of the Plough gear: Hay-boot is sufficient and necessary stuff to make Rakes, Forks, and such like Instruments; and Hedg-boot is necessary stuff to make and amend the Hedges.

House boot, Fire-boot, &c. what.
Plough-boot.

Hay-boot.

Hedg-boot.

All these a Lessee for life or years (be his Lease in writing, or by word) may (by the Law) cut down and take without any leave of the Lessor, in any part of the ground demised to him; wherein these things are to be known.

1. Where the Law gives him leave to take any one of these, he may take all of them. Lessees that have Estates for life or years.

2. He may take them, although there were no special Agreement, nor words in his Lease to give him liberty to take it.

3. He may (as it seems) cut it before he use it, that it may be fit for use, but not before some occasion begin to appear for the use of it.

4. If he be restrained by any special Agreement contained in his Lease, then he may not take it; for, *Modus & convertitur in unum legem*.

5. He may cut not more then enough, and not superfluity.

6. The stuff he doth cut and take, must be to amend and make the Hedges belonging to the things demised, to make the Corn and Hay growing upon, and coming of the same Land; the Wood for Fire to be burnt in some part of the housing, let by the same Lease; the Wood for Timber to amend part of the housing demised: For if it be bestowed in any other place, or to any other purpose, or more be cut then is reasonable, or otherwise then, as is before set down, it will be a Waste. Waste.
See for this Co. upon *Littl. 41. Broo. Common 32. F.N.B. 59. Dyer 19. Fitz Common 28.*

CHAP. XCVI.

Of Hunting and Hawking, and of Hawks.



As to these things, this is to be known.

1. None may Hawk or Hunt with Spaniels in standing Grain, or before it is stocked, under pain of forty shillings to the owner of the Ground, if he do it without his leave, Hunting, Hawking, &c.

2. The penalty of taking Hares, Pheasants, and Partridges by Nets and other Engines, Hares, Pheasants, Partridges.
23 Eliz. 10. 1 Jac. 27. 7 Jac. 11. 21 H. 7. 17.

3. The penalty of keeping Gray hounds, Dogs, or Nets, to kill or take Deer, Hares, Pheasants, or Partridges, *1 Jac. 27. 7 Jac. 11. 11 H. 7. 17. 14, 15 H. 8. 10.*

4. The

Hawks and
Hawks-Eggs.

4. The penalty of buying or selling Deer, Hares, Pheasants, Partridges, 1 *7ac.* 27.
5. The penalty for Hawking at, or destroying Pheasants, or Partridges, between the first of *July*, and the last of *August*, 7 *7ac.* 11.

6. The penalty for breaking down Fish-pond Heads, or entering into Parks, Woods, or other Grounds, and there to kill or chase the Deer, or take away Hawks or Hawks Eggs, 5 *Eliz.* 21.

7. The penalty for stealing, concealing, or taking away Hawks, 34 *Ed.* 3. 22. 37 *Ed.* 3. 19. 11 *H.* 7. 19. 5 *Eliz.* 21.

8. Every man may take Airies of Hawks, Sparrow-Hawks, Faulkons, Eagles, and Herons, in their own Woods, 9 *H.* 3. 13. But you may see more of this in my *Justice of Peace*, 2 part in the *Sessions charge*. 13 *R.* 2. 13. 14, 15 *H.* 8. 10.

Hunting in a
Park.

9. None may kill or hunt Deer or Conies in any Park, in pain of three months Imprisonment, and treble damages to party grieved, 3 *7ac.* 13. 7 *7ac.* 13. See there more for this.

CHAP. XCVII.

Of an Idiot, Idolatry, and Implication.

SeB. 1.
1. Idiot, what.



N Idiot or Man *Non compos mentis*, is one that is void of Reason and very foolish, and wanteth natural and common Understanding, as in the Cases, *infra*. Sometimes the word is taken for a Plea, to avoid a Deed made by such a man as is so, *Terms Ley Idiot*. *Crompt. Jur.* 114.

The kinde.

There are four sorts of Men *Non compos mentis*.

1. An Idiot or Natural fool so born, and he is called an *Idiot à Nativitate*.
2. One that is so by the Visitation of God, and he is called an Idiot Accidental.
3. One that is Lunatick by certain fits and seasons, that hath his *Lucida intervalla*.

4. One that hath made himself so by his own act, as a Drunkard; one that is born dumb, deaf, and blinde, is accounted as an Idiot to some purposes.

Who shall be
accounted such
a one.

He is then reputed, and to be taken a Natural or Accidental Idiot or Lunatick, when he may be made to believe any thing: As that an Ass can flie, Trees walk, and Beasts and Birds speak, and the like; or that cannot number twenty pence, name his Father and Mother, nor his own age, or the like. But if he have so much knowledge, as to be able to read or learn to read by the instruction of others, or measure an Ell of Cloth, or name the days of the week, or write Letters, or make acquittances, or beget children, or the like, whereby it doth appear he hath some light of Reason; in this case, he is not to be counted an Idiot, *Co.* 4. 124. *Co. super Litt.* 247. *Perk.* 5: *Terms Ley Idiot*. *Swinb. fol.* 43. *Broo.* 443. *Co.* 4. 12. 128. *Crompt. Jur.* f. 38.

How he is to
be tried.
Idiota Inqui-
rendo, what.

This Idiot is to be tried and discovered by the Writ which is called *De Idiota inquirendo*, which is a Writ directed to the Escheator or Sheriff of any County, where the King when he understood there was an Idiot, so weak of understanding, that he could not govern his own Estate: That the Sheriff or Coroner therefore do call before him the Idiot, and examine him before a Jury, whether he be sufficiently able to manage and order his own estate with discretion, and accordingly to certifie, *Co.* 9. 31. *F.N.B.* 231.

He that is an Idiot *à Nativitate*, the King should have the custody, and Wardship of all his Land (except Copihold Lands) of whatsoever Lord the same be held, and by what means soever, as by purchase or descent, the Idiot did come by them. Also he was to have the custody and Wardship of his Body, Goods, and Chattels, and all that is his, during the life of the Idiot: And the King was to have the profits of all this to his own use, save onely that with the same, he must fine and provide for the Idiot and his family, sufficient Meat, Drink, Apparel, and other necessaries.

But

But the King was to have no interest in the Estate and Substance of the Idiot, but onely a Custody, and therefore he could not sell any of the Lands, or Goods, or Chattels (unless perhaps make a Lease of the Land at a yearly rent.) And if the Idiot happen to come to be of his right minde again, then the King was to deliver all that was his to him again, if not, he was to leave it to the Heirs and Executors, or Administrators of the Idiot after his death: But Rights or Titles of Entry or Action, that the Idiot had, those (it seems) the King should have no benefit by neither, could he make any use of; but for all that was in possession, he was to have as before. And if any man should have kept the Body, Lands, Goods, or Chattels, from the King, the King should have remedy to recover it. 27 Ed. 2. 9, 10. Co. 8. 170. *Stamf. pr. c. 9. Co. 4. 126, 127. F. N. B. 232. 33 H. 8. 46. Dyer 25. 164. Fitz. sa Def. 37. Scire fac. 10. 1 H. 7. 24.*

And for the Lands, Goods, and Chattels of Lunaticks, the King was to hold them during the time of their Lunacy: But as for this Idiot, and he that is an Idiot *per Accident*, or one that hath his *Lucida intervalla*, the King was to have their Estate and Substance, not as he had the estate of the Natural Idiot to his own use without rendering an account; but in this case he had them onely to keep for the Lunatick, and was to find him and his family with it; and when he came to be of some memory again, must render to him an account for the profits, and deliver him all the overplus of that hath been laid out for the maintenance of him, and his family, Co. 8. 170. Dyer 25. *Stamf. pr. c. 9. F. N. B. 232.*

If a Copiholder be an Idiot, his Copihold-estate shall be ordered by the Lord; and not by the King. Dyer 302.

It seems such an Idiot may consent to marriage, and his Issues are Legitimate. *Trin. 3 Jac. B. R. Stiles case.*

If such a one were made a Judge, all Acts that should be done by, or before him, as Judge, were good, and would binde all men. *Broo. 446.*

If such an Idiot do any thing by Fine or Recovery, or the like, it will binde him, and all others, as if he were another man. But the Judges, before whom such a Fine or Recovery is taken, ought not to admit it; so if he acknowledge a Recognizance, it is unavoidable. Co. 4. 127. *Perk. sect. 24.*

If such a person, during the time of his Idiocy or Lunacy, had committed Treason against the King, he should be punished as a Traitor. Co. 4. 124.

All Acts that the Lunatick man doth, during the time of his *Lucida intervalla*, though it be by Deed in the Countrey, as a Feoffment, Obligation, or the like, shall binde him and all others, that it shall concern, as any other man. So if in those times he commit any Felony, or other offence, he shall be punished as another man. Co. 4. 127.

All Acts that are done by a Drunkard that makes himself *De non sane memorie*, shall binde and prejudice him, as if he were not so, as Deeds, Obligations, and the like, or Bargains and Contracts, he doth make then: Also if he do then in that case, commit any Treason or Felony, his Drunkenness will not mitigate, but aggravate his offence. Co. 4. 124. *Plow. 19. See Terms Law Disability 148, 149.*

If he make a Bond, and must be sued upon it, and Recovery be had, and his Execution done or money paid, before the Office is found; this is unavoidable. Co. 4. 126.

If such a one as is a Natural or Accidental Idiot or a Lunatick, by the Act of God, do whiles he is so, do or commit any act of Felony; this is no Felony in him, neither shall he lose or forfeit life or goods, or any thing else, though the act be Felony by a Statute, that doth say that every one that doth so, shall be judged a Felon. *Stamf. 1. 7. 3 H. 7. 1. Co. 4. 127. 21 H. 7. 31.*

If such a one in that case make a Testament, it seems, it is not good. See *Testament. Co. 6. 13. Dyer 203. 79.*

The Acts and Deeds of such persons done, during the time they are out of their minde, are void or voidable as Acts done by Infants are. See *Infant. F. N. B. 202. 7 H. 4. 5. 52. See more for both of them, Testament Numb. 4. Grant Numb. 2, 3. Fine Numb. 6, 8. Capacity; Disability throughout.*

* Sect. 4.
What Acts
such an Idiot
may do, or
not.

Who may take advantage by their Acts, or not.
Dum non fuit compos mentis, what.

Privies in blood, as Heirs, may take advantage, and shew the Disability of their Ancestors that were *Non compos mentis*, and so avoid their Acts and Deeds for this cause: And for this cause they may have a Writ appointed for that end called *Dum non fuit compos mentis*. Also Privies in Representation, as Executors or Administrators; and therefore if he should make any Obligation, Covenant, or the like; and they be sued upon it, they may avoid it by shewing his Disability. *Co. 4. 127.*

If the Idiot make a Gift, Grant, a Release of his Land, before the Kings Office had been found for him, the King might avoid it at any time, during the Idiot's life. So also he might avoid Obligations, Bills, or the like. *Co. 4. 126.*

If he grant a Rent-charge out of his Land, and die, his Heir may avoid it, and he shall hold it discharged. *Littl. 405, 406.*

A man himself that is *Non compos mentis*, shall never for that cause avoid his own act, either by Law or in a Court of Equity; for a man shall never be received and allowed to shulk himself. Adjudged, *Trin. 37 Eliz. Stroud versus Marshal, B.R. Mich. 2 Jac. Linch versus Hinde.* Adjudged, *Littl. 405, 406.*

Privies in Estate, cannot take advantage at any such Disability; as if a Donor in Tail *Non compos mentis* make a Feoffment in Fee, and die without issue, be in Reversion or Remainder cannot avoid this Deed, by this Plea. So if Tenant do *Non sane memoris* make a Feoffment in Fee, and die without Heir, so that the Land should Escheat, the Lord cannot avoid this Feoffment for this cause. *Co. 4. 127.*

The old Statutes about Idiots are *Prerog. Regis 9, 10.*

For the taking away of the Monuments of Superstition and Idolatry. See Act, 8 Aug. 1643. 9 May. 1644. See Pope.

Idolatry and Superstition.

Implication, what.

Implication is where the Law doth imply something that is not expressed between parties, upon their Deeds or Agreements, as sometimes, if there want words to express their minds, the Law will help it by Implication; and so one word, or thing shall be implied by another, sometimes one sentence shall be implied by another, sometimes one Estate by another: As if one Devise, that after his wife *J. S.* shall have his house; here the wife shall have an Estate for life by Implication. It is also in diverse other cases, as if one grant an Office, it is a Condition *sacit* implied by Law, That he must execute the Office, else the Grant to cease. So in every Exchange a Condition and a Warranty are *sacit* implied. *Quod necessarii subintelliguntur unde desit.* See in other Titles.

Devise.

CHAP. XCVIII.

Of Imprisonment.

1. Imprisonment.



Arrest:

Imprisonment is where a Man is restrained of his usual and lawful liberty; so that he cannot go abroad at all times, and in all places with that freedom, as at other times without Bail or Mainprise: And this, whether it be in the open Field, or in the Street, or in a House, or in a Gaol, or in a Stocks, all comes to one, if it be any Restraint of Liberty, it is an Imprisonment. *Terms Ley Imprisonment.*

An Arrest seems to be nothing else, but the first Act of this Imprisonment, when a man is first taken and restrained from his Liberty. *Terms Ley Arrest.* Note that this Imprisonment will excuse a man in many Cases from prejudice, for which see *Co. super Littl. 159. 260. &c.*

Sec. 1.
2: What Act shall be said an Arrest or Imprisonment, or not:

If one lay hands upon a man, and hold him; keep him in a house, lock him in a room, tie him to a Tree or Post; put him in prison or Stocks, or the like; all these be Imprisonments. So if one say to another, *I Arrest you in the Lord Protectors name*, and lay no hands on him, it seems this is an Arrest, especially if he be a known, sworn Officer that doth so, for in this case were the Arrest good, the Party is bound to obey, and to submit to the Arrest. And so was the opinion of the Lord-Keeper, and the two Chief Justices, *Mich. 5 Car. Co. 9. 66. 69.*

But

But if one do only require another to stand or stay, or say he doth intend, or will arrest him, but doth not lay hands upon him, nor say he doth arrest him; this, it seems, without more, is no arrest nor imprisonment, *Br. F. Imprif. 37.*

In all cases where the Common-Law, or where any Statute doth give power to arrest and imprison, there it is lawful and justifiable so to do. But in that case he that doth so, must take heed that he do pursue the Statute in the manner and order of doing of it: As if a Bailiff be found in arrearages before Auditors, the Auditors may commit him to Prison; but then it must be to the next Prison, and it must be speedily,

13 *Ed. 1. 11. Dyer 204.*

One convicted of Witchcraft may be imprisoned, *St. 1 Jac.*

A Forger of Deeds, or one that doth agree to any such thing, to the intent any Freehold may be recovered or charged, may be imprisoned. So if one had refused to pay his Tythes after sentence given in the Spiritual Court for them, he might be imprisoned, 27 *H. 8. 1.* And so in divers other cases, and for divers other causes; for which see the Statutes at large, 5 *Eliz. 14.*

In all cases regularly, where a man is fined by any Court that hath power to fine *Fine.* and imprison, there he may be imprisoned also; for Imprisonment is incident to every Fine: As if Jurors will take more then their Fees for their labors, after they have given their Verdict, of him for whom they gave it: If men will conspire to put a man in danger of his life by Indictment: If one will willingly plead a false Plea, to delay the Suit: If a Sheriff or Bailiff of a Franchise will not, or will falsly return his Writ directed to him: If a Guardian in Chivalry will take a Feoffment of his Heir within age, of his Land: If in a *Quid juris clamat*, or *Per qua servitia* the Tenant do appear, and refuse to attorn: If a Sheriff neglect or refuse to take his oath when he doth enter to his office: If a Lessee doth commit waste after a Prohibition by *Estrangement*: If one plead a false Deed, or deny his own Deed, and upon Trial it be found against him: If a Juror give a false Verdict: If one bring an Attaint, and it pass against the Plaintiff: If one bring an Appeal, and by his default the Will abate, or upon Trial it pass against the Plaintiff: If one that is upon Mainprise, fail to come in at his day: If one do a Trespass, Disceison, Forcible Entry, or the like; for these and many other causes a man may be imprisoned. *Br. Impr. 9. 77. 101, 102. Br. Fan. Impr. 107. 10. 13. 98. Fitz. per qua servitia, 23. Dyer 168. Co. 5. 105. 32 H. 8. 54. Br. Impr. 5. 9. 14. 11. 113.*

A man may be imprisoned for, or upon suspicion of Treason, Felony, or any other great offence, for the preventing of any such offence, the breach of the Peace, or the like; so for Night-walking, and the like. *Vide infra, 9 Ed. 4. 26. 20 Ed. 4. 6. 11 Ed. 4. 4.*

If a man be mad and furious, and like in his madness to harm; he may be bound or shut up by any man whiles he is so, to prevent mischief, *Br. F. Impr. 35.*

If men ride armed, or there be any Rebellion, the Sheriff, Officer, or any other assistant to them, may arrest and disarm them, and no false Imprisonment lieth, *1 H. 7. 7.*

If the Imprisonment be on a false and fained Suit; as in suing Execution on a Statute when the money is paid, no false Imprisonment lieth for this, *Stat. 43 Ed. 3. c. 25.*

If a Constable make a Deputy, and the Deputy do execute Warrants and make Arrests, it seems this is good. *Phelps and Winscombs Case, Mich. 13 Jac. B. R.*

If a Hue and Cry be levied, and no cause; he that doth arrest on such a Hue and Cry is to be justified, and he that raised it shall be punished, 21 *H. 7. 27.*

Ordinaries might imprison Priests for Incontinencie, 3 *H. 7. 1.*

By and upon a Writ of *Vi laica removenda*, the Sheriff may arrest a Clerk resisting, &c. albeit the Writ speak of many, and those Lay-men, *Adj. Trin. 18 Jac. B. R.*

For Treason, Felony, or Breach of the Peace, any man may arrest without Warrant or Precept, *New Terms ley Arrest.* But he that doth arrest, must see a Felony be done. Secondly, that he be suspect, *Idem.* And that there be some cause to suspect him

3- Where an Arrest or Imprisonment shall be said to be lawful.
1. In respect of the cause of the Arrest.

*Suspicion.
Common voice.*

him above another; as that Hue and Cry is gone forth, and doth denote such a man as he is; or that it is the common voice that he is the man, or it is such a man as he is, or that he is a Companion of Thieves, or that he hideth himself, flieth, or the like. For in these cases any man may by warrant of the Common-Law, without any Writ or Warrant from any other, and that before Presentment, Indictment, &c. arrest the party suspect; and whether the cause of suspicion be good, shall be tried by the Judges in the Action of False Imprisonment, or upon a *Habeas Corpus*. But it is said, that an Arrest upon a Hue and Cry is not good, unless some Felony have been committed, *Co. 2 par. Inst. 2 H. 7. 15. 5 H. 7. 5.* And any man so taken is to be brought to Gaol, to abide till Sessions, to be acquitted or indicted, *Idem. Etc. more, Cromp. Jur. f. 16. 6. 80. a. 93. b. 97. b. 110.* See more in *Co. 10. 76.*

A Justice of Peace may himself in his own discretion arrest a man, and compel him to find Sureties for the Peace: And if he will, he may then let him go without giving Surety, and no false Imprisonment will lie against him, *Br. Tress. 177.*

*In respect of
the party ar-
resting, and
his authority.*

Any man as well as a Constable or Officer, after a Felony is done, that doth suspect another, may arrest him and bring him to an Officer, or to a Justice of Peace, or to Gaol, which he will. But in this case the party must take heed of two things. 1. That there be a Felony done. 2. That he have some cause and reason to suspect that party that he doth arrest. See Causes *infra*. So any one that doth know such a man hath committed the Felony, may of his own head without any Warrant from a Justice or Officer, apprehend the Felon, and carry him to the Officer, Justice of Peace, or Prison. *Plow. 49. 29 Ed. 3. 9. 13 H. 7. 10. 20 H. 7. 26. 5 H. 7. 6. 10 Ed. 4. 17. 14 H. 8. 16.*

A Watchman may arrest Night-walkers in the night, *4 H. 7. 15: Co. 9. 68. or any suspicious persons, 5 Ed. 3. 14. 13 Ed. 1.*

If there be any Breach of the Peace by fighting, or any apparent likelihood thereof, the Constables or Officers may take the parties and set them by the heels, or put them in Ward. So if they offer to assault the Officer himself. So if there be a lewd suspected Fellow in a lewd House, it seems the Officer may set him by the heels, *Finches ley 336: Fitz. Bar 202. 3 H. 4. 9. 5 H. 7. 8. 13 H. 7. 10. 10 Ed. 4. 17. 12 H. 7. 18. 22 Ed. 4. 35.* And if there be an Affray, any man may restrain the Assayers to keep Peace: But the Affray being past, they cannot meddle farther without authority from Officers, *Co. 2 par. Inst. 52.*

If any Sheriff, Bailiff, Constable, Officer, or other Minister of Justice in doing their Offices, as executing Writs, the Justice of Peace Warrants, keeping the Peace, or apprehending Felons, require others to aid them in that work; the parties so required must aid them, and then their Arrest or Imprisonment is as lawful as the Officers, *Stat. 2 H. 7. c. 15. Westm. 1. c. 9. Winton 3 H. 7. 1. Co. 9. Ca. 8. 66. 5 H. 7. 15.*

If one man wound another, so that it is uncertain whether he will die or live; the Officer may apprehend the party, and keep him in hold till he see whether the party be like to live or die, *10 H. 7. 26.* And any other man may arrest such a man, and hold him for a reasonable time upon this account, *Co. 2 Inst. 52.*

Sec. 3.

If a man be outlawed for Felony, it seems any other man as well as the Sheriff or his Officers, may arrest the party without any Warrant: But if he be outlawed in an Action personal only, *contra. Dyer 120.*

By a Warrant from the Lord Protector, his Council, or from any the Courts or Westminster, or from a Justice of Peace, or from the Sheriff, one may lawfully arrest or imprison another: As if a Sheriff have a Writ to arrest a man, and he make a Warrant to any Bailiff of Franchise, or other sworn, known, or special Bailiff to arrest the party; this is a good authority. But therein they must take heed they do pursue their Warrant, or else the Arrest or Imprisonment may be wrongful. And this Warrant, it seems, must be in writing, unless the party to be arrested be present; or else it seems no good authority. But if the party be present, it seems such verbal authority is good enough, *Co. 8. 67. 26 H. 7. 5. Co. 6. 64. Br. Tress. 339. 10 H. 7. 18.*

If a Sheriff or his Bailiff arrest a man on a *Capias* directed to them, and there be

no Original on which the *Capias* was grounded; yet the Arrest is lawful in them. So if a *Capias* come to them to take the body of a Duke, Countee, Baron, Dutcheff, a Countess or Baroneff, against whom by Law no *Capias* doth lie for Debt, or the like, and the Sheriff do execute it; the Arrest and Imprisonment is lawful. So if the Suit upon which the Process do come to him be never so unjust, and he arrest by vertue of the Process, his Act is lawful. Co. 8. 67. 16 H. 7. 3. *Kelw.* 98. 43 Ed. 3. 33.

After an Action is entred in London, a Serjeant at Mace may arrest the party with his Mace *ex officio*, without any Precept at all. Co. 8. 67.

Officers may arrest suspicious persons that walk by night, and carry them to a Justice, or set them in the Stocks till the morning, 5 Ed. 3. 14.

If a Commission *contra legem* be to J. S. to arrest J. N. and J. S. do it, the Arrest is lawful in him, and no false Imprisonment lieth, *Br. Treff.* 372.

If a Sheriff arrest a Duke or such like on a *Capias*, the Arrest is lawful. *See before.*

If there be two or more of one name, and the Sheriff hath Process against one of them, and there is no distinguishing addition whereby the Sheriff may know which is intended; in this case if he do mistake, yet the party arrested hath no remedy but by *Indemnitate nominis*. But the Sheriff or other Officer is to see at his peril, that he mistake not the party in cases of Arrest; for he is bound to take notice of him; for if he mistake him by information of another, or the like; he shall have this Action, And so was the opinion of the whole Court, *Trin.* 38 *Elix.* *Cross Case*, B. R.

See B. 4:
In respect of
the party ar-
rested.

If a *Capias* come to a Sheriff to arrest a man by a wrong name, and he do it, this Action lieth, *Brownl.* 2 par. 48. So if a Process come to the Sheriff to arrest J. S. and he do arrest J. N. and although the party Plaintiff do shew him a wrong man; this will not help him. And yet if there be practice between him and the party arrested, he may aver this, and that will help him, *Brownl.* 1 par. 211. See *Br. F. Impr.* 19.

If one be arrested on a *Latus* or *quapias* in the morning of the day that the Writ is returnable, it seems the Arrest is lawful, *Trin.* 3 Jac. per three Justices.

Of the time.

If one arrest a Minister or another on a Sabbath-day, either at the suit of the party or the Protector, it is a good Arrest. But if the Minister be arrested at his Church, *enudo* or *redendo* to or from the same, the Bailiffs for this may be bound to their good behaviour, or might have been censured in the *Star-chamber*, especially if it be whiles they are about Divine service, 1 R. 2. 15. 50 Ed. 3. 5. Co. 9. 66. *Brags Case*, Hil. 7 Jac. C. B.

If one arrest another in the night upon a Process for the Lord Protector, or a common person, the Arrest is lawful, Co. 9. 66.

If two men be fighting, and one of purpose to prevent harm put one of them up in a house, or lock him in a chamber till the heat be past; it seems this is lawful: But if they had been quarrelling only, and not fighting, *contra.* *Br. F. Impr.* 28.

Of the manner
and order, and
end.

If a man take another on suspicion of Felony, or the like, and after put him in the Stocks for a while till some other course can be taken with him, it seems this is lawful and justifiable. So if he be sick, and he keep him a while for that, 5 H. 7. 4. 29 Ed. 3. 9. 9 Ed. 4. 9. 22 Ed. 4. 25. *Br. F. Impr.* 28.

If one arrest another on a Justice Warrant, and let him go, or he escape, and after he taketh him again upon the same Warrant, this is good enough, *Br. Impr.* 18. *Br. Impr.* 13.

If one seize the Wardship of the body of a Ward happened to him, this is justifiable, *Plow.* 194.

If a man be in danger to be killed by others, and one put or lock him in a house or chamber to keep him from their violence, it seems this is good and lawful; but he must not keep him there longer then is needful, *Br. F. Impr.* 3.

If one do keep or carry a man or woman by their own agreement, as upon a horse, in a Boat, or the like, this is justifiable also, *Br. F. Impr.* 18.

In respect of
the Place.

If one arrest a man upon a Writ in a Franchise, the Arrest is good, and this Action of False imprisonment will not lie, but an Action of the Case will. *Ch. 7th. B. R.*

If a man be arrested in a Church, the Arrest is good, and no False imprisonment lieth: But if Divine Service be let, the Bailiff may be punished. See before. See *Co. 9. 66.*

If a Prisoner escape, and the Sheriff take him in another County and arrest him there, the Arrest is lawful: See *Escape, infra.*

señ. 9.
In respect of
the pursuit of
Authority.

If a Constable or any other take a man for Felony or Treason, or suspicion of Felony, and carry him to the Gaol presently without any further Warrant, this is justifiable, and the Gaoler must at his peril receive him. But if another man that is no Officer do so, however it be justifiable in him, yet it seems the Gaoler may choose whether he will receive him or no, without a Justice of Peace's Warrant. And yet if another man take the Felon in the manner doing his Felony, in this case it seems the Gaoler must receive him. And if the Gaoler in these cases refuse to receive him, the Officer or other may take home the Prisoner and keep him at his own house till course be taken; and all this is justifiable. *Br. F. Impr. 24. 27.*

If a Sheriff make a Warrant to three *conjunctim & divisim* to arrest one; and one or three of them do it, this is good, *Ludlows Case, B. R.* But if two of them do it, it seems it is not good.

If another man that is no Officer arrest a man on suspicion of Felony, and then deliver him over to an Officer, and the Officer let him go, or do not bring him to the Justice or to Gaol, yet the Arrest of the first man is lawful. *Br. Impr.*

If a Prisoner be by a Writ of *Habeas Corpus*, or the like, to be brought to Westminster into any of the Courts there, and by the way the Sheriff bring him through another County, and there he detain him; yet there his detaining of him in this case is lawful: *Contra*, if he did go there with a Keeper without Writ. *Vide infra. Dyer 66.*

If a Justice of Peace send a Warrant to an Officer to bring J. S. before him, or one of the Justices of the County, to give Sureties for the Peace; and if he refuse, then to carry him to Gaol: And the Prisoner would go to one Justice, yet the Officer may bring him to another; and if he refuse there to give Surety, the Officer may take him to Gaol upon his first Warrant without any other. And in all these cases, no Action of False imprisonment will lie against the parties that do arrest or imprison. *Co. 5. 59.*

If one threaten to kill another, or break the Peace, and the Officer bring him to the Justice; and if he refuse to be bound for the Peace, and the Officer carry him to Gaol, this is lawful. *35 Aff. p. 56. 54. 7. 8. 38 Ed. 3. 6.*

If after a man is lawfully arrested, he be committed to a private Prison, where he should be sent to the common Prison, it seems this Action lieth. By *Cook Ch. Justice.*

Brownl. 2 part 1.

4. Where the
Arrest or Im-
prisonment
shall be said to
be unlawful,
upon which
False impris-
onment lieth.
False impris-
onment, what.
In respect of
the cause.

The Law doth much favour the Liberty of men: And therefore if any man shall be restrained therein without good cause, the party so wronged may have an Action of False imprisonment, in the nature of an Action of Trespass, which lieth where a man is wrongfully imprisoned, or detained in prison contrary to order of Law. And a man is then wrongfully imprisoned, when either there is no good cause for his imprisonment, or the party that doth it hath no good authority by any Common or Statute-Law, or by any power or Warrant derived from others: Or else when being lawfully imprisoned at first, he is unlawfully detained afterwards: Or else when the authority so given is not pursued, but the party that doth arrest doth misdeemean himself therein, as in the cases following. *F. N. B. in Trespass. Co. 8. 68. 67. Br. F. Imp. 1. 2.* But in all such cases the party grieved may have remedy; and this may be punished divers ways besides this by False imprisonment. For, 1. He may cause the party to be indicted at the Kings suit. 2. He may have a *Habeas corpus* out of either Bench, Chancery or Exchequer, for Officers privileged in their own Courts, and in the Upper Bench and Chancery for any other. And upon this the Gaoler must return, By whom and for what cause he was committed: And if it appear just, he shall be

be sent back; if not, he will be delivered; if it be doubtful, he will be bailed. 3. He may have a Writ *De homine replegiando*, or *De odio & At.* See Co. 2 par. Inst. 55.

For such petty offences for which a man is not fineable, he shall not be imprisoned: As if in pleading one do deny the Deed of his Ancestor, and it be found upon Trial to be his Deed: Or if one sue on an Obligation for a Debt, and yet know the Defendant hath a Release of the Debt; or if one plead a false Deed, and do after before Trial relinquish his Plea. *Br. Impr. 1. 2. 7.*

None may be arrested for Debt, Treasons, Detinue, or other cause of Action, but by virtue of a Precept or Commandment out of some Court. *New Terms ley Arrest.*

If one imprison me upon an illegal Warrant, as a binding Process from the Council of the Marches of Wales, &c. *Glovc. Ass. 17 Car.*

If one owe me money, or have trespassed me, and the like, and I will imprison him for it without order of Law, he may have a False imprisonment against me. So if I imprison him till he have given me a Bond, made me a Release, and the like: *Terms ley F. Impr. Br. Tresp. F.N.B. 88.c.*

If I suspect a man for Felony, and complain to a Constable, he cannot arrest him on my suspicion; but after I have arrested him and committed him to him, there the Constable may keep him and is bound to look to him, *per Ch. Just. Bridgman & Cur.* See more in *Marlb. c. 23.*

If one arrest another for having suspicious goods, and know of no Felony done before; or there be a Felony done, but no cause to suspect the party arrested; in these cases the party may have an Action of False imprisonment. For as a Suspicion without a Felony, so a Felony without a Suspicion, is no good cause to authorize a man to arrest. *7 H. 4. 3. 14 H. 8. 16. 27 H. 8. 23.*

If there be an Order by Law made by a Corporation or Village, That every one that shall, or shall not do such a thing shall be imprisoned, and hereupon a man that breaketh this Order is imprisoned; now hereupon the may have an Action of False imprisonment: For without some special Law or Custome to enable them, they cannot make Laws of imprisonment, *Co. 4. 64. 9 H. 5. 29.*

If a man bind himself to pay money, and that if he pay it not, it shall be lawful for the other to imprison him, and he fail payment, and the other do imprison him; a False imprisonment lieth, *23 Ed. 3. 3.*

If the Sheriff imprison upon a *Justitias* or *Nativus habendi*, this Action lieth against him, *2 H. 4. 24. See Dyer 244. Crompt. Jur. 93. 6.*

If a Warrant be to a Constable to arrest a man and bring him before him at the next Sessions, and he arrest him after the Sessions and bring him to the Justice, this Writ lieth, *7. 9 Car. B. R.*

If two men be quarrelling only, and one that is no Officer will go and sit them by the heels, the party may have False imprisonment against him, *Br. F. Impr. 28.*

If a Sheriff have a Prisoner in Execution, and do set him at liberty, or do voluntarily suffer him to escape, and afterwards without Writ do take him again in Execution, the party may have an Action of False imprisonment against the Sheriff; and though in this case the party had promised to come to Prison again by 4 day, and do not, and thereupon he arrest him; yet the Arrest is unlawful, *6 Co. 3. 44. Fide infra.*

If the Sheriff or any of his Bailiffs by warrant from him shall arrest any man after the Sheriff is discharged of his office; or a Justice of Peace and one that hath Warrant from him arrest any man after his Commission is determined, and notice thereof given; such Arrests will be unlawful, and the parties may have this Action, *Dyer 41.*

If any Bailiff arrest without a Warrant in writing from his Master or Officer, without a Warrant in writing from the Justice, (unless it be one that is present) it seems this is unlawful, and though he get a Warrant after in writing, yet this will not help the matter, but the party may have this Action, *Dyer 244. 24 H. 8. 16. Co. 9. 66. 344. 10 H. 7. 17.*

In respect of the parties arresting, and in their authority.

See B. 7.

If the Sheriff arrest a man without Writ, or without a Writ sealed, or in any other manner then in his Writ, this Action lieth against the Sheriff; and the having a Writ, or having it sealed after, before the Action brought, will not help, *Dyer* 242. 43 *Eliz.* 6.

If a Constable arrest on a suspicion, and he lie, and another that is no Officer, without commands of the Constable, pursue and arrest him; this is unlawful, *Br. Triss.* 197.

In respect of
the party ar-
rested.

If one have a Warrant to arrest J. S. and he come to another and ask him whether his name be J. S. and he say, yes; and thereupon he say, If your name be J. S. I arrest you at the suit of W. Now this is an unlawful Arrest, for which False Imprisonment lieth, *Trin.* 7 *Jac. B.R.*

If the Sheriff either of his own head, or by the direction of the Plaintiff arrest a contrary man, the party arrested may have this Action, unless it be a man of the same name: For which see above. *Kelw.* 219. *M.* 3 *Jac. Goldsmiths Case.*

If a Warrant be to arrest J. the son of W. and he arrest the son of J. which indeed is the right person intended, but not the person within his Warrant; here the party arrested may have this Action, 10 *Ed.* 4. 11. *Br. F. Impr.* 38.

Of the time.

If a Sheriff or his Bailiff will arrest a man on a Writ after the day of the Return, or a Bailiff before the Test of his Warrant; the party arrested may have this Action, *Dyer* 242. *Co.* 8. 66, 67. *James vers. Bone, Pas.* 17 *Jac. B.R.*

If the Constable or Justice of Peace, after an affray is past and all is quiet, if there be no body wounded, will imprison the affrayers in the Stocks or elsewhere, it seems they may have an Action of false Imprisonment, 3 *H.* 7. 6. 32 *H.* 8.

If a Warrant be to an Officer to cause A. to find Sureties for the Peace or Good-behaviour, and A. hearing of it do voluntary go to another Justice and bind himself, and get a *Superfedeas*: Now if after this the Officer arrest him, the party may have a false Imprisonment, *Ponton de Part.* 20.

Of the manner
and end.

If one hold another in his arms in the street or elsewhere, and hinder him of his liberty and restrain him; he may bring his Action of false Imprisonment, if it be against the parties will, though he were never put in Prison, 43 *Ed.* 3. 20. 22 *Ass.* pl. 25.

If the Master lock a man up in a chamber, and give his Servant the key to keep, and the Servant knowing his imprisonment there to be unjust, doth notwithstanding keep the key: Now this is unjust both in Master and Servant, and an Action will lie against both: But if the Servant had not known the cause, no Action would have lien against him, 22 *Ed.* 4. 54.

Seal. 8.
Of the place.

If the Sheriff will arrest a man on a Writ out of the compass of his County, the party arrested may have this Action: for he may detain his Prisoner in no other County, when he is to bring him on a Writ into a Court. Whereof see before, *Br. F. Impr.* 37. *West.* 7. 2. 34.

Of the purpose
of the Action
rity, as by mat-
ter ex post facto

If an Officer put a man in Prison that hath wounded another, to see whether the party will live or die, and there do detain him after he doth perceive that the fear and danger of death is past; in this case the party for this Detainer after a reasonable time, may have an Action of False Imprisonment, *Br. F. Impr.* 6.

If a Justice of Peace do send a general Warrant to an Officer to carry a person to Gaol, and he send down no cause why therein, and the Officer thereupon do so; it seems this Action will lie against the Justice, if not against the Officer also. But upon a general Warrant without cause to bring a person before him, if the Officer do so, it is a good Arrest enough (as it seems): however it seems the safest way to let down the cause.

If a Justice of Peace send for a man, and then presently send him to Gaol without any examination, the party may have this Action against the Justice, *Mish.* 8 *Jac. B. R.*

If the Sheriff after he hath arrested a man lawfully, when a legal Discharge is offered him, and a *Superfedeas* or other Writ, or the party, if it be at another mans suit, offer him a Ransome, and bid him let him go, detain him; this Detainer is a *Capias de se*, for which this Action lieth, 1 *R.* 2. 12. *Fitz.* 111. *Bar.* 253. *Wubers vers. Henly, B. R.* *M.* 13 *Jac.*

If the Sheriff upon a *Capias* make a Warrant to a Bailiff to take the party, and he pay the money to the Sheriff, and hath a *Superſedeas*, and doth shew it to the Bailiff, and yet he doth arrest him, or being arrested detain him under colour of ill-treatment; it seems for this False Imprisonment doth lie. *Stringer vers. Stanlake, Trin. 32 Eliz. Co. R. 13 H. 7. 16. 1 H. 7. 28. 33 H. 6. 48. Et issue suit rule in la cas D. Trozman & Hues, at Gloucester Summer-Affise 6 Car. dem. Whistlock Justice.* So also in the same case, if one after he hath lawfully arrested a man, do after detain him for Fees that are not due, or unlawfully arrest him again for them. See *Br. F. Imp. 12. Kelm. 36. 89.* So where a Keeper doth detain for undue Fees. Where a man may be imprisoned, See *Merson c. 3. 6. 7. 11.*

If one that is no known common sworn Bailiff arrest a man by Warrant from the Sheriff, and the party submit to the Arrest and desire sight of the Warrant, and the Bailiff will not shew it him; then may the party arrested have this Action against him; for after the time of the refusal, the Arrest is unlawful. And if the Arrest be by a Bailiff-erant and sworn, he is bound to declare the Contents only, and not to shew the Warrant it self: And if he do not so upon demand of the party arrested, *i. e.* shew the cause at whose suit, and for what, and in what Court; then the party arrested may have this Action against him, as against another Bailiff in the first case. But if the party arrested do not desire to see the Warrant, or know the Contents, or do not submit to the Arrest, but strive to escape; in this case the Bailiff is not bound to shew it, *Co. 9. 69. 21 H. 7. 23. 14 H. 7. 9. Co. 6. 55.*

If one after he have arrested a man, when he should carry him to Prison, or to a Justice, carry him to his own house, or to the Prison of another County, (unless it be in some special cases) or keep him longer at his house then is meet; in these cases the party may have this Action as for an unlawful imprisonment. So if a Justice of Peace, in stead of sending a Prisoner to Gaol where he should have his Trial, will send him to another place, or keep him at his house; the party may have this Action against the Justices, *per Cook & Foster Justices, Kelm. 45. Plow. 38. Br. F. Imp. 25. 3 Ed. 4. 6. 14 H. 7. 5. Hil. 8 Jac. Br. Trist. 247.*

If one be arrested by the Sheriffs or his Bailiffs, that by Law is bailable, and he under them such Bail as the Law requires, and they refuse it, or detain him longer; the party may have this Action. *23 H. 6. FNB. 152. Plow. 60. Dyer 25.*

If a Sheriff or Bailiff of a Franchise arrest a man upon a *Capias ad respondendum*, and after they do not return the Writ, or return him with a *Non est inventus*: Now in this case the party may have against the Sheriff or Bailiff that arrested him, an Action of False Imprisonment, *Co. 5. 90. Kelm. 81. 89. Plow. 16. 3 H. 7. 11. 21 H. 7. 12.*

If a Warrant be to bring one before a Justice of Peace, if he do not put in Surety of the Peace, and he do so, and the party notwithstanding apprehend him; the party arrested may have this Action, *Br. F. Imp. 17.*

If a Warrant be to an Officer, to cause a man to find Sureties of the Peace or Good behaviour, and the Officer arrest him before the order is required to do it, and doth refuse, he may have False Imprisonment; for the Officer ought to do this first, *3 Ed. 4. 12.*

If a Court meddle with a thing wherewith they have nothing to do; as the Court of Common-Pleas, with Pleas of the Crown; the Leet, with Actions between party and party: There in that case, if any such Court shall send out Precepts or Process to such men; in this case all the Officers or Ministers that shall execute such Process or Precepts, shall be punished in an Action of False Imprisonment. But if the Court have jurisdiction of the Cause, and have acted only in their Proceeding, *contra*: As where a *Capias* in the Common-Pleas is awarded without an Original, or a *Capias* against a Dove, Band, or the like; there no Action lieth against the Sheriff or other Officers for executing this Writ. And so in like manner in the Warrants of Justices of the Peace, if they do command anything in or about such matters as wherof they are Judges, or wherewith they have to do; although they mistake or mis-behave themselves in the manner of their Proceeding, yet the Officer in that case is not to be punished by False Imprisonment. As if a Justice of Peace will send a Warrant to carry

5. Against whom the Action of False Imprisonment will lie, or not.

carry a man to Gaol for Felony, before any Indictment be against the Felon (which it seems he cannot do) and the Officer do so, no Action of False Imprisonment will lie against the Officer. But if a Justice shall send a Warrant to an Officer to arrest one for a Debt he doth owe him, and express such a cause in the Warrant, and he do so; in this case the Action may be brought against the Justice and the Officer also. And for this cause it should seem reason that the Justice should set down his cause in his Warrant, that the Officer may judge whether it be fit to be obeyed or no, and not by a kind of necessity be brought into danger, and cannot see to prevent it. But the experience is otherwise in many places, *Wolsey's Case* M. 8 Jac. *Ca. 10 de case de Marshalcy*. Kely. 191. 14 H. 8. 16. 24 Ed. 3. 9. 7 Ed. 3. 24. *Br. Triff.* 371. 22 Aff. p. 64. *Plow.* 394. *Brownl.* 2 par. 16. See *Clergie*.

See. 10.

If one procure another to imprison me wrongfully, I may have an Action of False Imprisonment against them both, 12 H. 7. 15. *Dyer* 244.

If a Sheriff make a Warrant on a *Cap. ad respondend.* to arrest a man, and after the Sheriff do not return the *Capias*; here howsoever this Action lieth against the Sheriff, yet it lieth not against the Bailiff. *Contra*, if he be a Bailiff of a Franchise, 20 H. 7. 1. 21 H. 7. 12.

The Heir, Executor or Administrator cannot be charged for the False Imprisonment of the Ancestor or Testator. See *Action personal*.

If a Plaintiff will bring an unlawful Warrant, and shew the Sheriff the party, and require him to arrest him; or bring a good Warrant, and shew the Sheriff the wrong person, and require him to do it, the Action will be against them both, *Br. Triff.* 307. 99.

6. Gaoler, what.

It is one that hath the custody of the place and Prison wherein Prisoners are kept; and of these there be as many as Gaols and Prisons. Their duty and charge is, to look to their Prisoners that they escape not, at their peril; for they must answer for them. Also they must see that they have necessary provision: And for that the Law doth give them an Action of Debt to recover it against their Prisoner, in which Action the Prisoner shall not be suffered to wage his Law, because the Gaoler is bound to give it him. Also they are to see that such Prisoners as are in for Debt upon Executions, be kept in *arcta custodia*, and have not too much liberty; for by this means they will be forced the sooner to pay their Debts. The Gaoler it seems may put irons or bolts on any Prisoners legs that is committed to him, and justify it, *per Just. Bridgman*, Trin. 8 Car. *Mich.* 9 Jac. *Pinchens Case*. Co. 9. 87. *Dyer* 249. *Stat.* 14 Ed. 3. 10. 1 R. 2. 13. 3 H. 7. 3. 29 H. 7. 10. 1 Ed. 3. See more, Co. 3 par. *Inst.* cap. 100.

7. Prison, what.
Prisoner, what.

A Prison is a strong place or house for the safe keeping of Debtors and Malefactors. And a Prisoner is he that is restrained of his Liberty in any Action Civil or Criminal, or upon any Commandment which may be upon matter of Record, as a Commitment in a Court; or upon matter of Fact, when it is upon an Arrest by a Sheriff, Constable, or other.

Tower, what.

It is the principal Prison of the Nation, and therefore used for the principal Court, the High Court of Parliament, from whence they do commonly commit men to the Tower: And for the principal persons, the Peers of the Land, which are always imprisoned there when they are imprisoned.

Marshalcy and
Marshal, what.

It is the proper, ordinary, and immediate Prison for the Upper-Bench, for Prisoners that are committed out of, or condemned in that Court in Debts and other Civil Pleas. And the Sheriff, Gaoler, or Keeper, he is the Marshal, who is an Officer attendant on the Upper-Bench, *Dyer* 297. 21 Ed. 4. 71.

Fleet, what.

The Fleet is the proper, ordinary, and immediate Prison for the Common-Pleas, for the Prisoners committed thence and condemned there in any Civil Plea; the Keeper and Guardian whereof is an Officer attendant on this Court. Also this Prison doth belong to the Palace, Chancery, and Exchequer; and from thence they do usually commit to this Prison, *Dyer* 297. 21 Ed. 4. 71. *Dyer* 275.

Newgate, what.

It is the usual and proper Prison unto which Criminal offenders are sent from the Upper-Bench; and this Prison is also used for such kind of prisoners as are within the City of London, as the two Counters are used for such as are in prison for Debt there.

See

SeB. 12.
10. What shall
be said an E-
scape of one in
Execution, or
not.

No Warden of the Fleet shall suffer any prisoner in Execution, to go out of prison by Mainprise, Bail, Baston, without making gree to the party, unless by Writ or other Commandment of the Lord Protector, upon pain to lose his office, and the party to have a Writ of Debt against him, 1 R. 2. 12.

If a Sheriff or Gaoler suffer his prisoner in Execution to go abroad with his Keeper, or without his Keeper, unless it be by the License of the Lord Chief Justice, and of the party Plaintiff, or suffer him to go into another County out of his Custody, though it be with his Keeper, and with License also; this is an Escape in Law, though he come to prison again: But in London, by a special Custom, in some case, the prisoner may go abroad with his Keeper, and it is no Escape. *Plow. 36. 37.*

If a man be in prison on an Execution, and the Sheriff at the end of his year do not make him over by Indenture to his Successor, though he tell him of it, and he knoweth there is such a prisoner, yet the new Sheriff is not chargable with him; and therefore this is an Escape in the old Sheriff.

So if one man be in Execution for two Debts, and the Sheriff mention but one upon the Indenture; this is an Escape for the other. But if the old Sheriff die, then the new Sheriff is chargable for the prisoners he doth finde in prison, without any Indenture or other notice. *Co. 3. 72. 44.*

If upon a *Capias ad Satisfaciendum* the Sheriff return that he hath taken the Body, but hath him not in Court the day of the Return of the Writ, although he be in Gaol, yet it seems this is an Escape in Law: But the practice of this day is otherwise. *Ido quere. 7 H. 4. 11. Bro. Escape 107.*

If a Sheriff or Gaoler will let go his prisoner, and take a promise of him, that he will come again by such a day; this is an Escape, though the party be come again at the day. *Co. 3. 44.*

If the King had commanded, or if a great man should require the Sheriff or Gaoler, to discharge the prisoner, and he do so; this is an Escape. So if at any such command, he let him go at liberty for a little while; this is an Escape. *Dyer 278. 297. 13 H. 4. 13.*

If a Woman sole be a Keeper of a prison, and she marry with one of her prisoners; this is an Escape in Law. So if a man have a prison in Fee, and his Son and Heir be his prisoner, and he die, and the prison descend to his Son; this is an Escape in Law. *Plow. 37.*

If one be Arrested, and the party rescue himself by violence; or another do rescue him out of the Sheriff's hands, this is an Escape; for the Sheriff might have had *Posse Comitatum* to aid him; but if the Rescue had been by the Kings enemies, *contra. Dyer 241. Co. 6. 54.*

If the Baron and Feme be in Execution for the Debt of the Wife, and the Gaoler suffer the Wife to escape, this is an Escape which will make the Gaoler chargable for the Debt. *Dr. Sutcliffe versus Sir George Reynel. Trin. 13 Jac. Bar. Set Co. 3. 43.*

If the prisoner do involuntarily escape, and the Sheriff do make a hot pursuit after him, and take him, though it be in another County; this is no Escape, *Bro. Escape 4.*

Where there is no Imprisonment at the time of the Escape, there is no Escape, as if a prisoner Escape; and after the Sheriff take him for himself, not upon a fresh pursuit, and after in the time of another Sheriff he doth escape; this is no Escape to the Plaintiff, for he was not now in Execution for him.

So if a man be imprisoned by a Court that hath not power so to do: As if a Court Baron will grant a *Capias* to take a mans body in Execution; or the Court hath power, but doth not proceed legally. As if the Chancery will grant a *Capias* to take a mans body upon a Recognizance where no *Capias* doth lie, and the Sheriff do so; and after let him escape; or a Court will send a man to prison on a Judgment for the Plaintiff, without any request or desire by him; or the party that doth Arrest hath no Authority, as the Sheriff Arrest without Process, and after let the prisoner go: In all these cases there is no Escape, *14 Hen. 7. 1. Dyer 66. 106. 157. 160. Bro. Escape 3.*

If a Sheriff die, and a prisoner escape before another be made Sheriff; this is no Escape to charge the precedent or subsequent Sheriff, but the party may be taken in Execution again, upon the same Execution, *Co. 3. 72.*

If a prisoner in Execution escape, and the Gaoler make fresh Sure, and before his retaking the party doth bring his Action against the Gaoler; in this case the Gaoler cannot retake, as for the Plaintiff to have him in Execution again, but for his own Indempnity. But if he do not bring his Action, then he may take him for the Plaintiff, *Goldsb. 18c. pl. 114.*

If the Sheriff, Justice of the Court, and the Plaintiff in the Sure, License a prisoner to go for a time abroad, and he do so and return at his time, this is no Escape; but it seems the Gaoler or Sheriffs consent must be in this case also, *Dyer 275.*

If a Sheriff or Gaoler be to bring a prisoner by *Habeas Corpus*, or the like, into a Court by a day, and the prisoner get away by the way, or the Keeper go out of the right way, or into another County; yet if he come by the day of the Return of the Writ in Court: these be no Escapes. *Co. 3. 42. Dyer 249.*

If a Plaintiff by word License a Sheriff to deliver a prisoner, and he do so; this is no Escape. *27 H. 8. 24.*

If a Prison be burnt with fire, or broken by enemies of the Commonwealth, and hereby the prisoners get out; this is no Escape. *Contrā*, if it be broken by Rebels or Traytors. *Dyer 66. Bro. Escape 10.*

If a man be in Execution, and a Writ of Privilege is sent to the Sheriff from Parliament, to deliver him, and he do so, this is no Escape; but after Parliament, he may take him again, *Dyer 60.*

If a prisoner be took from a Gaoler, by the Lord Protectors Writ, and then by a Court committed to another, this is no Escape in the first Gaoler. *Dyer 249. 152.*

If one arrested on a *Mesn Proces* be rescued, the Sheriff shall not be punished for this; and if the party bring any Action, he may plead his Rescous, but so he cannot upon an Execution. *May versus Proby, & Lumley vic' Middlesex, Adjudg. Hil. 14 Jac. B. R.*

If a prisoner escape out of the *Kings Bench*, or *Marshalsey*, or the *Fleet*, the Keepers of those Prisons shall be charged, and the Action shall be brought against them.

Señ. 13.
11. Who shall be charged for an Escape.

If a prisoner escape out of either of the Counters in London, the Action shall be brought against the Sheriffs of London.

If a prisoner escape out of any other Gaol in the Countrey, the Action must be brought against the Sheriff of the County, *Dyer 278. 296. Co. 3. 52.*

If a prisoner be removed out of the *Fleet*, that was there upon an Execution out of the Common Pleas, and he be removed by a *Corpus cum causa*, and then sent to the *Marshalsey* for another Debt; if he escape thence, the Gardein of the *Marshalsey* shall be charged for the first and second Debt, and not the Gardein of the *Fleet*, *Dyer 152.*

If an escape were in the time of a Predecessor Sheriff, the Successor shall not be charged for it, but the Action shall be brought against the first Sheriff by the name of *Nuper vic'*, *Co. 3. 52.*

If a Gaoler that hath the Fee of a Prison, make a Lease of it for life or years, and the Lessee suffer an Escape, the party grieved may sue him; and if he be not sufficient to answer it, he may sue the Lessor, *Co. 4. 98. Dyer 278.*

It is where one is kept in Prison, or restrained from his liberty, contrary to Law, or threatened to be killed, maimed, or imprisoned; if he will not do some Act, or make some Deed, which he thereupon doth; now for this cause the Deed is void. And if the party to whom it is made, make any use of it, the party that made it may plead it was done by *Dureffe*, and so avoid it: And yet the party so imprisoned may have his Action of false Imprisonment also, for the Imprisonment, *Co. 3. 119. 2. 9. 2 Ed. 4. 19. Perk 16. 9 H. 7. 24. Terms Ley. Crompt. Jur. fol. 296.*

12. *Dureffe*, what.

As all kinde of Especialties; as Bills, Bonds, Feoffments, Leases, Releases, Wills, and the like, may be avoided by this means; so also it seems, Recognizances made upon the Statute, *23 H. 8. 6.* and Marriages may be avoided for this cause.

What Acts may be avoided by *Dureffe*, or not.

So also Discents hapning while a man is in prison, shall not hurt him, *Dyer* 143. But Records Regularly shall not be said to be so made, and therefore not avoided by such a Plea or Pretence, 16 *H.7.5.* 31 *H.6.9.*

13. What shall be said to be done by *Duress*, and thereby void or voidable.

To make the Case to be so, these things must be in the case.

1. There must be a Threatning, or Beating, or Imprisonment.

2. The Threatning must be of Life, Member, or Imprisonment.

3. It must be of the Life, Member, or Body of the party himself, that makes the Deed, or his Wife, or Child.

4. Upon this the Deed must be made; and if either of these be wanting, it is no *Duress*, *Broo. Duress* 76. 18. 9 *H.7.24.* 39 *H.6.50.* *Brownl. 2 part. 276.* As in the Examples following.

If one threaten me, unless I will make him a Bond of forty pound, and I tell him I will not, but I will make him a Bond of twenty pound, and I do so, this is by *Duress*. But if I say I will not do it, unless you give me five pound, and he do so, it seems this takes away the force, and yet if it move first from him, as I will give you five pound, and you shall give me a Bond of forty pound; here it shall be judged by *Duress*, and so void.

If four do threaten one to imprison him, if he will not seal a Deed to one of them four, and he do so for fear of this; this is void. So if one threaten, unless he will seal to four, and he do so, it is void to all four of them, *Broo. Duress* 1.

If one threaten or imprison a man till he swear, or promise he will seal such a Deed, and afterwards he doth it accordingly at another time, and in another place out of prison, and without threatning; yet this shall be said to be done by *Duress*, and therefore void, *Broo. Duress* 7. 11. 20. 21 *Ed.4.6.*

If one threaten to kill a man, unless he will make a Deed to *J. S.* a stranger, and he do so; this is void, as if it were to the party himself, *Broo. Duress* 9. 20.

If one that is in prison for another, upon a lawful cause, and I shall procure them to be used more severely in prison; by this means to compel him to make some Deed, and thereupon he do so; this shall be said *per Duress* and void, *Broo. Duress* 2. 10. *Brownl. Reg. 1 part. 64.*

If a man be imprisoned at my Sute, be the cause unjust, or not, and he will then make an Obligation to another; this is good, and cannot be said to be *per Duress*. *Terms Ley.*

If one threaten me to take away my Goods, burn or break my House, enter upon my Land, or to kill or wound my Father or Mother, Brother, or Sister, or Friend, or do imprison any of them; and hereupon I seal a Deed, this is good, and shall not be said *per Duress*, 7 *Ed.4.21.* 20 *Ass. pl. 14.* 18 *H.6.21.* 21 *Ed.4.13.* 15 *H.6.17.* 11 *Ed.4.13.* 8 *H.6.8.* *Co. 2.9.* Some affirm the contrary upon threats to Father or Child, 15 *Ed.4.1.*

If one distrain my Beasts, to compel me to seal a Deed, and will not deliver them, unless I do so, and threaten me, that unless I will seal the Deed, if I take my Cattle again, he will beat and kill me; this is no *Duress*, and therefore if I do seal upon this any Deed, the Deed is good enough, *Broo. Duress* 16.

If a man be arrested and imprisoned upon good cause, and being in prison make an Obligation, or other Deed to him, at whose Sute he was arrested, or to any other for his enlargement; it is good enough: As if Auditors do commit an Accomptant to prison, and then he make an Obligation to his Master for the Arrearages; or if one in prison for Felony, will grant a Reversion to one to help him out of his trouble, it is good enough, *Dyer* 143. *Broo. Duress* 17. 11. 4. 6. *Mansfields case in C. B.*

If *A.* and *B.* by *Duress* to *B.* seal a Deed, the Deed is good to *A.* that was never threatned, *M. 7 Jac.*

If one make an Obligation by *Duress*, and after being at large, take a Defenceance upon it; this makes the Obligation good, and doth estop him to say it was by *Duress*, 3 *H.6.16.* *Broo. Defenceance* 17.

If a stranger be imprisoned by another stranger, and kept in prison until another, as Surety for the stranger, make a Bond; this is not avoidable by this Plea, *Brownl. 1 part. 64.* But if a Court that had no power to imprison a man (as the High Com-

Commission formerly) in things out of their power, had imprisoned a man, and took Bond of him for a Fine; this had been, and still will be void upon this account, *Brownl. 2 part. 14.*

It is where a man is taken and arrested for any cause whatsoever, for that he is restrained of his liberty, and for being under Arrest, doth give Bond to appear at the Assizes, Sessions, or other Court; then upon this he is bailed (*i. e.*) set at liberty till his day of Appearance come. And if he be not bailable, the parties that bailed him, may be punished, *Terms Ley Bail. 4 Ed. 3. 2.* *SeB. 14. 14. Bail, what.*

It is where a man is arrested in some special case, then the Judge may deliver his body to certain men to keep, to bring him at his day; and these be called *Mainper-vors*, who if the party appear not at the day, are to be amerced: And where a man arrested, is bailable, and cannot be bailed, he may have a Writ of Mainprise to bail him, *Terms Ley Main Per-vors, F.N.B. 249. 9.* *Mainprise, what.*

Such as are arrested on mean Proces, Writ, Bill, or Warrant, in Actions Personal, or Indictment for Trespass, are Bailable. Such as are accused of Receipt of Felons, of Commandment, or Force, or Aid, in Felony done, and a man appealed by an Approver after the death of the Approver (if he be no common Thief, or defamed) shall be let out of prison by a Surety, 33 H. 6. 10. *Plow. 67. Westm. 1. 15. Daltons J. P. fol. 271.* *15. Who may be bailed, or not.*

Such as are brought before Justices upon a light suspicion, or upon malice, if he perceive it so, though it be an accusation of Felony, 1 R. 3. 3. 3 H. 7. 3. *Westm. 1. cap. 15. 27 Ed. 1. 3. 1 Ed. 3. 8.*

Such persons as are in prison or Executions, *Cap. ut legat'* Excommunications, Sureties of the Peace, Vagabonds, or by some special Commandment from some Justice for some special cause, Felonious burners of Houses, and the like, are not bailable, 5 Ed. 3. 8. 2 H. 5. 2. 33 H. 6. 10. See the Proces against the Bail, *Brownl. Rep. 1 part. in toto, 2 part. 76.*

The Defendant in an Appeal of Maim, if the Maim be hainous, nor the Principal in an Indictment, or Appeal of Felony, nor the Accessory after the Attainder of the Principal, nor any in High Treason, 6 H. 7. 11. *Westm. 1. 75. Stamf. 71. Attorneys Acad. 167. F.N.B. 249.* Where Bail ought to be taken of an offender, 1 H. 7. 3. 3 Phil. & Mar. 13.

It is a Writ lying where a man is imprisoned upon a false Conspiracy, and there is no Appeal or Indictment against him, then he may have this Writ; and the Conspiracy being found, he shall be delivered upon the Bail of twelve sufficient men of the County, whether he be guilty or imprisoned of Malice, or not, Co. 9. 56. *Register* see for this, 2 part. of *Co. Inst. 42.* *Odio & Atria, what.*

See more for Prison, Prisoners, Gaol, Gaolers, and Arrest. 1 Ed. 3. stat. 1. 7: 5 Edw. 3. 8. 14 Ed. 3. stat. 1. 10. 13 Rich. 2. 15. 5 H. 4. 10. 19 H. 7. 10. 6 H. 8. 6. 23 H. 8. 3. 14 Eliz. 10. *Westm. 1. 34. 50 Ed. 3. 5. 1 R. 2. 15.* And in my Book of *Justice of Peace, cap. 26.*

For Discharge of Prisoners unable to satisfy their Debts, see *Att. 4 September 1649. Att. 21 December 1649. Att. 6 April 1650: Ordinance, 6 October 1653. Ordinance, 9 June 1654.*

For Mainprise and Bail. The old Statutes are *Marlb. cap. 27. Westm. 1. 3 H. 7. 3. 1, 2 Ph. & Ma. 13. 2, 3 Ph. & Ma. 10.*

CHAP. XCIX.

*Incident, Appendant, Parcel or Adjacent, Intert
and Incontinency.*

1. Incident,
what.
The kinds.



Incidents are such things as depend on other things more principal, to which they are in a manner accessory; and these are sometimes called Appendant, and sometimes Appurtenant; and these are of a different nature and consideration: For some of them are, as it were, Parcel of the things themselves that are the principals, as the Glass-windows, Doors, Wainscots, and other Appendix of a House to the house itself, Trees, Hedges, Ways, and Waters to the ground, in which they are. Some of them are so Incident to their principal,

that they cannot be divided from it, and yet continue to be: As a Court Baron to a Manor, Court of Pipowders to a Fair, and Eskovers to a House: Charters of Land to the Land, and Common Appendant unto the Land, to which it is Appendant.

And these Incidents howsoever they are not needful to the *esse*, yet to the *benefit* of the things themselves they are needful; and therefore the Law hath such a care to preserve them: And for this cause it is, That if a Common of Eskovers do belong to a House, and after the House fall, or be gone, it shall continue to the place, where the House stood.

And these two kinds of Incidents are so inherent to the Principals, that by the Grant of the one, the other is granted, and they cannot be extinct by Release, nor saved by Exception from the other; but in special cases, though it be not named as the Glass, and the rest, by the Grant of the House, Trees by the Grant of the Ground, and the Court Baron by the Grant of a Manor, and so the rest.

And the third sort of these Incidents, are such as may or may not have Dependence on their Principals, and will stand well enough without them: As an Advowson, Villain, Leet, Warren, and the like; all which may be Appendant to a Manor by Prescription of Continuance of Usage, time out of minde; or may be, or be made in Gross, being severed from their principal; of this nature also is a Rent Incident to a Reversion, *Co. super Littl. f. 93.*

And these also pass by the Grant of the principal, without any other words of *Cum pertinentiis*: See *Broo. Incidents in toto. Perk. sect. 112. Dyer 288. 14 H. 8. 25. Co. 11. 50. 8 Hen. 7. 54. Plow 3. 81. Co. 4. 38. Co. super Littl. fol. 131, 132. 143. 151, 152.* See much of this in the *New Book of Excessors*, fol. 5.

2. What things
shall be said to
be Parcel of,
or Incident to
other things,
and go with
them, or not.

All things that are annexed and fastned to the House by Nails, Skrews, or Pins, or by Mortar or Stones, though it be set there by the charge of a Lessee, as Glass, Wainscot, Tables, Shelves, *Vates turneis*, and the like: Also Doors, Locks, Keys, and the like, are so Incident to the House, that being once there set on by whomsoever, they cannot be ever after divided from the House, unless it be by him that hath the Inheritance, that may pull it down if he will: And therefore if any Lessee for life or years, shall set on to any House any such thing, he cannot after take it away, neither before nor after the end of his Term; much less then when they are fixed by the charge of another; and therefore these do go with the House, and the Heir hath them that hath the House, and the Executor as Chattels. See *Chattels. Co. 4. 63. 21 H. 7. 26. 20 H. 7. 13.*

Land, Meadow, Pasture, Wood, and divers other things are Parcel of a Manor, and Incident to it; for this word is a Compound and Collective word. So Lands, Meadows, or Pasture, may be Parcel of a Monastery, Rectory, Castle, or Honor:

So

So also Tithes, Offerings, and Glebe Land, are Parcel of Parsonage or Vicaridge, *Plow. 170. 168. 15 H. 7. 8.*

Fealty is Incident to Homage, and Homage and Knights Service to Eſcuage, and by Grant of Service, Eſcuage doth paſs, *Co. lib. Inſt. 1 part, fol. 69.*

Fealty is an Incident inſeparable to a Tenure or Reverſion, *Co. ſuper Liſt. 93. 143.*

So is a Diſtreſs to Homage, Fealty, and Eſcuage, *Co. ſuper Liſt. 130 b. Crompt. 7th 113: 116 a.*

If one grant me to put Pipes in his Ground to bring water to my houſe; now as Incident to this Grant, I may come upon the Ground to amend my Pipes when there is need. So if I have Trees growing in another mans Ground, I muſt have as Incident to it, ſo much of the Soil as to nourish the life Vegetative of the Trees, *9 Ed. 4: 35. Co. 11. 49. 5: 111. 21 H. 6. 47.*

Fire-boot, Houſe-boot, Plough-boot, and Hay-boot, is Incident to every Leaſe for life or years. See *Houſe-boot, 9 H. 7. 11.*

A Diſtreſs is Incident to every Fine or Amercement in a Law-day. See *Leet and Fine.*

The Qualities of Dower, Courteſie, Diſpariſhment of Waſte, and power to ſuffer a Common Recovery, are Incident to an Eſtate-tail: See *Tail, Co. 10. 30.*

Rent and Services reſerved upon any particular Eſtate, are Incident to the Reverſion thereof: Alſo Fealty is Incident to Homage, and to every Tenure, Diſtreſs and Fealty is Incident to Rent-service: A Rent ſeparably Fealty inſeparably is Incident to the Reverſion, *Co. ſuper Liſt. 130.* And by the Grant of the Reverſion, all the Services will paſs, *Co. ſuper Liſt. 137. Kelm. 136. Co. 11. 27. Co. ſuper Liſt. 152.*

Incorporeal things, as Advowſons, Allains, Ways, Courts, Fiſhings, Commons, or the like, may properly be Parcel of, or at leaſt Appendant to Corporeal things, as Houſes, Lands, Manors, and the like. *Et ſic contra, Plow. 170. Co. 4: 38. Co. ſuper Liſt. 122. Co. lib. Inſt. 1 part, fol. 49.*

A Forreſt may be Appendant to an Honor, Land to an Office, or an Office to Land: an Advowſon, Market, Fair, or Warren, Leet, Hundred, and ſuch like, may be Appendant to a Manor. Ways, Commons, Fiſhings, and the like, may be Appurtenant to Lands, Meadows, Paſtures or Rents. A Leet may be Appendant to a Hundred. A Waif or Eſtray may be Appendant to a Leet, or to a Manor. A Villain Regardant, an Advowſon Appendant, are Incident to a Manor; and paſs without *Cum pertinentiis, 11 H. 7. 16. 32 H. 6. 45. Plow. 170. 8 H. 7. 5. 4 Ed. 4. 29. 6 H. 7. 11. Co. ſuper Liſt. 367. March. 76. pl. 115.*

A Reverſion Expectant on a Franck-tenement, may be Parcel or Appendant to a Franck-tenement or Inheritance in Poſſeſſion: And all theſe Appendants may be made by Preſcription of Uſage time out of minde; *Co. 11. 47. Co. 6: 34. Plow. 70.*

If one Leaſe a Manor, excepte an Acre; now this Acre as to the Leſſor, is no part of the Manor, but as to him that hath right by a Tide, it is Parcel; and therefore he need not make any Faſprife in his Writ, *Plow. 104.*

If one ſell a Manor, excepting the Woods and Underwoods, and Hedges, and Hawks bred in the Wood, the Leſſor ſhall have them, not the Leſſee. See *Manor, Co. ſuper Liſt. 324. 2^o Liſt. 591. 14 H. 8. 11.*

A Waif or Eſtray, is not as Parcel, nor inſeparably Incident to a Leet, nor one liberty to another, as a Leet to a Hundred, or the like, but by Common Uſage, time out of minde, they may become Appurtenant or Appendant, nor a Rent, or Homage or Fealty, *9 Ed. 4. 35. 11 H. 7. 12. Plow. 332. Co. ſuper Liſt. fol. 150.*

Toll, Pickage, and Stallage, is not of Common Right, Incident to a Fair or Market, as the Court of Pipeſword is to a Fair, *F. Curia, Hil. 17 Jac. B. R.* But by Preſcription perhaps may become Incident.

No Corporeal things are, or can be incident to, or parcel of other things of the ſame nature and ſubſtance, as one houſe to another, or Land, Meadow, Paſture, Rent, or the like, to a Houſe or to Rent, unleſs it be in caſe where that to which it is incident,

Incident, be a compounded thing, as a Manor, Farm, Castle, Honour, or the like, for to such, Land, Meadow, and Pasture, may be incident. See before: *Plow.* 170. 85. *Bro. Incident* 25.

A Leet cannot be Appendant to a Church or Chappel, nor Common of Turbary to Land, nor Common Appendant to Meadow, or Pasture, *Co. 4.* 38. *Bank feloni.* and such like Royal Franchises cannot be Appendant to any Manor or House, or the like, *Co. 10.* 88.

A Frank-tenement or Inheritance in Possession, cannot be Parcel and Appendant to a Reversion, *Expectamina.* *Co. 11.* 47.

Frank-tenement, for which see *Grant.* Fealty or Reversion is not inseparable to the Rent, neither will it pass by the Grant of it; *Ch. Sup. Litt.* 130. 324, 325.

One Office cannot be Appendant to another properly; but there be some great Offices that have other Offices, as incident to theirs, by common use of time out of minde, as the Chief Justices; and so now they are become Appendant; *Plow.* 138.

If one make a Lease of an Incorporeal thing, rendring Rent; this Rent is not incident to; neither will it pass by the Grant of the Reversion; *Co. lib. 10.* 1 part: fol. 47.

The Waincot doors, or any other part of a House, may be severed from a House, by him that hath the Feoffment of the House. A man may bar himself of his liberty, to himself his Pipe that hath it (as in the case above.) A man may sever his Tithes and Offerings, from his Glebe. A Lessee may bar himself of his Fire-boot, Hay-boot, and Plough-boot, by Agreement; for *Moderis & contrarius vicinus* &c. And a man of his power to distrain in some cases where his Distress is incident; And a man of his power to distrain in some cases, where his Distress is Incident. And the Tenant in Tail in some cases, may be barred of the Privileges and Qualities that are incident to his Estate; *Bro. Incid.* in 100. 7 Ed. 4. 11. *Brownl. Rep.* 2 part. 192, 193.

But a Court Baron cannot be severed from a Manor, nor a Manor from the Court, for they live and die together: So neither can a Court of Pipowders be severed from a Man, Common of Erovers from the House, to which it doth belong, nor Common from the Land, to which it doth append; but these Commons may by a man be extinct: See *Common. Plea.* 381. *Co. 11.* 77. 914. *Doffl & Stud.* 75. 26.

Homage and Fealty cannot be parted; nor Fealty from a Tenure; nor Wardship and Marriage from Esuage: But Rent may be severed from a Reversion, and so it may from Fealty; for it is but incident separable, yet it passeth by Grant of the Rent; *Co. lib. 10.* 1 part: fol. 47. *Co. 9.* 127. *3 H. 6.* 5. *4 H. 7.* 10.

Fees or Annuities for Offices, cannot be severed from the Offices, while the Offices continue: See for this, *Plow.* 381.

If one grant Wood to be burnt in such a House; this may not be granted from the House, but he that hath the House, shall have the Wood; *Co. lib. 10.* 1 part: fol. 47.

If the King had a Manor to which an Advowson is Appendant, and he grant the Manor, and not name the Advowson in special; now hereby the Advowson is severed, and become in Crown: So if one Lease a Manor for life, reserving one Acre Parcel of it; hereby this Acre is severed: So if one Disseise a man of an Acre Parcel of a Manor, hereby this Acre is divided till by his Entry it be united: And in all these Cases, the owner of the Manor doo after graunte the Manor or the Reversion of it, the Advowson or Part of Land doth not pass. *Carol.* 64. *11. 47.* *Dyn.* 48. *11. 48.* If one Disseise one of Common Appendant belonging to my Manor, and during the Disseison, I sell the Manor; now hereby the Common is extinct for ever; *Co. 11.* 47. *11. 48.*

If a Lord will release his Services to his Tenants, hereby they are extinct.

3. Where things Incident may be severed, and how, or not.

4. Where things once Appendant, become Disappendant or Extinct.

No Corporeal thing is incident to another, or parcel of other thing, as one house to another, or Land, Meadow, Pasture, &c. incident to a House or to Land, unless in some case where it is incident to the use of the house, or to the use of the Land, or to the use of the Pasture, &c.

Of Intent.

INtent is the true meaning of men, and their minde, in their words, sayings, and doings: And this in some cases, the Law hath much regard unto, and in some not. As in *Acts* of Parliament, the intent and minde of the Law-makers is much regarded. In Arbitrments, the Intent and Minde of the Arbitrators; in Wills and Testaments, the Intent and Minde of the Testator; also in Deeds and Publick Instruments, in Bargains and Contracts, the Law hath much respect to the Intent of the Parties: And therefore in divers cases, if the Intent be satisfied, though the words be not, the Law is satisfied with this; As if a Feoffment be made on Condition, that the Feoffee shall make a Gift in Special Tail to the Feoffor, and his Wife by such a day, and they both, or one of them die before the day, leaving issue behinde them, and then the Feoffee make back an Estate in the first case, to the Issue, and the Heirs of the Body of the Father and Mother, and in last to the Survivor of them, without impeachment of Waste, the Remainder to the Issue in Tail; howsoever this be no performance of the words; yet because it is as near the Intent as may be, the Law doth accept of this as a good performance of the Condition. So *contra* when the words are fully performed, and not the Intent, the Law will not be satisfied with it: And therefore in the case above, if the Feoffee had made a Feoffment to another before, or granted a Rent-charge out of the Land, or the like; and after, before the day, make back an Estate according to the Condition; yet the Law will not allow this for a performance of the Condition, and yet he doth as much as is in the words. *Littl. Condit. 82. Plow. 291. 28. See 23 H. 7. 4.*

Intent, what, & Regard.

In some cases the Law doth not regard mens Intent, as when men shall do evil, when they say they intended none; or do more evil when they intend less: Here they shall be punished according to their Deed, and not according to their intent; as if one intend onely to beat a man, and therein happen to kill him. So if Mens Wills and Testaments have any thing in them contrary, and repugnant to any rule of Law, the Law will not regard it, nor labor to fulfil it.

Of Incontinency and Bastardy.

AS to the point of Incontinency, we are to know there are divers degrees thereof. First, There is Bigamy, the having of more Wives then one, wherein these things are to be known. It is Felony for any one having a Husband or Wife, and knowing him or her to be alive, to marry another Husband or Wife: Secondly, But if the Husband or Wife have been seven years together beyond Sea; or they have been seven years together one from another in any part of the Kings Dominions; the one of them then not knowing the other to be alive within this time; or they were duly divorced from the first Husband or Wife, or the first marriage be duly declared to be void, or the first marriage were made within age of consent; In all these cases it is no Felony, *1 Jac. II.*

Bigamy, or Double Marriage.

And as to Adultery, these things are to be known.

Adultery.

1. It is Felony for a Woman, knowing her first Husband to be alive, or not having been three years absent, continually beyond Sea, or elsewhere continually from her, so long she nos knowing him alive within that time, or by common report reputed to be dead, to be known by a man, it is Felony in both of them.

2. It is Felony for any man to lie with a married Woman, if he know her to be so, *At, 10 May, 1650.*

Fornication.

3. If any others lie together, or if any one be a Bawd, or keep a Bawdy-house, the second offence in both these cases, is Felony, *At, 10 May, 1650.*

Bawd.

4. As to Incest, it is to be known, That it is Felony for any one to lie with his, or her Grand-father or Grand-mother, Father or Mother, Brother or Sister, Son or Daughter, or Grand-child; Father, Brother or Sister, Fathers Wife, Mothers

Incest.

Buggery.
Sodomy.
Rape.

Husband, Sons Wife, Daughters Husband, Wives Mother or Daughter, Husbands Father or Son, *Alt.* 10 May. 1650.

5. It is Felony to commit Buggery with a Beast, or to commit Buggery, or Sodomy with a man, 25 Hen. 8. 6. 3 Eliz. 17. Co. 3 part of Inst. cap. 10.

6. It is Felony to ravish or force any Wife, Widow, or Maid, against her will, albeit she do after agree, and consent to it, 13 Ed. 1. 34. 6 Rich. 2. 6. Co. 2 part. Inst. cap. 11.

7. It is Felony carnally to know any Maid that is at that time under age of ten years, albeit she be consenting to it at the time, 18 Eliz. 6.

8. For Fornication, the first offence the offender is to be sent to Gaol three moneths without Bail, and until security given for the Good-behavior, for one whole year; or the Justice of Peace may binde to the Good-behavior for a less time, at his discretion, *Alt.* 10 May. 1650.

9. A Bawd, or one that keeps a Bawdy-house, is for the first offence to be whipped, set on the Pillory, burned on the Forehead with the Letter B. put in Bridewell for three years, and bound to the Good-behavior for her life, *Alt.* 10 May. 1645. Co. 3 part. Inst. cap. 98.

10. If there be a Bastard in the Case, the Reputed Father thereof, at the request of any Parish, (in danger to be charged therewith) is to be bound to the Good-behavior, and to be at the next Sessions, that he may be forth-coming.

11. The Woman that hath the Bastard, when she is delivered, and recovered, is for the first offence to be sent to Bridewell a year; and for the second offence she is to be sent thither, till she put in Sureties for her Good-behavior, and not so to offend again.

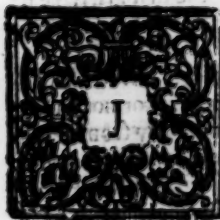
12. If the Justices out of, or in the Sessions, make any order for the keeping of and securing the Parish in danger to be charged, the party charged to be the Father, and the Mother must obey it, or be committed to Gaol till they do it, 18 Eliz. 3. 7 Jac. 4.

13. The Laws of Bigamy in other cases, then as before, are now void, and the marriage of all orders of men, and second marriages lawful to all, and not prejudicial to any. See 1 Ed. 6. 12. 10 Eliz. 7. And see more for Bastards, in *Bastard*, and my Book of Justice of Peace.

CHAP. C.

Of Joyntenants, Parceners, and Tenants in Common.

Self. 1.
1. Joyntenants,
what.



Joyntenants are such as have, and come by Lands or Tenements, Goods, or Chattels, by one and the same joynt Means and Title, as in the cases hereafter following. As if Lands be given or granted by Fine, Recovery, &c. Deed, or without Deed, or Devised by Will to two or more, and their Heirs, or to two or more for their lives, or for other lives, or to two or more for years. (But between Baron and Feme after marriage, there is no Moyety, but each of them hath all, Co. super Littl. 187, 188.)

So if Goods, or any other Chattels, be given or granted to two or more, and they have it in Possession, or in Right; in all these cases the Donors or Grantees are Joyntenants.

So if a Contract be made to two or more, or a Recognizance or Obligation be made to two or more, the parties to whom the Contract is made, the Conseees and Obligees

Obligees are Joyntenants of this Debt or Duty: And between these Joyntenants there is a twofold Privy in Estate, and in Possession, *Co. super Littl.* 169. Also Joyntenants may be of an Estate by wrong; but this *¶ in accrescendi inter mercatores pro beneficio commercii locum non habet*: As of two Merchants for the Wares, Merchandises, Debts, or Duties, that they have as joynt Partners or Merchants. See *Terms Let.* *Littl. fol.* 62. *Broo. Joyntenants* 17. *Plow.* 10.72. *Dyer* 150. 305. *Co.* 3. 26, 29. 1. 85. *Noy, chap.* 6. *Co. super Littl.* 182.

If an Advowson be granted to B. *Habendum eis & uni eorum conjunctim & divisim*; it seems by this they are Joyntenants, *Dyer* 304.

If Lands be given to two *& uni eorum diutius viventi*; hereby they are Joyntenants for life, *Co.* 11. 4.

If Lands be given or granted to two, without limitation of any Estate; hereby they are Joyntenants for life, *Co.* 8. 95.

If Lands be given or granted to two or more *Habendum* to them successive, they are hereby Joyntenants. So if Lands be granted to two or more, and to him that shall survive, they are by this Limitation, Joyntenants. *Broo. Joyntenants* 33. And this is so, whether the Grant be for life or years. See *Broo. Joyntenants* 140. *Whitlocks case, M. 3 Jac. B.R. Broo. Trespass* 54.

If a Lease be made to two more for years, with a *Proviso*, That if they die within the Term, that the Term shall cease, hereby they are Joyntenants, *Dyer* 67.

If Joyntenants be ousted or disseised, and sue for and recover again, they shall be Joyntenants as they were at first, *Co. super Littl.* 188.

If Chattels Real or Personal be granted to a Bishop, or the like, and another, or to two Corporations, or the like; here they are Joyntenants: And it is not as in the case of Lands so granted, *Co. super Littl. fol.* 190.

If Lessee for years grant his Term to another, and a Woman, they are Joyntenants.

But if Goods be given to a Woman, and another, the Husband of the Woman, and the other, are Tenants in Common.

If a Lease be made to two or more, *Habendum eis ad terminum vite eorum conjunctim & alterius diutius viventi, ac assignatis suis qui primus eorum discedere contingat durante vita ejus qui superstiti*; hereby they are Joyntenants, *Dyer* 46. *Co. of Copihold* 142.

If an Estate be made to a Husband and Wife, and a third person, hereby they are Joyntenants, the Husband, Wife, hath a Moyety, and the other person, the other Moyety, *Litt.*

If Lessee for life grant to him in Reversion, and two others, for two parts in three parts, the other men are Joyntenants. *Broo. Joyntenants* 14.

If Lands be given to two Men or Women, or more, and the Heirs, or Heirs Males, or Heirs Females of their Bodies, or in any such like manner; hereby they are Joyntenants for their lives, and they have several Inheritances; and their Issues after shall be Tenants in Common, *Co. super Littl. fol.* 182, 183. *Dyer* 350. *Littl. fol.* 62, 63, 64.

If Lands be given to two or more, and the Heirs, or Heirs Males of the Body of one of them; hereby they are Joyntenants for their lives, and one hath the Inheritance, *Dyer* 350. *Co.* 3. 60.

If one make a Feoffment in Fee to the use of himself, and his wife that shall be, and after he take a wife, she shall be Joyntenant with him, *Co.* 1. 101.

If Joyntenants Exchange their Lands, they have in Joyntenancy for other Lands, they shall be Joyntenants of their other Land, as they were of this, unless they agree to have it in Common, *Perk.* 55, 56.

If two Men or more do Disseise another, now hereby they are Joyntenants of this Estate, which they have got by the Disseision, unless they made the Disseision to the use of another, or to the use of one of them, *Littl. cap. Joyntenants, fol.* 62.

If one Disseise to the use of two, and one agree at one time, the other at another, they are Joyntenants, *Co. super Littl.* 188.

2. Where a man shall be said to be a Joyntenant, or not.

If a Rent-charge of ten pound be granted to *A.* and *B.* *habendum* to them two, viz. to *A.* until he be married, and to *B.* until he be advanced unto a Benefice; these be Joyntenants in the mean time; and if *A.* die before marriage, the Rent shall survive, but if *A.* had married, the Rent should have ceased for a Moyety, *Et sic est converso.* See more there. *Co. super Littl. fol. 180, 299, 300.*

If a Lease be made to three joyntly in the Premises of the Deed, *habendum* to one for life, the Remainder to another for life, the Remainder to the third for life; hereby they are not Joyntenants, but have one in Remainder after another, *Dyer* 260.

If one Demise to two *habendum* to one for years, and to the other for life, they are no Joyntenants, *Co. super Littl. 188.*

If Lands be given to a Husband and Wife, and the Heirs of their Bodies, here is no Joynttenancy between them, *Co. 10. 50.*

If two or more Disseise another to the use of one of them, they are not Joyntenants, *Littl. f. 62.*

If a Lease be made to two or more. *Habendum eis pro termino visa eorum esse alteri, eorum diutius viventi successive uni eorum post alterum sicut nominantur in Indentura, & non conjunctim,* and Livery of Seisin be made accordingly, hereby the Lessees are not Joyntenants, but shall take one after another, *vide per eos* Tenants in Common: For where there is a Tenancy in Common, there is no Joynttenancy: But if an Indent be between *A.* of the one part, and *B.* of the other part; and thereby *A.* demise to *B. C.* and *D.* *habendum* to them *successive*, there *C.* and *D.* must take by way of Remainder, and not joyntly, *Dyer* 361.

If a man make a Lease for life, and after grant the Reversion to the Tenant for life, and another and their Heirs, they are not Joyntenants of the Reversion, but the one hath all for life, and the Reversion between them.

So if two be Tenants for life, and the Reversion is granted to one of them, *Co. super Littl. fol. 182.*

So if Lessee for life, grant his estate to him in Reversion, and a stranger.

So if a man make a Lease for life, and grant the Reversion to two in Fee, and the Lessee grant his Estate to one of them.

If Lands be given to two & *heredibus*, it is void, and doth limit no Estate.

If Lands be given to a man, and such a woman as shall be his wife, here is no Joynttenancy, but the man shall have the whole. But if one make a Feoffment in Fee to the use of himself, and of such wife as he shall after marry for their lives, when he takes a wife, they are Joyntenants, *Co. 1. 101. Co. super Littl. fol. 188.*

If Lands be demised for life, the Remainder to the right Heirs of *J. S.* and of *J. H. J. S.* hath issue and dieth, and after *J. H.* hath issue and dieth, the issue are not Joyntenants, because the Moyeties veiled at several times, *Co. super Littl. Idem.*

The nature of this Tenure is, that every Joynttenant is seised of the whole thing, whether Lands or Goods, of which he is a Joynttenant, and they have it *pro indiviso*, and if one of them die naturally or civilly, so long as the Joynttenancy doth continue, the surviving Joynttenant shall have his part, and so he that doth live last and longest, shall have the whole, and neither of their parts shall go to their Heirs, Executors, or Administrators, as long as there be any other Joynttenant left to take it, and this is called *ius accrescendi*, *Co. super Littl. 181. Plow. 203. Co. 6. 76. Littl. fol. 280, 281. Broo. Joynttenancy 38.*

In all the cases above, if one of the Joyntenants die, his part shall go to the survivor; as if three Joyntenants be of Land in Fee, and one have issue, and die, the Land shall go to the other two survivors; and if one of them die, the last liver shall have the whole, and his Heirs for ever, *Littl. fol. 62. Dyer 187. Co. 1. 76.*

So if two or more have a Lease for years, or a Wardship, and one of them die, the survivor shall have the whole, and not the Executor or Administrator of the deceased Joynttenant, *Littl. f. 62.*

See 2.
3: Where the
Survivor shall
have all by
right of Sur-
vivorship.

So if a Recognizance, Bill, or Contract, be made to two, or more, and one die, the Survivor, not his Executors, or Administrators, shall take the benefit of it, *Littl. f. 62. Broo. Joyntenants 7. 17.*

So if the Obligation were to Baron and Feme, and he die, she may sue, and shall have it.

And in all these cases the Survivor may sue in his own name alone, *Broo. Joyntenants 44. 6 Ed. 4. 8. 22 H. 8. 1.*

If the Baron and Feme, and a third person are Joyntenants into, and the Husband sell away the whole, and die, and after his Wife die; now by Survivorship the right of Action, to recover the whole, is come to him, and it seems he shall recover the whole.

If two Joyntenants be in a Fee, and one make a Lease for years of his own part, rendring Rent, and die, the Survivor shall have the Reversion, but not the Rent, *Co. super Littl. fol. 185. Dyer 187.* For he comes in Paramount.

If a Feme-sole and another be Joyntenants of a Lease for years, and after she take a Husband, and die, the surviving Joyntenant shall have the whole; for the Joynture was not settled by marriage, but the Husband might have severed it, if he would in his Wives life. *Plow. 4. 18. Co. super Littl. fol. 185.*

If three or more Joyntenants be, and one Release to them all, it seems, that yet the Joyntenancy doth continue, and that the Survivor amongst them, shall have the whole, *Broo. Joyntenants 2.*

If a Feme-Covert and a stranger be Joyntenants of a Term, and the Husband have the Fee-simple, and after the wife die, the stranger shall have the whole by Survivorship, for here the Joynture was not severed. *Plow. 4. 19. 30.*

If two Joyntenants be, and one become in debt to the Lord Protector, and die, it seems the Survivor shall have the whole; yet see the Statute of the 13 *Eliz. cap. 4.*

If the Limitation be to *A.* and *B.* and the Heirs or Heirs Male of *B.* here if *B.* die, *A.* shall have the whole by Survivorship, and if *A.* die, *B.* hath the Fee-simple, *Littl.*

If two Joyntenants be of a Rent, and it be behinde for many years, and one of them die, the Survivor shall have all the Arrearages, and may bring an Action and recover them, *Broo. Joyntenants 3.*

So if two Joyntenants be of a Manor, and a Bailiff receive the profits for many years, and then one of them die, the Survivor alone shall have all the Arrearages, and may by Action recover them. See the Statute of *Broo. Joyntenants, fol. 22.*

So if a Husband and Wife lose an Advowson in a *Quare impedit*, by a false Oath, and the Husband die, she alone shall bring the Attaint, and not the Executors, Heir, or Administrator of the Husband, though the damages recovered against them were paid out of the Goods of the Husband. *Broo. Joyntenants, fol. 7.*

If Baron and Feme before marriage, be Joyntenants in Fee, and after the Husband, during Coverture alien and die; now his Wife shall have the whole by Survivorship: And if the Baron be attainted for Felony or Treason, yet the Wife shall have a Moyety at least, *Termes Ley, Dyer 122.*

If Lands be let to *A.* and *B.* during the life of *A.* If *B.* die, *A.* shall have all: But if *A.* dieth *B.* hath nothing, *Co. super Littl. fol. 181.* See the *Womans Lawyer, fol. 151.*

But otherwise it is amongst all sorts of Merchants, and of joynt Shopkeepers that joyn in Trade; in this case of the increase thereof, if one die, the other shall not have the benefit by the Survivor, see *Brownlows second part, fol. 99.*

Self. 3.
4. Where not,
but the Joynture
is severed,
and so this
Quality of the
Tenure gone.

If once the Joyntenancy be severed, unless it be revived again (as in some cases it may) the quality of Survivorship is gone. And therefore if once the Joyntenants make Partition amongst them; this is a Severance, and if after one of them die, his part shall go to his Heir, Executor, or Administrator, as the case is, and not to his Companions, *Littl. f. 68, 69. Broo. Joyntenants 2. 8.*

So if one of them give, grant, or convey away his part for all his time; this is a Severance, and will prevent Survivorship; so if he Surrender it, *Daniels case, Hil. 13 Jac. B. R.*

If two Infants be Joyntenants in Fee, and one of them make a Feoffment of his Moyety; this is a Severance of the Joynter, *Broo. Joyntenants 13.*

If two be Joyntenants for life or years, and one of them purchase the Fee, or it descend upon him; this is a perpetual Severance of the Joyntenancy, *Dyer 12. Ca. 61. 3. 60.*

If *A.* be Tenant for life, the Remainder to *B. C.* and *D.* for life, the Remainder to *E.* in Fee, and *E.* levy a Fine to *A.* for life, and the Remainder to *B.* in Fee; this is a Severance of the Joynter between *B.* and the rest, *Ca. 3. 60.*

If an Estate be to three, and the Heirs of one of them, and he that hath the Fee die, and one of the Survivors purchase the Reversion, hereby the Joyntenancy is severed.

If a Lease be made to two for their lives, and after the Lessor grant the Reversion to them two, and to the Heirs of their two Bodies; the Joynter is severed, and they are Tenants in Common, *Co. super Littl. 182.*

If two Joyntenants be of a Lease for one and twenty years, and the one of them letteth his part for certain years, part of the Term; the Joynture is severed, *Co. super Littl. 192.*

If two Joyntenants be in Fee, and one letteth his part to another for the life of the Lessor, and the other Joyntenant dieth first, here shall be no Survivorship, but it may be if the Lessor had died first, *contra, Co. super Littl. 19.*

If a Feme-Covert and another be jointly possessed of any Chattels Personal, the Law doth presently sever the Joynter of it, and give her part to the Husband, *Contra of Chattels Real ut supra, 21 H. 7. 29. Co. super Littl. 185. 25 H. 7. 19. Plow. 4. 19.*

Survivorship holdeth not for Goods amongst Merchants, *Brownl. Rep. 1 part, 99.*

If three Joyntenants be, and one Release to one of his Companions his part; it seems by this the Joynture is severed for that part, and the Releasee, and the other shall hold that part in Common, *Broo. Joyntenants 2.*

If two Joyntenants be, and one is attainted for Felony; in this case the Lord, not the Survivor, shall have this Moyety, *Broo. Adjudg. 12 Car.*

If two Joyntenants be of a Term, and one commit Felony by killing himself, or otherwise, or be outlawed, the Joynture is severed, for the Lord Protector shall have the Moyety by Forfeiture.

And if it be a Joyntenancy of Personal things, as Bond, Oxen, or the like; the Lord Protector will have the whole by Prerogative: So also of Chattels Real, if they be between Husband and Wife, *Plow. 419. 19 Hen. 7. 47. Broo. Joyntenants 34.*

If one Joyntenant lose his part, and it be recovered from him in an Action; hereby the Joyntenancy is severed, *Broo. Joyntenants 9.*

If a Baron, and Feme, and a third person be Joyntenants, and the Baron sell the whole; this is a Severance of the Joynture, and if he die, the Wife may sue for her Moyety, *F. N. B. 193.*

If one Joyntenant being ousted by his Companion, bring an Assise against him, and recover his Moyety; this is a Severance of the Joynture. *Broo. Joyntenants 41.*

If two Women-Coverts be Joyntenants, and their Husbands alien the whole, and each of them recover his part by a *cur in vita*; this is a Severance of the Joynture, *Broo. Idem 43.*

If a man be seised or possessed of a joynt Estate, and a Judgment is had against one, and Execution, it seems this is a Severance for so much, and so long at least as Execution is, *Co. 6. 79.*

If two Joyntenants be in Fee, and one make a Lease for life, and die; it seems this is a Severance of the Joynture, at least, if the other Joyntenant die; that the Lessor shall not have his part, *Co. super Littl. fol. 191.* But if the Tenant for life die before either of the Joyntenants, then it is in *Statu quo prim.* *fol. 193.* See *Littl. fol. 68.*

If a Lease be made to two for their lives, and the longer liver of them, or either of them longest living, and they make Partition and one die; the Lessor, not the Survivor, nor the Heir or Executor of the Lessee shall have his Moyety that is dead, *Co. super Littl. f. 191.* *Broo. Joyntenants, f. 28. 30 Ass. pl. 8.*

If one have a Rent issuing out of Land, and grant it to the Tenant of the Land, and another; here the Survivor shall have nothing, for the one half was extinct, *Plow. 419.*

If two Joyntenants be in Fee, and they both joyn in a Lease to an Abbott, and a secular Man for their lives; here the Reversion depending upon either of the Freeholds, is severed.

So if a Lease be made to two secular Men *habendum* the one Moyety to one, and the other to the other. *Co. super Littl. fol. 131.*

If two Joyntenants be in Fee for life, and one make a Lease for years of the Land, or grant *Vestura terra*, or *Herbagium terra*. to begin presently or after his death, or at any other day to come; this is a good Lease, which the Survivor cannot avoid, though the Lessee die before Entry, or do not enter till after the death of the Lessor, *Co. super Littl. 184. Plow. 203. Littl. 286. Alienatio rei profectus juri accrescendi: Co. super Littl. 186.* So if two Joyntenants be of a Water, and one grant the several Pischary.

Sec. 4.
§. Where the Lease, or Charge of one Joyntenant is good, and shall charge or bind the Land, or not.

If two be Joyntenants for life, and one make a Lease for years, of his part, to begin after his death, during his Companions life; this is a good Lease, Adjudged, *Harbin and Bassets case, Mich. 3 Jac. B. R. Cite arere in Daniels case, Hil. 13 Jac. B. R. per Justices;* and therefore *a fortiori*, when the Lease is to begin presently.

If two Joyntenants be for life, and one of them Lease for years, rendring Rent, and die; this is a good Lease, and the Successor shall have it subject to the same, and yet the Rent reserved thereupon, is determined, *Dyer 187.*

If two Joyntenants be in Fee, and one grant a Rent-charge in Fee, and after Release to the other; now in this case the Grant of the Rent is good, and the other Joyntenant shall hold the Land charged.

If a Feme-sole and *J. S.* be Joyntenants for life, and she marry *B.* and *B.* and his Wife Lease to *C.* for sixty years, rendring Rent, if the Wife and *J. S.* live so long, and the Wife dies: Now this Lease is good against the Survivor, but it seems the Rent is determined, *Smalman versus Agtorrow, B. R.*

If one Joyntenant grant a Rent-charge, Common of Pasture, Turbary, or a Corrad, or a Way out of the Land and die, the Grant is void as to charge the Land, and the Survivor shall hold it discharged; but if he survive, it is good. So if after the Charge, the Grantor release to his Companion, then he shall hold it charged, *23 H. 6. 5. Co. super Littl. f. 185.* especially if he hath another Companion or Survivor living. See *Littl. 289. Co. super Littl. 184.*

If two Joyntenants be for life, and a Judgment is had against one of them, and he after releaseth to his Companion, and dies before Execution; now the Survivor shall hold this Land discharged of the Judgment. *Contrà*, if he had sued Execution in the life time of the Joyntenant, for then his Moyety, notwithstanding the Release, was subject to Execution.

So it is in the case of a Statute or Recognizance, but if he survive his Companion, the Charge is good for ever. *Co. super Littl. fol. 184.* See *Co. 9. 79. Plow. 418.*

If a Feme Covert and another be Joyntenants of a Lease for years, and the Husband

Husband will grant a Rent out of the Land, and die, and the Wife die; this Grant is void, and the Survivor shall hold it discharged, *Plow.* 418.

If a Lease be on Condition, That if the Lessee pay to the Joyntenants ten pound at such a day, then he shall have a Term, and the Joyntenants die before the day, here it seems the Lease is not good, and the Survivor shall hold it discharged, *Plow.* 263. For this was no Lease, but a Communication onely, *Co. super Littl.* 184.

If two Joyntenants be of Land, and one of them grant Common of Pasture for Cattle in the ground, and die, this is not good; but the Survivors shall hold, if discharged, *Perk. fect.* 103.

If one Joyntenant in Fee-simple had been in Debt to the King, and died; after his death, no Extent should have been made upon the Lands in the hands of the Survivor, *Co. super Littl.* 185.

But if a Recovery be had against one Joyntenant, and he die before Execution, the Survivor cannot avoid this.

6. What Act
one Joynte-
nant may do,
or nor.
By himself.

A Joyntenant may by Act executed dispose his own Estate, and give, grant, or sell it to whom he will, or make any Lease of it for part of his time, to begin presently, or at a day to come after his death, or otherwise at his pleasure; but he cannot dispose his Companions part, and yet if he grant the whole, it will be good for his own part; but it will not pass his Companions, though he happen to have it before the Survivorship; neither can he devise his own part by Will, *Littl.* 186. *Phar.* 203.

And if two Joyntenants be for life, and one of them doth make a Lease for eighty years, to begin after his death, and after death; this was adjudged by all the Judges of England a good Lease against his Companion, *Goldsb.* 187. *yl.* 130.

One of the rest may sue Partition, and compel his Companions to make Partition. See *Partition & its Statutes*, 32 *H.* 8. 32. 34 *H.* 8. 1. *Co.* 6. 12. *Co. super Littl.* fol. 187.

If a Joyntenant make a Lease for years, though the Lessee never have possession, or it begin at a day to come, and the Joyntenant which made it, die before the day; it bindeth the Survivor: But if he had granted one, that he should have a Lease, if he pay ten pound before *Midsummer* next, and the Joyntenant which made it, die before the day; this will not binde the Survivor, for here no present interest did pass, and a Rent thereupon reserved shall not go to the Survivor. *Co. super Littl.* 318. *Plow.* 203. *Brown.*

One alone cannot present to an Advowson; but if one had done it, and the Bishop instituted, &c. it had been good, and it should not hurt his Companion for any after Presentment, *Co. super Littl.* f. 186.

If Lands be given to two, and the Survivor of them, neither of them alone whiles they both live, can charge or give this Remainder, *Whitlock's case*, *Mich.* 3 *Jac.* B. R.

If a Joyntenant in Fee, Covenant to stand seised for good considerations of his Companions part after his death, and after he die before the Covenantor, so that he hath his part by Survivorship, yet the Covenant is void, and doth not raise any use. *Burtons case*, *Mich.* 3 *Jac.* B. R.

With is Com-
panion.

All the Joyntenants together may grant or charge the Land, how and in what manner they will.

They may all together by consent and agreement make Partition by Deed, and if they be Joyntenants for years, they may do it without Deed, *Co. super Littl.* 186. *Littl.* f. 65.

To his Com-
panion.

They may give their parts one to another by Release, and such a Release is good without any words of Heirs, *Co. super Littl.* fol. 194. and without Attornment, or other Ceremony, *Co. super Littl.* 318. And therefore if a Baron and Feme, and a third person be Joyntenants, and the third person release to the Baron and Feme; this is good, and gives all the Estate of the third person to the Husband, or he may release to the Wife alone, and then that would give all the Estate to the Wife alone: Also one of them may make the other his Bailiff of his Moyety, and have an Action of Account against him, and he may let his part to his Companion for years, or

at will, *Co. super Littl. fol. 185. Littl. fol. 69. Co. 6. 79. 8. 63.* But they cannot make a Feoffment, or give Livery of Seisin one to another, as Tenants in Common and Parceners may; but a Tenant in Common cannot release to his Companion, but a Parcener may both Release and Infeoff, *Perk. sect. 193. Co. super Littl. 200.*

One Joyntenant may prejudice his Companion, as to the profits of the thing, of which they are Joyntenants; for there is a Privy in Trust between them; and therefore if one take all the profits of the Land, or all the Rent of the thing, or one get the Body of the Ward, or get the Personal thing, whatever it be, and use it, the other hath no remedy, but to do the like if he can: And in case of Executors, one of them may sell any Chattel, Real or Personal, without the rest. See *Executors.*

Dyer 23. vide infra, Co. 2. 68. Kelw. 22.

If two have a Seigniorship of a Knights-Service, and the Tenant is dead, his Heir within age, so that the Lord may now seise the Ward or Wave, and Distrain for the Rent: If one of the joynt Lords do Distrain for the Services, the other is barred and bound by this, *1 Ed. 3. Co. 2. 68.*

Also in Personal Actions, the one may release all: As if an Obligation be made to two, one of them may release the whole, *Co. 6. 25. Plow. 263. Co. 2. 68.*

Also if a Recognizance be made to many, and one purchase Parcel of the Land, the Statute is extinct for all. See *Statutes, Aff. 106.*

So if two Joyntenants bring an Action of Waste, and one Release; this is a Bar to his Companion, *Co. 2. 68.*

And if one Joyntenant do waste the Land of both of them, as it seems, it shall be recovered, *Kelw. 23. yet see 14 Edw. 1. Retorn del Vicomte. 9 Hen. 5. cap. 15.*

If two Joyntenants be of a Term, and one have the Lease, and he give or grant it away, it seems he hath no remedy for the Deed; but this doth not hurt the Estate. By three Justices, *Trin. 38 Eliz. B.R.*

But one Joyntenant cannot prejudice another, as to any matter of Freehold or Inheritance; and therefore a Joyntenant in Fee, for life or years (unless he be in the Case of Executors before) cannot sell his Companions part, or evict him out of it, or charge or impeach it: So neither can he release any real or mixt Action, brought by them against another; As if they bring an Assise, or Writ of Right of Ward, for the Body of a Ward, or the like, and one Joyntenant release to the Defendant; this will not prejudice the rest, but it may give them the whole, *Co. 2. 68. 30 H. 6. 45 Ed. 3. 10. Kelw. 60. Dyer 167. 179.*

All such Acts as Joyntenants, are compellable to do; there, if one Joyntenant do it, and do it so as the Law will compel him; this is good, and will binde his Companions: As if a Woman have Title of Dower to the Land, and one Joyntenant will endow her, and that of a third part onely of the Land; this is good, and will binde his Companion: Or if one Joyntenant Attorn to the Grantee of the Reversion, or Services in the Countrey, this is good. As if a Lessor disseise his Lessees, and make a Feoffment, and one of them re-enter, this is an Attornment in Law, good, and shall serve for both. So if a Reversion be granted to one Joyntenant for life, and he accept the Deed, this is a good Attornment for the other in Law. So if one Lessee give Seisin of a Rent to a Lord, it is good, and will binde the rest. *Co. 2. 69. 30 H. 6. 2. Littl. f. 119. 12 Aff. pl. 20.*

So all things that are for their benefit, and as well for the benefit of his Companion as of himself, the Act of one shall binde the rest: As if they be to pay a Rent to the Lord, or the like. Payment by one shall serve for all; so a Claim or Entry after a Disseisin, or the like, *Co. 2. 68.*

If one Joyntenant will endow a Woman of a Rent, in stead of Land, or endow her of more then a third part; this will not binde his Companions. So if the Reversion of two Tenants for life, or the Rent or Seigniorship of two Joyntenants be granted by Fine there, if a Writ be brought, to require the Joyntenants to Attorn, one must not Attorn without the other, *Co. 20. 67.*

Self. 5.
7. Where one Joyntenant may prejudice his Companion, or not.

8. Where an Act done by one Joyntenant shall binde his Companion, or not.

9. What Acts done by, or to one Joyntenant, shall benefit his Companion, or not.

If one Joyntenant enter or claim the Land, that he and his Companions have right to, this shall avail the rest generally, *Co. super Littl. f. 252.*

If two Joyntenants make a Lease for life, and the Lessee surrender to one of them; it seems this shall enure to both, in respect of their joynt Reversion, but if the Lessee grant his Estate to one of them, *contra. Co. super Littl. f. 192. Perk. 615.*

If one of them obtain a Seisin of Rent, this shall avail his Companion. *Brou. Tender 16.*

If two Joyntenants make a Lease by Poll, or Deed Poll, rendering Rent to one of them; this shall enure to both. *Contra*, if it be by Deed indented. See *Reservation*. But perhaps if one enter or claim, specially to his own use or for another, it may not avail his Companion.

10. How Acts done by, or to them, shall enure.

If two Joyntenants be of Land with Warranty, and they make Partition by Deed, the Warranty is destroyed; but if it be upon a Writ, *contra. Co. super Littl. fol. 186, 187.*

If a Warranty be made to them, this shall enure to them as several Warranties, *Co. 5. 819.*

See 8. 6.

If there be three Joyntenants, and one release to one of the other; this shall not avail the other. *Co. super Littl. f. 193.*

If Donee in Tail be disseised by two, and he release to one of them, this shall enure to both: But if the Kings Tenant for life had been disseised by two, and he release to one of them, he shall hold out his Companion. So if two Joyntenants make an Estate for life, and then disseise their Lessee, and he release to one of them, he shall hold out his Companion.

If Tenant for life be disseised by two, and he in Reversion, and Tenant for life joyn in a Release to one of the Disseisors, he shall hold his Companion out: But if they severally release their several Rights, it shall enure to both the Disseisors.

If two men do gain an Advowson by Usurpation, and the right Patron doth release to one of them, it shall enure to both.

If two Joyntenants be disseised by two, and one of them release to one, this shall enure to both for a Moyety.

If one be disseised by two Women, and one take a Husband, and the Disseisee release to the Husband; this shall enure to both Disseisors. See more in *Release. Co. super Littl. 276.*

11 What Acts done by one Joyntenant may have against a stranger.

It seems a Joyntenant can have no Real or Personal Action, concerning the Joynttenancy, but he must joyn with his Companion; and therefore if they be disseised of the Freehold, they must have an Assise against the Disseisor; if they be ousted of a Term on *Ejectione firme*: And if they be wronged in the Profits, as by Waste, Trespass, or Arrearages of their Bailiff that hath received their Rents or Profits, they must joyn in the Action always, unless it be in some special cases, as that *Plow. 419. Co. super Littl. f. 195, 196. Littl. 311. 22 H. 6. 12. Brou. Joyntenants 36.*

Against his Companion.

Yet if three Joyntenants be, and one release to one of his Companions, and after they be disseised; now for the two parts of which they be Tenants in Common, they must bring one Action, and for the third part of which, he is Tenant in Common with the other, he must bring an Action alone, *Crompt. Jur. f. 49. b. Littl. f. 7c.*

One Joyntenant hath no Action nor Remedy against another for the taking of the Profits, or for Waste making, or the like: And therefore if it were Wood, and one cut it down, and sell it all, and keep all the money; or if it be an Advowson, and one alone present, and in the cases before, he hath no Action at Common Law to relieve himself. See before *Doff. & Stud.*

So if one will not help Inclose the Grounds, or Repair the Walls or Bridges, or the like. But if one oust the other altogether, he may have an Assise, or chase the others Cattle, for the chasing he may have Trespass: And if there be Houses or Mills upon the thing, and they be in decay, the other Joynttenant may compel him by a Writ of *Reparatione facienda*, to joyn to repair it, or of *Contributions facienda*, to contribute towards it. See of *Tenants in Common. F. N. B. 34. 162. 6 Hen. 7. 8. F. N. B. 127. Brou. Joyntenants 41. Dyer 923. Co. 6. 12, 13. Lib. Inst. 1 part. fol. 54.*

If there be two Joyntenants for life, and the Fee to one, and he that is Joyntenant for life onely deth Wafte, the other that hath the Fee hath no remedy againft him, *Dyer* 913.

If two Joyntenants be of a Manor, and a Copihold Efcheat, one of them may grant the Copihold, and his Companion fhall not avoid it, *Co. of Copihold*, fol. 91.

Joyntenancy is a Plea where an Aftion is brought againft one for Trefpafs, or other matter about that Land that another hath in Joyntenancy with him; then this being fhewed, will abate the Writ, for they muft joyn as is before, *Dyer* 31. *F.N.B.* 229. *Dyer* 32.

Tenants in Common, are fuch as have and come by Lands, Tenements, Goods, or Chattels, by feveral Titles and Means; as in the cafes hereafter following, *Co. super Littl.* 189. 12. Tenants in Common, what.

If any Joyntenant in the cafes above, give, grant, or convey over his part of the thing which they fo hold in Joyntenancy to a ftranger; in this cafe the Joyntenancy will be gone, and the ftranger and the reft of the Joyntenants, will then be Tenants in Common: Or Tenants in Common may be by Prefcription, as, where one and his Anceftors, and thofe whose Eftate he hath in one Moyety, have held in Common the fame Moyety with another Tenant that hath another Moyety, and with his Anceftors, and thofe whose Eftate he hath *pro indivifo*, time out of minde. And between thefe, there is onely a Privy of Poffeffion, and not of Eftate of Land, *Littl. fol. 70. Co. 4. 628. 63. Co. super Littl. fol. 169, 198, 199.*

If a Feoffment be of Land to A. and B. *habendum* the one half to A. the other half to B. here A. and B. are Tenants in Common; but if it be to one and his Heirs, and to the other and his Heirs, *Contrā. Co. super Littl. fol. 65. Littl. 65.*

13. Where a man fhall be faid to be a Tenant in Common, or not.

If one Devife by Will to his Sons or Daughters, or to others to be enjoyed equally, or by equal Portions, or to be equally divided, any fuch like words in a Will, will make a Tenancy in Common, *Co. super Littl. fol. 183. Co. 3. 37. Dyer 25.*

If Lands or Goods be given or granted to a Corporation, and another man, they are Tenants in Common at the firft, for they cannot be Joyntenants, *Co. 5. 8.* And there muft be feveral Liveries, if it be a Feoffment. So of Lands given to any body Corporate or Politick, as to two Bifhops, *Co. super Littl. fol. 189, 190: Littl. fol. 66. 16 H. 7. 16.*

If one feised of a peece of Land, infeoff another of a Moyety thereof, and fay not which Moyety, the Feoffor and Feoffee of the two Moyeties fhall be Tenants in Common, *Littl. fol. 67.*

If two Joyntenants be in Fee, and one Leafe his part for life to another, the Tenant for life, and other Joyntenant, are Tenants in Common, at leaft during the Leafe for life, *Littl. f. 41. 67.*

Parceners are in the nature of Tenants in Common; and if one of them alien her part, the Alienee and the reft fhall hold in Common, *Littl. f. 70.*

Self. 7.

If there be three Joyntenants in Fee, and one of them make a Feoffment to a ftranger; now this Feoffee, and the other two Joyntenants, are Tenants in Common, but the other two remain Joyntenants ftill, *Littl. f. 46.*

If two Joyntenants be in Fee, and one give his part to a ftranger in Tail, and the other his part to another ftranger in Tail; the two Donees and their Ifsues, are Tenants in Common, *Littl. f. 66.*

If three Joyntenants be, and one Release to one of his Companions; now for this third part releafed, he is Tenant in Common with the other two, *Littl. fol. 68.*

If Lands be conveyed to two Men or Women, and the Heires of their Bodies after their death, their Ifsues are Tenants in Common, *Littl. 285. Co. 1: 84. 85.*

If upon a Partition, one Parcener grant a Rent to the reft, they fhall be Tenants in Common of this, *Co. 5. 8. 15 H. 7. 14. Dyer 153.*

If a man and a Feme-sole have a Villain, and after intermarry, and the Villain purchase Land, they shall be Tenants in Common of the Villain, as they were of the Land, and so of other like things; for the Law hath respect to the cause,
3 Ed. 3. 84.

If J. S. be Parson of D. and Lands be given to J. S. Parson, and his Successors, and J. S. Clerk, and his Heirs, he is a Tenant in Common with himself in respect of his several capacity. So in all such like cases, *Co. super Littl. fol. 189, 190. Broo. Dean 2. 14 H. 8. 30.*

If a Tenant for life grant to him in Reversion, and others, they two are Tenants in Common with him, *Broo. Joyntnancy 14.*

If a gift be to two *Habendum*, to one for his life, and the other for his life, it seems they are Tenants in Common, *Dyer 10.*

If a Lease be made to two for the life of one, the Remainder to the other without more, it seems by this Limitation they are Tenants in Common, *Dyer 60.*

If a Remainder be limited to the right Heirs of J. S. and J. N. they shall take severally, and be Tenants in Common, though the words be joynt: *Ca. 5. 8. 34 Ed. 3. 29.*

If Land be given to a man, and two women, and the Heirs of their Bodies, here are several Inheritances, of which, the Issues are Tenants in Common, *Ca. 10. 59.*

If Lands be given to two men, and their wives, they are Joyntenants for life, but after the husband and wife hath one moyety in Tail, in Common with the other Baron and wife, *Ibidem.*

If two Parceners make a Lease, rendring Rent, they have this Rent in Common; but if they grant the Reversion, excepting the Rent, *contra.* for there they are Joyntenants of the Rent.

If two Joyntenants be of a Chattel Personal, and one commit Felony, the Lord Protector, and the other Joyntenants are not Tenants in Common, but the Lord Protector will have all, *Plow. 322.*

So if two had such a thing in Common, and one did commit a Forfeiture, the Lord Protector will have all. *Ibidem.*

The nature of this holding is, That howsoever they occupy in Common, and they hold *pro indiviso*, and neither of them doth know his own part, as in the case of Joyntenants, yet the Survivor in this case shall not have the part of him that dieth (as in the cases of Joyntenants) but it shall go to his Heir, Executor, or Administrator as the case is; and therefore such a Tenant may Grant or Charge his Land, as he may any other Land, whereof he is Sole seized; and if he will pass it to his Companion, he may make a Feoffment, and give Livery of Seisin to him as Parceners may; for it will not pass by Release, as between Joyntenants: But Actions Personal, as it seems, do survive, and the Survivor shall have the whole of them, as in the cases of Joyntenants, *vide infra.* And it seems in this case one of them cannot do any act to binde, or prejudice his Companion, because they have several Titles; and in this case they may also make Partition, if they will, by Agreement, *Link. f. 72. Plow. 140. 10 Ed. 4. 3.*

All Actions that are Real, and in respect of the Reality, the one may and must sue alone; as if they be disseised, every Tenant in Common must have a several Assise against the Disseisor. And so should it seem for mixt Actions that are most in the Realty, for the *Magis dignum trahit ad se minus dignum.* But in all Personal Actions, as for Trespas in breaking the Hedges, spoiling the Houses, Grass, Corn, cutting the Wood, taking Fish, or the like, there they must sue jointly, and cannot sever in the Action.

So also for Rent in a Lease, in Account against the Bailiff, and Actions mixt that are more Personal then Real, as Waste, and the like: And if one of them die, before these Actions brought, the right of the Action doth survive to the rest onely, and they alone shall have it as in the case of Joyntenants before: And if one of them sue alone for these Causes, the Defendant may plead, That he is Tenant in Common, and so avoid the Action, *Littl. fol. 70, 71. 22 Hen. 6. 12. Broo. Tenants in*

Common

14. The nature and quality of this Tenure.

See 8.
15. What actions one Tenant in Common may have, or not. Against a stranger.

Common 18. 24. 2. *Broo Joyntenants* 51. 38 *Edw.* 3. 7. *Co. super Littl.* fol. 195. 198.

If one avow upon a Distress taken Damage-feasant, he must do it as Bailiff to all the Tenants in Common, not to one onely, *Adjudg. Hil.* 7 *Car.*

If Tenant for life, the Reversion to two Sisters commit Waste, and one Sister die having issue, and the Tenant commit Waste again, the issue and her Aunt shall joyn in the Action of Waste; and the Aunt-sole recover treble damages for the Waste done in her Sisters time, 45 *Ed.* 3. 3.

If his Companion disseise him of his Freehold, he may have an Assise, if he Eject him of his Term, he may have an *Ejectione firme*, as it seems. But for any wrong in taking the whole profits from his Companion, the Law is all one in this case, as in the case of Joyntenants, which see before; for one of them cannot sue another, *Co. super Littl.* 199.

Against his Companion.

And yet if one Tenant in Common will break the Dove-house of another, and kill his Pigeons, and spoil his flight, or carry away all his Corn after it is sowed, it seems the other shall have Trespass against him; or break the Pales of his Companions Fold, which they have in Common, Trespass lieth; but this seems to be for the wrong done to that wherein he hath a sole property. *Co. super Littl.* f. 200. *Westm.* cap. 12. 14 *Ed.* 4. 8. *Somersets* case, *B. R.* Pasche, 3 *Jac.* *F. N. B.* 91. 5 *H.* 7. 8. 21 *H.* 8. 1. in the Preamble.

And if two Merchants occupy their Goods in Common, and to their Common profits, the one may have an Account against the other. So may another Tenant in Common, if he make his Companion his Bailiff. *Co. super Littl.* fol. 200: 10 *H.* 7. 16.

If two be Tenants in Common of Chattels Personal, or of Chattels Real entire; and one get all, the other hath no remedy, but to get the Possession again, if he can. But if two be Tenants of a House or Mill, one may force the other to contribute towards Reparation; and if they have a River in Common, and one corrupt the River, the other may have an Action on the Case. *Et sic in similibus*, see in the Margent, *Co. super Littl.* f. 199, 200.

In the Personality, one Tenant in Common may prejudice his Companion, as well as a Joyntenant, as in taking the profits; for which see before. As also in any Personal Action brought by them all, one may Release; but if the same be for a thing entire, and in the reality, as a Presentation to a Church, Wardship of a Body, or the like, there the Release of one doth not prejudice the rest, but doth give the rest the whole, *Co.* 5: 98. 45 *Ed.* 3. 10. *Co. super Littl.* 197.

16. Where one Tenant in Common may prejudice his Companion, or not.

If two Tenants in Common joyn in the Grant of a Rent-charge of twenty shillings, this shall be and enure as several Grants. *Co.* 5. 8.

17. How acts made by, or to one shall enure.

An Attornment by one, is good for all the rest; except the Lord Protector be one, for then it is void for all. *Brooks* case, 6 *Car.* *Chr. Ward.*

18. What act done by one, will binde the rest.

Of Parceners.

Parceners, otherwise called Coparceners, are such as have equal portion in the Inheritance of the Ancestors, and this is in the nature of a Tenancy in Common, the difference see in the *Englisch Lawyer*, fol. 24, 25. And of these there are two sorts.

Self. 9.
1. Parceners, what.
The kinds.

One is of Parceners by Law, which is when a man dieth, seised of Land in Fee-simple, or Fee-tail; and hath no Sons, or other Heirs Male; but Daughters, Sisters, Aunts, or the like (for if he have but one Daughter, she is no Parcener) then these Daughters, or other Collateral Heirs, shall have the Lands in equality amongst them, and these are called Parceners at Common Law.

The other is, where Sons or Daughters by the Custom of the Country do challenge an equal part of their Ancestors Lands he died seised of, as the Custom

of

Parcenary.
2. Partition,
what.

3. Partitio-
facienda, what.

Joyntenants.
Tenants in Com-
mon.

The fruit of it,

4. What per-
sons shall be
accounted
Parceners, or
not.

The nature of
this Tenure.

5. Where Par-
ceners are com-
pellable to
make Partiti-
on, and how.

of Gavel-kinde in *Kent* is, and these are called *Parceners* by Custom; and in these cases, all these *Parceners* are in Judgment of Law, but as one Heir. And they may if they will, hold the Land joyntly without Division, and then they shall be said to hold in *Parcenary*; or they may divide it, and every one hold his part to himself, and that is called a *Partition*, and is defined to be the dividing of Lands or Tenements, descended by Common Law or Custom, amongst Co-heirs or *Parceners*, whether they be Sons or Daughters, Sisters, Aunts, or otherwise of kin to the Ancestor, from whom the Land descended to them: And this may be made, and done voluntarily, or by Agreement of the parties, and without Writ, which is called a *Division* by the Common, or else it may be Compulsory, and by Writ, if either or any of the parties refuse, and thereby the rest or any of them, or their Heirs (if any of them be dead) that are willing, may compel the others that refuse; and this Writ is called a *Partitio facienda*, which is defined to be a Writ that lieth for those that hold Lands or Tenements *pro indiviso*, as Coparceners, and would sever to every one his part, against him or them that refuse to joyn in *Partition*, to compel them to it.

And such a *Division* as is so made by Writ, is said to be a *Division* by Statute Law; and this Writ also Joyntenants or Tenants in Common, may have to make a *Division* amongst them, if they will. See beneath; *Parceners stat Hibernie*. 9 H. 3. 1. *Dyer* 29. Co. upon *Littl. fol.* 164. Co. 6. 12. *Dyer* 265. F. N. B. 61.

And this *Division* after it is made, doth change the holding by Coparcenary, so that after every one shall hold his part in severalty: And yet so, as if the part of one be afterwards recovered from him by a lawful Title; in this case he may compel the rest to make a new *Partition*, and he shall have another part from them, and till then he may occupy in Common with them: But if he had aliened that part wholly away, whereof the *Evection* was, then it seems he cannot enter upon his *Companions*, unless he had reserved some *Reversion*: See for this, Co. upon *Littl. fol.* 164. 170.

None shall be accounted *Parceners*, but such as are Females and in equal distance, as Daughters, Sisters, Aunts, or the like, or the Heirs of such Females that come to Land by descent. For if any such persons purchase Lands or Tenements; in this case they are not *Parceners*, but Joyntenants. See more for this Co. upon *Littl.* 164. where it appeareth, that men may be *Parceners* in special cases; the Son of ones Daughters, with the Daughters of another.

The having of Land in Coparcenary, is in the nature of holding of Land in Common, for no Survivorship hath place amongst them; and either of them may by Act executed, or by his will grant, give, or charge, his own part, whether the thing be in Possession, or *Reversion*: And they may make a *Ecoffment* one to another, and give *Livery* one to another, Co. upon *Littl.* 164. *Littl. fol.* 64. *Dyer* 29. *Littl. fol.* 280.

And if an *Advowson* descend amongst them, they shall present by turn, the eldest first, and the rest after, *ordine quisque suo*: And if either of them disturb the other, in this case, he that is disturbed, may have a *quare impedit* against his Companion; but so cannot one Joyntenant or Tenant in Common against another, *Littl. fol.* 64. *Dyer* 29. *Littl. fol.* 280. *Kelw.* 1. F. N. B. 34.

So long as the Land is undivided, they have one entire *Freehold* in it, in respect of a stranger, but amongst themselves, to many purposes, several *Freeholds*. And this *Unity* is not severed by the death of any of them, but her issue, and the rest shall be sued joyntly, and sue so, but the issues of several Coparceners shall not joyn; and yet when they have recovered, a Writ of *Partition* lieth between them, and there is between them a *Privy* in Person, in Estate, and Possession, Co. upon *Littl. fol.* 164. 169. F. N. B. 62.

Parceners are compellable by the Common-Law to make *Partition*; and for that purpose they may sue out a Writ of *Partitio facienda* (see above.) And though one of them have made a Lease of his part to his *Companions*, yet he may have this Writ against the rest. *Fitz. N. B.* 62.

Also

Also Joyntenants and Tenants in Common, whether they be so, of an Estate of Inheritance in Fee-simple, or Fee-tail in their own Rights, or in the Rights of their Wives; or which hold joyntly or in Common, for Term of life, year, or years onely.

Joyntenants.
Tenants in
Common.

And Joyntenants, or Tenants in Common, where one or some of them have Estate or Estates for term of life or years, with the other that have Estate or Estates of Inheritance, or Freehold, are compellable by the Writ of *Partitio facienda* to make Partition of the Lands, they do so hold as Coparceners are.

And in all these cases, let him that brings the Writ see that he comprehend all the Land, whereof Division is to be made in his Writ. *Stat. 31 Hen. 8. chap. 1. 32 Hen. 8. chap. 23: Bro. Partition, fol. 33. Co. 6. 12. Dyer 265.*

Sec. 10:

If three Parceners be of a Reversion after an Estate for life, and one of them alien his part by Fine, and after the Tenant for life die, and one of the other two enter into the whole: Now the Alienee, and the other cannot joyn, and have one Writ of *Partitio facienda* upon these Statutes, but they must bring several Writs.

So if in this case the two Coparceners had joyned, and brought the Writ against the Alienee upon these Statutes, the Writ would abate; yet if the Husband of one of the Sisters, or one of the Parceners her self purchase one of her fellows parts, there is a special Writ by the Common Law in this case to compel Partition, *Dyer 128. 243. F.N.B. 62.*

If there be two Parceners, and one of them take a Husband, and hath issue by her, and she die, and he hold himself in as Tenant by the Courtesie, they may make Partition by agreement; or if the Tenant by the Courtesie will not, the other may compel him by this Writ: But if the Parcener refuse, the Tenant by the Courtesie cannot have this Writ against the other, that doth refuse, *Littl. selt. 164.*

If one of the Parceners alien his part in Fee, the other Parcener may bring this Writ against the Alienee, but the Alienee cannot bring it against the Parcener, unless it be upon the Statute, as a Tenant in Common, *Co. upon Littl. fol. 175.*

Coparceners may make Division of their Lands they hold in Coparcenery, either during their whole, or a part of their Estate, and that they may do (as hath been shewed) either by Agreement with, or without writing, and that divers ways.

6. What shall
be said a good
Partition of
their Land.
Without Writ
by Agreement.

1. As if they agree to divide it, and do divide it to every one his part.

2. If they chuse certain Friends to divide it, and set it out into parts; and in this case the eldest must chuse first, and so every one in his age, unless they otherwise agree.

3. If after the parts be divided, and set out, there be Lots cast, and so a choice is made by that means.

4. By casting in Land in *Hochpot.* See beneath, and in *Littleton*, and all these are good Divisions.

Hochpot.

And in all these cases the parties dividing, if they be of full age, at the time of the Partition made, be bound for them and their Heirs, though it be never so unequally made.

Infant.

But if the parties that divide, were seised of an Estate-tail, there the Division (if Tail be unequal) will onely binde them for their lives, and the issue of him that hath the lesser part, may either avoid it, or affirm it.

So if the Division were made by the Husbands of the Parceners; the Wives after their deaths, if their parts be not equal, may either avoid it, or affirm it.

So if the Parcener be within age, at the time of the Division made after she comes of full age, she may either affirm or avoid it; & if in these cases, that party that may avoid, do verbally agree to the Division, or take the profits of the part allotted t

o him or

or make a Lease of it, after his time, he may avoid it; this hath affirmed the Division: But it seems in all these cases, where the Division is equal, that it is not to be avoided by any of the Parceners, or their Heirs, *Co. super Littl. 174.*

A Partition by Agreement, without Writing, that one shall have one part of the Land, and another another part; and that he that hath the better part, shall pay to the other Parcenter a yearly Rent, issuing out of his Land; this is a good Division; and the party to whom this Rent is given by the Agreement, may distrain in the Land of Common Right for this Rent, though there be no Deed; so a Reversion, nay Advowson, or the like, in this case may pass without Deed, *Littl. sect. 251. 29 Ass. pl. 23. Plow. 134. Dyer 19.*

If they agree that one of them shall have all the Lands in Severalty one year, another all another year, or in any such manner, this is a good Partition, *F.N.B. 62. 11 H. 4. 3. 21 Ed. 3. 7.*

If there be some Land in Fee-simple, and some Land in Fee-tail descended, and they agree one shall have the one sort of Lands, and the other the other; this is good, but this may become void by matter *Ex post facto*, *F.N.B. 62. M. Littl. sect. 26.*

If Joyntenants, or Tenants in Common of a Term of years of Land, do make Division thereof by word, without Deed, it seems it is good enough, *Dyer 350.*

If Joyntenants, or Tenants in Common of any Estate of Inheritance, in Fee-simple, Fee-tail, for life or for years, by mutual agreement, by writing, make Partition, it is good, *Dyer 350. Bro. Partition 38.*

But if Joyntenants, or Tenants in Common of any Estate of Inheritance or Freehold, make Partition by word only; this is not good to sever the Joynture, *Co. upon Littl. 165.*

But Tenants in Common may by word and Livery of Seisin, make Partition well enough the same, *Co. 6. 12. Dyer 350.*

Se8. 11. Prochein Amy. If Partition be made by *Prochein Amy* of an Infant that is a Parcenter, it is not good.

If the Ancestor died seised of Land intailed, and so much in Fee-simple, and the eldest take the intailed, and the other the Fee simple, this is good for their time; but if the youngest Alien all or part, in Fee or in Tail, that he leave not a sufficient Recompence to the Issue, the Issue may avoid the Exchange, and take to half the exchanged Lands, and the other hath no remedy for his part of the Fee-simple Lands, *Co. upon Littl. fol. 172.*

But *contra* of a Lease for life or years, but if part of the Fee-Land descend, the Issue must waive the profits of that, if he will have the benefit of the other.

By Writ.

The Partition that is made upon a Writ directed to the Sheriff, to make Partition between the parties, must be by the Oath of a Jury of twelve lawful men of the Neighborhood.

For so is the Judgment upon this Sute, That the Sheriff in person shall go to the Lands, and that he by the Oaths of twelve men of his Bailiwick, shall make Partition between the parties, and that one part shall be assigned to one, and another part to another. And how the Sheriff doth do this, he must return under his Seal, and the Seal of the twelve men to the Justices, before whom the Writ is returnable. *Co. upon Littl. fol. 167.*

If *A.* and *B.* be Tenants in Common of a Manor, and *A.* purchase Land, so intermix with the Lands of the Manor, as the Jury cannot tell how to make Division of the Manor, and to distinguish it from the Land purchased: In this case *A.* must shew the Jury the bounds of the purchased Lands, and *B.* is not bound to do it, or else if the Jury have no evidence of either side, and they make Partition of the Manor, as it is commonly presumed and known to extend, it is good enough, *Dyer 164.*

If there be a Capital Messuage upon the Lands to be divided, the Sheriff must allot that wholly to the eldest of the Parceners, and not divide it. *CONTRA TENENTUR. Co. upon Littl. 165.*

For

For such Inheritances as are entire, as a Villain, Reasonable Estovers, and the like, either the eldest must have all, and the rest contribution, or else one shall have it one while, and the other another; but a Rent-charge is dividable, and the Distress also. See *Co. upon Littl. fol. 164, 165.* See all the *Treatise in the English Lawyer, fol. 24, 25.*

The Entry of the one Parcener into the Land descended; may avail, and shall be the Entry of the other, if they agree, so *Littl. 160.*

7. Where the Entry of one of them shall benefit the other, or not.

But if one that doth enter, do enter into all to his own use, or after his Entry make a Feoffment in Fee; this special Entry shall not benefit the other: As if a Tenant in Tail die having two Daughters, and the eldest enter into the whole, and thereof maketh a Feoffment, with Warranty; this is a Collateral Warranty, which sheweth that the Entry did not avail both, for there the Warranty must begin by Disseisin. But this Entry is onely available when the other will; and therefore if one enter, both cannot be vouched as Heirs, for that is a disadvantage; but both may have an Assise, *Littl. 160. 4 H. 7. 9.*

If Land descend to Parceners, and they die having Issues, and the Issues be disseised, or if the Parceners themselves were disseised; their Issues, or themselves must joyn in an Assise, against the Disseisor.

8. Where they must joyn in Action, or not.

So if they be disturbed in a Presentment to an Advowson, they must all joyn in a *quare impedit.*

So if they have cause to bring Waste or a Cessavit, they must joyn. See *Joyntenants, and Tenants in Common.*

So for Personal wrongs, they must joyn in Action; and if some of them die, the Action survives to the rest, and they shall recover all, as in *Accounts, Trespass, &c. Kelw. 1. Littleton, fol. 71. Broo. Joyntnancy 51. 48. Co. upon Littl. fol. 198.*

It is a mixing together of Lands in Frank-marriage, with other Lands in Fee-simple descended: As if a man be seised of thirty Acres of Land in Fee, and giveth ten of them in Frank-marriage with his Daughter, having but one Daughter more, and die seised of the other twenty Acres; now if she that is married, will have any part of the twenty Acres, she must relinquish her twenty Acres, and cast them into the other twenty Acres in Hotchpot, and thereupon an equal Division must be made of all, else her sister shall have the whole twenty Acres.

Hotchpot, what.

But if the Land given in Frank-marriage were by another Ancestor, or given in another nature, and not in the nature of Frank-marriage, then she need not put it into Hotchpot, *Littl. sect. 267, 268.*

For the Ile of *Wigbr.* see 4 H. 7. 16.

Ile of Wigbr.

Ssss

CHAP.

CHAP. CI.

Of Judgment, Judges, and Ireland,
King and Queen.Judgment,
what.

Judgment is the Sentence and Decree that a Judge doth make at the end of a Sute, which is no more but the pronouncing of what the Law doth set down, and determine in that case according to that which is alleged and proved. And this so long as it stands in force, and till it be reversed by Attaint or Writ of Error, is final and makes an end of the Sute. *Finches Ley 453. Co. super Littl. 39:*

As to this take these things:

Arrest of Judgment,
what.
Curia avisare
vult, what.Vacat of a Judgment,
what.Judges or what
Justices.Association,
what.*Coram non*
Judice, what.

1. In every Judgment there is to be a Prosecutor, a guilty person, and a Judge.
2. Some Judgments are Final, and some are not.
3. Judgments when they are ready to be given, may be staid, if there be any Error in the proceeding: For albeit a cause be so forward, that it is ready for Judgment, yet if there be any Error in the proceeding, or it standeth so in Law that Judgment ought not to be given in it, as the Judges are about to do, upon the opening of the Matter, and Motion of the other party, the Judgment may be staid. And this is called an Arrest of Judgment; and upon this is entred by the Judges, *Curia avisare vult*, the Court will advise.
4. Judgments duly given must continue, and the parties for whom they are given, be in peace until they be reversed by Attaint or Error.
5. The Judges that give the Judgment, and in some cases other Judges that are above them, may if there be cause, after they are given, avoid them; and this is called a Vacat.
6. A Prelate, two Earls, and two Barons, (upon complaint by Commission from the King) might have called for any Record where delay in any Court had been of entering Judgment, and they with the Lord Chancellor, Treasurer, and Justices of either Bench; and such of the Kings Council, as they had thought fit to call to them, might have given Judgment in the Cause, and that must have stood, or they might have referred it to the next Parliament.
7. The Parliament may call in question, and reverse if they see cause, the Judgments given in all other Courts. But see for these, and other things of this Subject: 4 H. 4. 23. 14 Ed. 3. Stat. 1. 5. Co. 3. 13. Dyer 268. *Crompt. Jur.* 18. Brownl. 98, 99, 188, &c. Dyer 249.

A Judge is one that is deputed by the Supreme Magistrate to do right by way of Judgment, and he is called also a Justice: Of Judges and Justices there are many kinds. But see for them in *Officers and Courts*.

Association is where some others are joyned with the Judges to be assistant with them.

Coram non Judice is where any man doth take upon him as a Judge to do any thing in a Cause, wherein he hath no Jurisdiction; in this case all that he doth, is void, and said to be done *Coram non Judice*.

So it is for the Judges of the Court of Common Pleas to meddle with the Pleas of the Crown; a Steward in a Leet to meddle with Civil Actions between man and man.

For Judges and Justices, this onely is to be known.

1. The Supreme Magistrate hath by his Prerogative, the making and appointing of the Judges and Justices.
2. He may increase or diminish them as he shall see cause.
3. When they do enter into their Offices they must be sworn, duly to serve the Supreme Magistrate in their Offices, 14 Ed. 3. Stat. 1. 5. 18 Ed. 3. 3:

4. The

4. The Judges and Justices are to do right according to their Oaths, and Offices, to all men, without delay and respect, and not to regard any Letters or Commands, from the King himself to the contrary, 2 *Ed. 3.* 8. 20 *Ed. 3.* 1, 2, 3.

For Ireland, and that which concerneth the same, see the Statutes, 17 *Ed. 1.* 1: Ireland. 34 *Ed. 3.* 17, 18. 1 *H. 6.* 3. 2 *H. 6.* 8. 16, 17 *Car.* 30, 33, 34, 35. And *Wingates*

Abridgment.

For the Adventurers in Ireland, see the Ordinance, 1 *June.* 1653.

Adventurers.

For Iron, see 28 *Ed. 3.* 5.

Iron.

For the Sale of the Kings and Queens Lands, and Goods, see *Acts*, 23 *Novemb.* 1649. 17 *July.* 1649. 26 *June.* 1649.

CHAP. CII.

Of Latin and Law.



Or Latin, this onely is to be known.

1: That all Law-Books that are Printed, must be in the English Tongue, and not in Latin. *Latia.*

2. All the Pleadings and Proses in Sutes must be in English under pain of twenty pound. *Acts*, 22 *Novemb.* 1650. and 9 *April.* 1651.

Law is a Rule for the governing of a Civil Society, to give to every man that which doth belong to him. 1. *Law*, what.

1. Our Laws are divided into three sorts. Common Law, which is nothing else but Common Custom, and that which is commonly used through the whole Nation; and this is founded especially upon certain Principles or Maxims made out of the Law of God, and the Law of Reason.

The kinds of the Law.

Maxims of Law.

2. Statute Laws which are certain Acts and Constitutions of Parliament, that have been made in all succeeding Generations, to correct, abridg, and explain the Common Law: And all these to give right to every man, and to preserve every man from wrong.

3. The Customs of particular places, which are the Laws of the places. *Doff. & Stud.* l. 9. 75. *Dyer* 54. *Co. 11.* 74. *Brownl. Rep.* 2 *part.* f. 198.

4. There is also the Civil Law, Martial Law, Ecclesiastical Law, Canon Law, Law of Nations, Law-Merchant, a part of the Law of Nations, and the Law of Chivalry, or Title of Honor. And of all these Laws, our Law taketh some notice, *Doff. & Stud.* 6. *Fitz. Gard.* 118. *Dyer* 150. 21 *H. 7.* 33. *F. N. B.* 117. *Co.* 2 *part.* *Inst.* 58.

An involuntary Ignorance, as that of an Infant, or a Lunatick, will excuse them in many cases, *Plow.* 19.

As if such an one do such an act as would be Felony, or some other lesser offence in another; this shall be excused in them.

So if such a one neglect to claim, or enter to his Land in time, this laches or neglect shall not prejudice him.

But if any other man transgress any Law, it will not excuse him to say, That he was ignorant of the Law; this is a voluntary Ignorance, as is that also of a Drunkard; and therefore his drunkenness will not excuse him of any offence he shall commit, *Co. 1.* 45. *Plow.* 19.

If a man know that two men have pretended Title to one peece of Land, and he will say that the one hath the right, and the other hath no Title; if in truth it be otherwise, and the other hath the right, that he saith hath none; an Action of the Case for Slander of the Title will lie, and this ignorance of the Law will not excuse him, *Co. 1.* 177.

2. Where the Ignorance of Law, will excuse a man, or not.

So in the case of Bankrupts, if one come not in to demand his debt, he may lose it, and the ignorance of Law will not help him; *Vigilantibus & non dormientibus subveniunt jura*, Co. 2. 26.

3 Where the ignorance of the Fact will excuse, or not.

If a Man have made a Lease on Condition, that the Lessee shall not do some Collateral Act, as Alien without Licence, or the like, which the Lessee may do, and the Lessor never know of it, and the Lessee break the Condition, and after the Lessor accept the Rent; this shall not bar him of Entry for breach of the Condition, unless the Lessor had notice; for this ignorance of the fact here, shall help him. Co. 3. 65.

But if one be bound in an Obligation with Condition, that he or another shall do any act, as Counsel shall advise, and he tender him a Deed, that the Obligor cannot read nor understand; he must seal it presently, and may not forbear till some body read it to him, else his ignorance will not excuse him. Co. 2. 3.

If a Devise be made to one of Land, till he shall levy one hundred pound, and the Devisee do not know of the Devise, and the time doth run on; yet he shall hold it no longer then the time he might have levied so much out of it, and his ignorance of the fact here will not help him. Co. 4. 82.

If one be bound to repair Houses, and he know not of the decay, this will not excuse; but if it were to repair such Houses as another shall after assign, and he assign unknown unto him; here his ignorance will excuse, *Dist. & Sind.* 149. But no ignorance of Law in these points will help.

Wager of Law, what.

It is an Oath taken by some certain persons in some Courts, where one is charged with a Debt, or Detinue of Goods without Specialty, or upon some secret Agreement, where the Plaintiff cannot prove the Surmise of his Sure by any Deed, or open act (in which act the Defendant might privily discharge it) then the Defendant may if he will, wage his Law; and that is, swear that he doth not owe the money, or detain the Goods as the Plaintiff doth pretend, &c. And he is to have six, or eight, or twelve (as the Court will appoint him) more, that must swear they think that he sweareth truth, which is like the Oath made by Compurgators in the Civil Law; and this offer to wage Law, is called Wager of Law, and the doing of it, doing of Law; and this must not be without witnesses. They were used to be eleven, and himself twelve, which did countervail a Jury. He is to be sworn directly and absolutely, and the Compurgators, that they believe he doth say true.

Where it lieth, or not.

This liberty of Wager of Law, is allowed onely in cases of Secrecie, where the County cannot have notice of the thing: As in Action of Detinue, of Goods lent, or left with the Defendant, for which the Plaintiff hath no Especialty; and in Actions of Debt, upon private Contracts and Agreements, and the like; as for Money lent, Rent upon a Lease for years, of a stock of Sheep, or the like, Detinue of a Horse, or other personal thing.

But it lieth not in an Action of Debt for Rent upon a Lease for years in writing; nor in an Action of Debt for Arrearages of Account, nor in an Action of Debt upon any Bill, Bond, or other Especialty, nor in any Action of the Case, nor in Account upon Receipt by another Mans hand, not upon Contract when the party hath a Deed of the Contract, nor upon a Lease of Land, though it be stored with Beasts, *Finches Ley* 425. Nor in an Action of Debt brought for Wages by a Laborer, bound by Statute to serve, nor upon a Lease for years, though it were made without Deed. See for this, Co. 2. *part. Inst. cap.* 28. See more in the Statutes of 38 Ed 3. 5. 5 H. 4. 8.

4. Nient Lettered, or not able to read.

It is a Plea given for a Lay and unlearned Man, to avoid a Deed he hath made, when such a man is to seal a Deed, and he desire to hear him read, or to hear the Contents of the Deed; and the other party, to whom the Deed is to be sealed, do not read him, or cause him to be read, or the Contents to be shewed; or the party himself, to whom the Deed is to be sealed, or another at his request, or of his own minde, do read or declare the Contents thereof, falsely and untruly, concealing part, or reading otherwise then it is, or adding more, and thereupon the party seal it: Now if he be after sued upon this Deed, or the party make any use of it, the party that made the Deed may avoid it, by shewing the whole matter; but if it be a matter of

of Record, it cannot be avoided for any such cause. So if the party do not desire to hear the Deed read, or the Contents thereof, there the not reading of it, will not make the Deed void: but in that case the misreading of it, though it be done without the parties request, will make the Deed void. But no Ignorance of the Law upon the Deed will help in this case.

Then a thing is said to be in Abeyance, when it is in no person, for that no person is capable of it for the present; but it is only in consideration of Law, and kept by Law, for one that may be capable of it: As when a Lease is made for life, the Remainder to the right Heirs of *J. S.* which *J. S.* is then living; this Remainder is kept by the Law, for it is out of the Grantor, and yet cannot be in the Heirs of *J. S.* for he can have no Heirs while he liveth; but if he die before the Lessee for life, it will rest well enough, otherwise not; and till the death of the Tenant for life, the Remainder is said to be in Abeyance. *Terms Ley. Co super Littl. 342.*

The Books of Law must be turned into, and all Proces in the Courts must be in English. See for this *Att. 7 Nov. 1650.*

CHAP. CIII.

Of a Lease.



Lease doth properly signifie a Demise or Letting of Lands, Rent-Common, or any Hereditament unto another for a lesser time then he that doth let it, hath in it. (For when a Lessee for life or years, doth grant over all his Estate or time unto another, this is more properly called an Assignment then a Lease.) And this albeit, it may be made and done by other words, yet it is most commonly and aptly made by the words, Demise, Grant, and Let; and in this case he that letteth, is called the Lessor, and he to whom it is let, the Lessee.

1. Lease, what:

Assignment.

Lessor, Lessee.

This word also is sometimes, although improperly, applied to the Estate, *i.* The Title, time or interest the Lessee hath to the thing demised, and then it is rather referred to the thing taken or had, and the interest of the Taker therein; but in this place it is applied rather to the manner or means of attaining, or coming to the thing Letten.

And in this sense it is sometimes made and done by Record, as Fine, Recovery, &c. and sometimes, and most frequently, by writing, called a Lease by Indenture, albeit it may be made also by Deed Poll. And sometimes also it is (as it may be of Land, or any such like thing grantable without Deed for life, or never so many years) by word of mouth without any writing, and then it is called a Lease-Parol: And hence comes the Division of a Lease-Parol, and a Lease in writing. And all these ways it may be made either for life, *i.* for the life of the Lessee, or another, or both; or for years, *i.* for a certain number of years, as ten, an hundred, a thousand, or ten thousand years, moneths, weeks, or days, as the Lessor and Lessee do agree; and then the Estate is properly called a Term of years: For this word Term doth not only signifie the Limits and Limitation of time, but also the Estate and Interest that doth pass for that time: These Leases also for years do some of them commence *in presenti*, and some *in futuro*, at a day to come; and the Lease that is to begin *in futuro*, is called an *Interesse termini* or Future interest; or at will, *i.* when a Lease is made of Land to be held at the will and pleasure of the Lessor, or at the will and pleasure of the Lessor and Lessee together: And such a Lease may be made by word of mouth as well as the former. *Terms Ley. Co super Littl. 43. 45. Justice Dodridge Treatise, called The Use of the Law. Broo. Leases, 60. 437. Flow. 421. 432. Dyer 125.*

2. The kinds.

Term of years.

Interesse termini, or Future Interest, what.

Regularly

3 Things necessarily required in every good lease.

Regularly these things must concur to the making of every good lease. See *Grant Numb. 4. Co. 6; 36. 34. 35. 1. 154. 155. Co. super Litt. 45. 46. Plow. 273. 523.*
 1 As in other grants, so in this there must be a Lessor, and he must be a person able, and not restrained to make that Lease.

2 There must be a Lessee, and he must be capable of the thing demised, and not disabled to receive it.

3 There must be a thing demised, and such a thing as is demisable.

4 If the thing demised be not grantable without a Deed, or the party demising not able to grant without Deed, the lease must be made by Deed. And if so, then there must be a sufficient description and setting forth of the person of the Lessor, Lessee, and the thing leased, and all necessary circumstances, as sealing, delivery, &c. required in other grants, must be observed:

5 If it be a Lease for years it must have a certain commencement, at least then when it comes to take effect in interest or possession, and a certain determination either by an express enumeration of years, or by reference to a certainty that is express, or by reducing it to a certainty upon some contingent precedent by matter *ex post-facto*, and then the contingent must happen before the death of the Lessor or Lessee.

6 There must be all needfull ceremonies, as livery of seisin, attornment, and the like, in cases where they are requisite.

7 There must be an acceptance of the thing demised, and the estate by the Lessee. But whether any rent be reserved upon a Lease for life, years, or at will, or not, is not material, except only in the cases of Leases made by Tenant in Tail, husband and wife, and Ecclesiasticall persons. Of which see *infra*.

4 What shall be said a good and a sufficient lease for life or years. Or not.

1 In respect of the persons of the Lessor, and the Lessee, the thing leased, & the estate, property, or possession of the Lessor therein.

For the ability and capacity of the Lessors and Lessees, and what shall be said a good lease or not, in respect of the ability of the Lessor, and the capacity of the Lessee, and the description of their persons, the nature and description of the thing demised, and what mis-recital, or misnomer will hurt, or not, See *Grant Numb. 4; and infra Numb. 5. 6. 7.*

Leases for life, or years, or at will, may be made of any thing corporall or incorporall, that lieth in livery or grant. Also leases for years may be made of any goods or chattels. See for this *Grant Numb. 4. Bro. Leases 23.*

A man seised of an estate in Fee-simple in his own right of any Lands or Tenements, may by Deed or writing in the country, or without writing, by word of mouth make a lease of it for what lives or years he will. And he that is seised of an estate in Tail of any Lands or Tenements, may make any lease out of it for his own life, but not longer unless it be by fine or recovery, or it be such a lease as is warranted by the Statute of 32 H. 8. (whereof see more *infra*.) And he that is seised of Lands or Tenements of any estate for his own or anothers life may make what lease for years he will of it, and it will be good as long as the lease for life doth last. And he that is possessed of lands or Tenements for years, may make a lease of it for all or part of the years, and these are good Leases. The Tenant for life or years may also assigne over all their estates if they please. And if such Tenants make leases for longer time, as if Lessee for years make a lease for life; it seems by this the Land will pass for life, if the Term of years last so long. But if he give livery of seisin upon it (as he must to make the lease for life good) this is a forfeiture of the estate for years. *Co. 7. 12. 1. 44. Plow. 524.*

A License to a man to enjoy land for 7 years, is a lease for 7 years; and a License to sow Corne, is upon the matter a lease of the Land till the Corne be taken away: by Baron Thorpe, at *Glew. Assises. 1654.*

If an Infant be seised of Land in Fee-simple, and he make a Lease for years of it rendering no rent; this lease is void. But if there be a rent reserved upon the lease, then the lease is but voidable, and may by the acceptance of the rent by the Infant after his full age be made good. *9. H. 7. 24. 18. Ed. 4. 2. Plow. 545.*

Jointenants, Tenants in Common, and parcenours may make leases for life or years of their own parts, and purparties at their pleasures; and these leases will binde their companions.

Forfeiture. Infant.

Acceptance.

Jointenants. Tenants in Common.

And

And one Coparcenour, or Tenant in Common may make a lease of his part to his companion if he will. *Litt. cap. Tenant in common, F. N. B. 62. G.*

If a Feoffment be made upon condition, and before the time of performance of the condition, the Feoffor and Feoffee doe joyn to make a lease for life or years of the Land; this is a good lease.

A man that hath an estate in land to him and his wife and his Heirs, may make what lease he will of the Land, and this will be good against all men but his wife onely, and that for her time. *Bro. Leases 58.*

If there be Lessor in Fee, and Lessee for ten years; in this case they two may joyn together and make a Lease for lives, or for any terme of years; and this is good. *Co. 10. 49.*

A Disseisee cannot make a lease of that Land whereof he is disseised untill he make his entry or recover the possession of the Land again. So neither can a woman that hath recovered the third part of her husbands Land in a writ of dower, make any Lease of it before she be in possession by execution: And yet if a Lease be made to me for years, I may make a Lease of part, or an assignement of all the term before I have made my entry into the Land demised. So if the Father die, and the Son make a lease to a stranger of the Land descended to him before his entry; this is a good lease: but if a stranger had entred and abated into the Land, and then the son had made the lease, *contra, Plow, 133. Bro. Scire facias 36. Co. super Lit. 46. Plow. 137. 142.*

In some cases also such persons as are not seised in Fee-simple, &c. nor able to derive such estates for life or years out of their own estates, may lawfully notwithstanding make such leases for life, &c. And this is sometimes by some speciall Act of Parliament enabling them so to doe: And hence it is also that a Tenant in Tail may make leases for three lives or twenty one years. And sometimes it is by some speciall power or authority that is given or reserved by and to the party himself that had the Fee-simple in him, or given to some other to doe it in his name, and leases thus made may be good. And therefore if any Act of Parliament enable a Tenant in Tail or a Tenant for life to make leases for three lives, or twenty one years, leases that are so made in pursuit of that authority, are good. And if a man be seised of Land in Fee, and convey it to the use of himself for life, or in Tail, with divers remainders over, with a proviso that it shall be lawfull for him or any such Tenant in Tail, to make leases for twenty one years; in this case he or they may make such leases and they will be good. But in both these cases care must be had to pursue the authority strictly: that the leases made be according to the power and direction given by the statute or proviso: for if it differ and vary ever so little from the sense and meaning of the same; the lease will not be good. And therefore in the case before of a power to make leases for twenty one years, if the party make more leases for twenty one years at one time than one, they are all void but the first, because it is against the intent of the parties, though it be not against the words. And so if the power be to make leases for three lives; he cannot by this make a lease for ninety nine years if three lives so long live. But if the power be thus provided, &c. that he may make any lease in possession or reversion; so as it doe not exceed the number of three lives or twenty one years; in this case a lease may be made for ninety nine years if three lives live so long. But where uses are raised by way of covenant, and in the deed there is a proviso that the covenantor for divers good considerations may make leases for years; in this case this power is void, and therefore no lease can be made hereupon: neither will any averment help in this case. And if a man have a letter of Attorney, or other authority to make leases for another, and doe make them accordingly; such leases are good. *Co. 5. 5. Dier 357. Co. 6. 2. 8. 70. 1. 175. See in leases made by Tenant in tail infra.* But herein also caution must be had of three things. 1 That the authority be good. 2 That he that is the Deputy or Attorney doe pursue the authority strictly. 3 That he doe it in the name of his master, and not in his own name. *Co. 9. 76.*

But if a power to make leases be raised upon a Covenant to stand seised without any transmutation of the possession, this is void in law, and not to be holpen in equity. *Carls Rep. 30.*

By speciall power or proviso to make leases.

Averment.

2 In respect of the manner of the agreement and the words whereby the same is set down. And what words will make an estate for life or years.
Livery of Seisin.

Livery of Seisin.

Livery of Seisin.

Executors.

Covenant.

Covenant.

Executors.

A Lease made for a Thousand days, Months, or weeks, is as good for so long as it endureth as a lease for an hundred or a thousand years. So a lease for half a year, or a whole year is good: So if a lease be made from day to day, or from week to week for four years; this is a good lease for four years, *Et sic de similibus*. So if one make a lease for ten years, and so from ten years to ten years, during an hundred years, or untill an hundred years are incurred; this is a good lease for an hundred years. So if one make a lease from three years to three years, during the life of *I S.* in this case if livery of seisin be not given, this is a good lease for six years; but if livery be given, it is a good lease for the life of *I S.* And if a lease be made from my death untill *Anno Domini 1650*; this is a good lease. *Brownl. 1 part 30. Co. 6. 72. 14 H. 8. 13. Plow. 422. Plow. 272. Bro. Leases 49. Dier 24.*

If I say to *I S.* being in my house [Here *I S.* I demise to you my house and Land so long as I live;] this is a good lease for life to him if livery of seisin be made. *Et sic de similibus. Co. 6. 16.*

If one make me a lease of Land untill an hundred pound be paid me, and make livery of seisin upon it; this is a good lease for life determinable upon the payment of the hundred pound. But if no livery be made, it is no good lease. *21. Aff. pl.*

If one make a Lease to me for my life, and for four, ten, or twenty years after: this is a good lease for life first if livery of seisin be made, and then a good lease for years for so many years as are agreed upon afterwards, which my executors shall have. And if no livery of seisin be made; yet it seems it is a good lease for so many years after my death. *Bro. Leases 27. 51.*

If an Indenture of Lease be made between *A* of the one part, and *B C* and *D* of the other part, and therein *A* doth demise land to *B* To have and to hold to him for eighty years, if *B* shall live so long, and if he die, or alien the premises within the term, then that his estate shall cease, and then the Lessor doth grant the Land to *C* for so many years of the said term as shall be then to come after the death or alienation of *B*, if he live so long; in this case this is a good lease to *B* for so many years as he shall live of the eighty years, but the lease to *C* after is not good, for the term is ended by the death of *B*, but if the words of the second demise be To have and to hold during the residue of the eighty years, and not during the residue of the term; in this case the second demise is good to *C* also. *Co. 1. 153. Dyer 253.*

If one make me a Lease for sixty years if I live so long, provided that if I die within the term, that my Executors shall have it during the residue of the sixty years; in this case this is a good lease for the sixty years determinable upon my death, but not a good lease for the residue of the sixty years after my death. And yet it may amount to a good covenant for that time. *Co. 1. 155. Dyer. 150. 2. 53.*

If *A* covenant to levy a fine to *B* and his Heirs, provided that if he pay *B* and his Heirs ten pound at the end of thirteen years, that then the fine shall be to the use of *A* and his Heirs, and *A* doth covenant with *B* by the same Deed, that *B* his Heirs, Executors, and assigns, shall quietly hold the premises from *Michaelmas* next for thirteen years and yearly from thenceforth for ever if the ten pound be not paid according to the intent; in this case this covenant doth not make a good lease for the thirteen years, and it is but a covenant. *Evans case. Trin 5. Jac. B. R.*

If one make a lease for a certain number of years, and it is further agreed that upon some contingent the Lessee shall have the Fee-simple, and livery of seisin is given hereupon; in this case the lease for years doth continue good for the time agreed upon. *Plow. 272. Lit. Sect.*

A lease for years cannot by the agreement of the parties be made to the Heirs of the Lessee, nor intailed to the Heirs of his body. And therefore if a Lease be made to *I S* and his Heirs, or to *I S* and the Heirs male of his body, yet the executors of *I S* and not his Heirs shall have it, and the Executors may sell the term. *Co. 2. 24. 10. 87.* If two agree by word that one of them shall have such a peece of Land for twenty years; this is a good and perfect lease that is made by this agreement, albeit they doe agree to have a writing made of it afterwards, for in this case the writing is but the confirmation of it. But if the agreement be that such a writing shall be made, or that a lease shall be made of such a thing between them and put in writing, so that the agreement hath reference to the writing, and implieth an intent not to perfect

perfect the agreement till the writing be made; in this case the lease is not a perfect lease until the writing be made. *Per Justices Jones at the Assizes at Glouc.*

Albeit the most usuall and proper making of a lease is by the words, Demise, grant, and so term let, and with an *Habendum* for life or years, yet a Lease may be made by other words, for whatsoever word will amount to a Grant will amount to a lease. And therefore a Lease may be made by the word, Give, Betake, or the like. The word *Lacavis* also is a good word. And the use in the Exchequer is to make Leases by the word *Commissimus*, which is a good word to make a Lease, *Co. Super Litt. 5. F. N. B. 270. 2. Br. Leases. 71.* And if *A.* doe but grant and covenant with *B.* that *B.* shall enjoy such a peece of land for 20. years; this is a good lease for twenty years. *Br. Leases. 60.* So if *A.* promise to *B.* to suffer him to enjoy such a peece of land for twenty years; this lease is a good lease for twenty years. *Mic. 9. Jac. B. R. Curia.*

So if *A.* license *B.* to enjoy such a peece of land for twenty years; this is a good lease for twenty years. *5 H. 7. 1.* And therefore it is the common course, if a man make a feoffment in fee, or other estate upon condition that if such a thing be, or be not done at such a time, that the feoffor, &c. shall reenter, to the end that in this case the feoffor, &c. may have the land and continue in possession untill that time, to make a Covenant that he shall hold and take the profits of the land untill that time, and this Covenant in this case will make a good lease for that time, if the uncertainty of the time (whereunto care must be had) doe not make it void. And therefore if *A.* bargain and sell his land to *B.* on condition to reenter if he pay him an hundred pound, and *B.* doth covenant with *A.* that he will not take the profits untill default of payment, or that *A.* shall take the profits untill default of payment; in this case howbeit this may be a good Covenant yet it is no good Lease. And if the Mortgagee covenant with the Mortgagor that he will not take the profits of the land untill the day of payment of the mony; in this case albeit the time be certaine, yet this is no good Lease but a Covenant onely. If one give a Bond for the quiet holding of a Close for three years; it seemes this is no lease in Law. See the opinion of the Parliament for Bonds and Covenants both *Stat. 14. Eliz. cap. 11. Agreed by all the Judges. 20. Jac. ut per. Just. Bridgman. And 8. Cur. B. R.*

A Lease for years may begin at a day to come, as at Michaelmas next, or three or ten years after, or after the death of the Lessor, or of *J. S.* and it is as good as where it doth begin presently. But a lease for life of any thing whatsoever whether it lie in Livery, or in Grant, if it be *in esse* before, cannot begin at a day to come. And therefore if a lease be made *Habendum*, from Michaelmas next, or from the day of the making of it, or after the death of the lessor, or after the death of *J. S.* to the lessee for life, this lease is not good: but in case of a lease of land made thus, it is sometimes holpen by the livery of seisin. For which See *Livery of Seisin chap. 9. Numb. 13. Co. 5. 1. super. Litt. 48. Plow. 136. 197. March. 50. Plow. 78. 177. 236. See Frank Tenement. Brownl. 1. part. 79. 80. 88.*

But all leases for years whether they begin *in presenti*, or *in futuro*, must be certaine, that is, they must have a certain beginning, and certain ending, and so the continuance of the term must be certain, otherwise they are not good. And yet if the years be certain when the lease is to take effect in interest or possession, it is sufficient, for untill that time it may depend upon an uncertainty, viz. upon a possible contingent precedent before it begin in possession or interest, or upon a limitation or condition subsequent: but in case when it is to be reduced to a certainty upon a contingent precedent, the contingents must happen in the lives of the parties. And albeit there appear no certainty of years in the lease, yet if by reference to a certainty it may be made certaine it is sufficient. *Id. errorum off. quod verum reddi potest.*

As for examples, if *A.* seised of lands in fee, grant to *B.* that when *B.* shall pay to *A.* twenty shillings, that from thenceforth he shall hold the land for twenty one years, and after *B.* doth pay the twenty shillings; in this case *B.* shall have a good lease for twenty one years from thenceforth, and if *A.* grant to *B.* that if his tenant for life shall die, that *B.* shall have the land but ten years; this is a good Lease. And if one make a lease for years after the death of *C.* if *C.* die

Text

within

Covenant.

3. In respect of the Commencement, & continuance & end of the term or estate. Incertaintie. Freehold to commence in futuro.

within ten years; this is a good lease if *C.* die within the ten years, otherwise not. But if *A.* be seised of land in fee, and lease it to *B.* for ten years, and it is agreed between them that *B.* shall pay to *A.* an hundred pound at the end of the said ten years, and that if he doe so, and shall pay the said hundred pound, and an hundred pound at the end of every ten years, that then the said *B.* shall have a perpetuall demise and grant of the premisses from ten years to ten years continually following *extra memoriam hominum &c.* in this case this, albeit it be a good lease for the first ten years, yet it is void for all the rest for incertainty. And if a lease be made to begin from the Nativity of Christ, and he doth not say which Nativity, as next &c. it is void for incertainty. And yet if a lease for years be made of land in lease for life to have and to hold from the death of the tenant for life; this is a good lease: So if it be to have and to hold from *Michaelmas* next after the death of the tenant for life, or from *Michaelmas* next after the determination of the estate of the tenant for life; these are good leases. So if there be a former lease in being for life or years, and another lease for years is made of the land to have and to hold from the end of the former estate by surrender, forfeiture, or otherwise for twenty years; or to have and to hold from the surrender, forfeiture, or other determination of the former lease if there be any, and if there be none for twenty years; these and such like leases are good, and this commencement is certain enough. And if one make a lease to begin after the death of *I. S.* & to continue untill *Michaelmas*, which shall be in *Anno Domini 1650.* this is a good lease. *Co. sup. 5. Lit. 45. Co. 1. 1. 155. Co. super Lit. 45. Plow. 83. 124. Co. 6. 35. 1. 155. Plow. 270. Hil. 16. Jac. in the Exchequer. Plow. 191. 533. Ca. 6. 36. Plow. 523. and 17 Jac. B. R. Agree.*

If a man have a lease of land for an hundred years, and he make a lease of this land to another to have and to hold to him for 40 years to begin after his death; this is a good lease for the whole forty years, if there shall be so many of the hundred years to come at the time of the death of the lessor. But if the lessor grant the land to another to have and to hold to him for and during all the residue of the term of an hundred years that shall be to come at the time of the death of the grantor; this is void for incertainty. And yet if in this case he grant withall all his estate, or all his term, or all his interest in the premisses of the deed, and then say to have and to hold the land &c. to the grantee for all the residue of the term of an hundred years that shall be to come at the time of his death, by this the whole estate and interest of the grantor into the land doth passe presently by these words in the premisses of the deed. And if in this case the lessee for an hundred years make a lease of the land to have and to hold after his death for an hundred years; this will be a good lease for as many of the first hundred years as shall be to come at the time of his death. If a lease be made to two for their lives, the remainder which shall first happen to dye for forty years; in this case this is but a possibility. And therefore neither the one nor the other, nor both together can grant away this terme of forty years; *Goldb. 168. Lit. Bro. Sess. 437. Bro. Grant. 154. Co. 1. 155. Plow. 520. 521. See Exposition of Deeds.*

If *A.* make a lease to *B.* for ninty years to begin after the death of *A.* on condition to be avoided upon the doing of divers acts by others, and afterwards makes another lease of the land *Habendum* after the determination or redemption of the former lease, it seems this is a good lease and certain enough. But if a lease be made to *A.* for eighty years if he live so long, and if he dye within the said term or alien the premisses, that then his estate shall cease, and then he doth further by the same deed grant and let the premisses for so many years as shall then remain unexpired after the death of *A.* or alienation to *B.* for the residue of the said term of eighty years, if he shall live so long; in this case, the lease to *B.* is void, for after the death of *A.* the term is at end, but if he say for the residue of the eighty years, it is otherwise; *Per Justice Bridgeman. Co. 4. 152. Dier. 353.*

If *A.* doth make a lease of land to *B.* for so many years as *B.* hath in the Manor of Dale, and *B.* hath then a lease for ten years of the Manor of Dale, in this case this is a good lease for ten years. But if *A.* make a lease of land to *B.* for so many years as the land *B.* hath in execution shall be in execution; this lease is void for incertainty. And if a lease be made during the minority of *I. S.* or untill *I. S.* shall come to the

age of twenty one years, these are good leases; and if *T. S.* dye before he come to his full age, the lease is ended. But if a lease be made to another until a child that is now in his mother's belly shall come to the age of twenty one years, this lease is not good. And if a lease be made for so many years as *T. S.* shall name, in this case if *T. S.* dye name a certain number of years in the life time of the party lessor, this is a good lease. But if a lease be made for so many years, as the executor of the lessor, or of the lessee shall name, this lease is void. *Plow. 273. 313. 322. F. N. B. 3. N. 13. H. 8. 11. Co. 6. 35.*

If a man make a lease for twenty one years, if *T. S.* live so long, or if the coverture between *T. S.* and *D. S.* shall so long continue, or if *T. S.* shall continue to be Parson of Dale so long, these and such like leases are good. But if *T.* make a lease to *B.* for so many years as *A.* and *B.* or either of them shall live, not naming any certain number of years, this cannot be a good lease for years. So if the Parson of Dale make a lease of his glebe for so many years as he shall be Parson there, this is not certain neither can it be made so by any means. And yet if a Parson shall make a lease from three years to three years so long as he shall be Parson, this is a good lease for six years if he continue Parson so long, and for the residue void for incertainty. So if I make another a lease of land until he be promoted to a Benefice; this is no good lease for years, but void for incertainty. *Co. super Lis. 45. Plow. 27.*

If I have a rent charge of twenty pound *per annum*, and let it to another until he have levied an hundred pound; this is a good lease for five years. But if I have a peece of land of the value of twenty pound *per annum*, and I make a lease of it to another until he shall levy out of the profits thereof an hundred pound; this is no good lease for years, but void for incertainty. *Co. 8. 35. 14 H. 8. 10. Plow. 274.*

But her note in all these cases of incertain leases made with such limitations as aforesaid, as until such a thing be done, or so long as such a thing continue &c. that if livery of seisin be made upon them, they may be good leases for life determinable on these contingents, albeit they be no good leases for years. *Plow. 27. Co. 6. 35.*

Note.

And in some speciall cases a lease may be good notwithstanding some incertainty in the continuance of it, for a lease may cease for a time and revive again, as if tenant in tail make a lease for years reserving twenty shillings, and after take a wife and die without issue, in this case as to him in reversion the lease is merely void: but if he indow the wife of the tenant in tail of the land, as to the wife, it is revived again. So if tenant in taile make a lease for years rendering rent, and die without issue, his wife enceint with a son, and he in reversion enter, in this case as against him the lease is void, but after the son is born the lease is good again if it be within the Statute. So if tenant in fee-simple take a wife, and then make a lease for years and dieth, the wife is indowed; in this case she shall avoid the lease, but after her decease the lease shall be in force again. *Co. super Lis. 46. 10 Ed. 3. 16.*

If a lease be made for life or years to *A.* and after the lessor doth make a lease for years by word or in writing to *B.* regularly this concurrent lease to *B.* is a good lease at least for so many years of the second lease as shall be to come after the first lease is determined according to the agreement, as if the first lease to *A.* be for twenty years, and the second lease to *B.* be for thirty years, and both begin at one time; in this case the second lease is good for the last ten years. And yet the reversion will not passe without the attornment of the tenant, and therefore if any rent be reserved on the first lease, the second lessee shall not have it until the first lessee doth attorn. But if the second lease be for the same or for a lesser time, as if the first lease be for twenty years, and the second lease be for twenty or for ten years to begin at the same time; these second leases are for the most part void. *Plow. 433. 421. 273. Co. 1. 155. Bro. Leases. 73. 10. Plow. 521. Co. 4. 38.* And yet herein a difference is taken between leases made by matter of record and by writing, and leases that are made by word of mouth; for if the second lease be made by fine, deed indented, or poll, albeit it be but for the same or for a lesser time, and albeit it be a lease of the land it self, and not of the reversion, yet it will passe the rent reserved upon the first lease if the first lessee attorn, and so also it will do without attornment where attornment is not needfull. But if the second lease be made by word of mouth it is otherwise, for a reversion and a

4. In respect of another lease then in being of the same thing.

Estoppel.

rent in this case will not passe without deed, and therefore a grant by word doth not passe them.

And if the second lease be by fine or deed, and not by word, then also it will work by way of Estoppel both against the lessor and against the lessee; so that if the first lease happen by any means, as by surrender or otherwise, to determine before it be run out, then the second lessee shall have it, and if there be any rent reserved upon the second lease, the lessee must pay it from the time of the making of the lease. *Dier. 58. 356. Plow. 421. 422. Co. 1. 155.* And therefore if one make a lease of land to A. for ten years, and after make a lease to B. of the same land from *Michaelmas* next for ten years, and before *Michaelmas* the first lessee doth purchase the fee simple, so that now by this means his term is drowned, in this case the second lease shall begin at *Michaelmas*. *Dier. 131. Plow. 437.* So if one make a lease to A. for twenty years, and make a lease of the land to B. for two years, rendering rent, and after A. makes a lease for the rest of his time to C. by deed, this lease if made for two years does amount to a good lease of the rent and reversion, and so is also without Argument, if there be any consideration given for it, for then it is also a good lease for all the rest of the term after the two years. *Co. 4. 53.* So if one make a lease to A. for twenty years, if he live so long, rendering rent, and after he doth make a lease to B. by Indenture for eighty years to begin presently, or grant the reversion to begin at a day past, or the like, in all these cases if the first lessee attorne, the rent will passe, but if not it will be a good lease for the land for so many of the years as shall bee to come after the first lease ended. But if the second lease be by paroll without a deed, the reversion as a reversion will not passe, and the grant will be void if there be nothing else, to help it. *Co. 1. 155. Plow. 432. 434. Hil. 6. 7. Ar. Admde. Finch versus Vaughan.* And in cases where the second lease is void, albeit the first lessee surrender his estate, or his estate end by a condition, yet the second lease is not hereby made good. *Dier. 112.* But if the second lease for years after another lease for life or years be made for money, so as it may be said to passe by way of bargain and sale, this may help the matter, for in this case albeit it be by word only, it may passe the reversion and the rent also; but in most cases it is good for the remainder of the term after the first lease ended. And if the second lease be to begin after the end of the former lease, in this case the former lease is no impediment at all to the validity of the latter lease, but the latter lease is good notwithstanding. *Co. 2. 35. 16th. 17th. 18th. 19th. 20th. 21st. 22nd. 23rd. 24th. 25th. 26th. 27th. 28th. 29th. 30th. 31st. 32nd. 33rd. 34th. 35th. 36th. 37th. 38th. 39th. 40th. 41st. 42nd. 43rd. 44th. 45th. 46th. 47th. 48th. 49th. 50th. 51st. 52nd. 53rd. 54th. 55th. 56th. 57th. 58th. 59th. 60th. 61st. 62nd. 63rd. 64th. 65th. 66th. 67th. 68th. 69th. 70th. 71st. 72nd. 73rd. 74th. 75th. 76th. 77th. 78th. 79th. 80th. 81st. 82nd. 83rd. 84th. 85th. 86th. 87th. 88th. 89th. 90th. 91st. 92nd. 93rd. 94th. 95th. 96th. 97th. 98th. 99th. 100th.*

Any person whatsoever of full age that hath any estate of inheritance in fee-tail in his own right of any lands, tenements, or hereditaments, may at this day without fine or recovery make leases of such lands for lives or years, and such leases shall be good so as these conditions and incidents following be therein observed and kept. *Stat. 32 H. 8. cap. 28. Co. super Litt. 44.*

1. Such leases must be by deed indented, and not by deed poll or by paroll.
2. They must be made to begin from the day of the making thereof, or from the making thereof.

And therefore a lease made to begin from *Michaelmas* which shall be three years after for twenty one years, or a lease made to begin after the death of the tenant in tail for twenty one years is not good. *Co. 5. 6. Dier. 246.*

But if a lease be made for twenty years to begin at *Michaelmas* next, it seemes this is a good lease.

3. If there be an old lease in being of the land, the same must be surrendered, or expired and ended within a year of the time of the making of the new lease, and this surrender must be absolute, and not conditionall; also it must be real, and not illisory or in shew only. For *factum non dicitur quod non perseverat*. *Co. 5. 2.*

4. There must not be a double or conturrent lease in being at one time, as if a lease for years be made according to the statute, he in the reversion cannot afterwards expulse the lessee and make a lease for life or lives, or another lease for years according to the statute, nor *conversa*. But if a lease for years be made to one, and afterwards a lease for life is made to another, and a letter of attorney is made to give livery of seisin upon the lease for life, & before the livery made the first lease

5. What leases or other acts may be made or done by a tenant in tail. And what leases made by such a tenant shall be good to binde the issue, or him in remainder, or others after the death of the tenant in tail. And how they shall bind.

And if upon the old lease the Rent were payable at four days in the year, and by the new lease it is reserved to be paid at one day; this is not a good lease. But if the rent upon the old lease be payable in gold, and the new rent be payable in silver; it seems the lease is not good. And if a Tenant in Tail be of a Manor that hath been usually demised for ten pound rent, and after a Tenancy exchanged, and then he doth make a lease of the Manor rendering ten pound rent by the year; in this case this is a good lease, but if the Lessor purchase a Tenancy, then it seems otherwise. *Trin. 3. Jac. B. R. Cornwall case. Co. 5. 5. Co. 5. 6.*

Wast.

9 Such leases must not be without impeachment of waste. And therefore if Tenant in tail make a lease of his Land intailed without impeachment of waste; this lease is void. And if a lease be made for life, the remainder for life, &c. this is not a good lease: for in this case during the remainders, the Tenant for life cannot be punished for waste done. But if such a Tenant of Land make a lease of it to 13 for the lives of three others; this is a good lease, albeit it may afterwards become an occupancy. *Co. 6. 37. & Miers case Adjudge.*

10 Such leases must not be against any special Act of Parliament. And therefore if a woman that is Tenant in Tail of the gift of her deceased husband, or any of his Ancestors whilst she is sole, or after with another husband make any such lease warranted by this Statute; yet this lease is not good. *Stat. 11 H. 7. 20. Co. 3. 31.*

Acceptance.

11 They must have all due ceremonies and circumstances for the perfection of them, as other such like leases have, as livery of seisin, and the like, where they are needfull. And then only when leases have these conditions, and are made according to these provisions, are they said to be within this Statute of 31 H. 8. and such only as do bind the Tenant in Tail himself, and the issue in Tail, for otherwise it be not warranted by this Statute, albeit it will bind the Tenant in Tail himself that made it, yet it will not binde his issue, but as to him it will be void, or voidable at the least: for if Tenant in Tail of land make a lease of it for an hundred years without any rent reserved thereupon; this lease as to the issue in Tail is void: but if he make a lease of his Land for an hundred years rendering rent, and have issue and die; in this case the lease is only voidable by the issue at his pleasure, and therefore if the issue accept the rent after the death of the Tenant in Tail; by this means the lease is affirmed and become good. But howsoever the lease be made, it will not binde him that comes in of a remainder over, nor him that is the donor. And therefore if a Tenant in Tail makes a lease warranted by the Statute, and after die without issue, so that the land doth remain over to another, or revert to the donor; in these cases neither he in remainder, nor the donor shall be bound by this lease; for as to them the lease is void. And yet by a common recovery the Tenant in Tail may make leases of, or lay charges upon the land to bind the donor and him in remainder also. But otherwise it is of a fine, for if Tenant in Tail make a Lease for years by fine, this will not bar the donor, nor the remainder in any case where it is in a stranger. And yet if the remainder be in the Tenant in Tail himself, and he make a lease for years by deed according to the Statute or by fine; this lease is good and shall bind his own remainder. *See more Brownl. 1 part. 139. 173. Co. 7. 7. 8. 34. Dyer 7. 8. The woman's Lawyer. 73. Plow. 435. 436.*

6. What leases or other acts may be made or done by the husband with the lands he hath in Fee-simple, or Fee-tail in the right of his wife, or jointly with her. And what leases made by him of such lands are good. Or not. And how.

12 The Husband may at this day without fine or recovery make leases of the lands, tenements or hereditaments, whereof he hath any estate of inheritance in Fee simple, or Fee-tail in the right of his Wife, or jointly with his wife made before or after the coverture, so as there be in such leases observed the eleven conditions or limitations before required in the leases made by Tenant in Tail, and so that the wife doe joyn in the same deed, and be made party therunto, and doe seal and deliver the same deed her self in person. For if a man and his wife make a letter of Attorney to another to deliver the lease upon the Land; this lease is not a good lease from the wife warranted by the Statute.

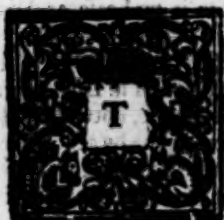
13 And yet then as in other like cases of leases not warranted by this Statute, it is a good lease against the husband.

14 And when the lease is such a lease as is warranted by the Statute, it doth bind the husband and wife both, and the Heirs of the wife; but if it be an estate Tail

CHAP. CIV.

Of a Libel.

Libel, what:



The kinds of it.

He word Libel is taken two ways: Sometimes this word is used for the Declaration in a Matter in the Spiritual Court, which must be delivered unto the Defendant when he demands it. Sometimes, and so here this word Libel is taken for a Scandalous writing or doing of somewhat that tendeth to the defamation of another, it is called *Famosus libellus seu infamatoria Scriptura*: Sometimes it is against a private person, sometimes against a publick person, sometimes against the living, sometimes against the dead.

A Libel in writing, is when any Epigram, Rime, or other writing, is composed or published to the note, or contumely of another, by which his fame or dignity may be prejudiced; and this may be either *verbis aut centilemis*, as where it is maliciously repeated or sung in the presence of others; secondly, *Traditione*, when the Libel or any Copy of it is delivered over to another to scandalize the party, or it may be by other means. As first, by Pictures, when the party is painted in any ignominious and reproachful manner. Secondly, By Signs, when one doth make or fix a Gallows, or any other reproachful or ignominious sign at the door of the party, or elsewhere, Co. 5. 126. *Crompt. Jur.* 335. See Co. 3 part. *Inst. cap.* 76. *Brownl.* 2 part. 152.

The punishment of it.

Whosoever contrive, or procure to be contrived, or maliciously publish any of these Libels, knowing them to be so (which way soever it be done) against a private man, living, or dead, is a great offender; and against a Magistrate, or publick person is a greater, and shall be punished by Indictment; and in this case it will not help the Libeller, though the things be true, whereof the Libel is; for it is punishable notwithstanding.

And if one finde any such Libel against a private man, he may burn it, or deliver it to a Magistrate; if it be against a publick person, he must deliver it to a Magistrate, or else may be punished: But if one onely read a Libel, or hear it read, or laugh at it, or write a Copy of it onely, this is no such Publication as is punishable: And yet if after he hath read, or heard it, he repeat it, or read it, or part of it to others, this is punishable. Co. 5. 126. 9. 39.

Of the Lords day.

FOR the better understanding of the Law, herein these things are to be known.

1. This day is by every one to be sanctified and kept holy: And men must be careful herein, to exercise themselves in the duties of Piety and true Religion publicly; and every one on this day (not having a reasonable excuse) must diligently resort to some publick place, where the Service of God is exercised, or must be present at some other place, in the practice of some religious duty, either of Prayer, Preaching, Reading, or Expounding the Scriptures, or Conference upon the same.

Spin:

2. None may on this day meet out of their own Parish at any sports whatsoever, nor may they meet within their own Parish for Bear-baiting, Bull-baiting, Enterludes, or other unlawful Exercises, under pain to forfeit three shillings and four pence for every offence, to be levied by Distress and Sale of Goods, and for lack of Distress,

Distress, to sit three hours in the Stocks: Nor may any on this day keep, or be present at any Wrestling, Shooting, Bowlings, Ringing of Bells for pleasure, Mask, Wake, Church-Ale, Dancing, Games, Sports, or Pastimes whatsoever, under pain to forfeit five shillings, if he be above fourteen years old, and twelve pence by him that hath the Government of him, if he be under fourteen years old, to be levied by Distress, and sale of Goods; or if no Distress be to be had, to sit in the Stocks three hours.

3. No Carrier may go with his Horses, Waggoner, Carter, or Wainman; may go with his Cart, Waggon, or Wain, or Drover with his Cattle, on this day, under pain to forfeit twenty shillings for every offence, to be levied by Distress and sale of his Goods, if he be questioned within six weeks after the offence done. But there shall be but one twenty shillings forfeited for one Journey, although he pass through twenty Parishes, and the twenty shillings that Parish shall have where the Distress is first taken. *Carriers.*

4. No Butcher may kill or sell any Victuals on this day, under pain to forfeit six shillings eight pence, if it be questioned within six weeks after the offence done, to be levied by Distress and sale of Goods. *Butcher.*

5. None may cry, shew forth, or put to sale any Wares, Merchandises, Fruits, Herbs, Goods, or Cattle, on this day; unless it be in an Inn or Victualling-house, and for such as cannot otherwise be provided for and unless it be the crying and selling of Milk before nine in the morning, and after four in the afternoon, from the tenth of September, to the tenth of March; and for the rest of the year before, eight in the morning, and after five in the afternoon, under pain to forfeit the thing so cried, or offered to sale. *Tradesmen.*

6. None may on this day, without good cause, travel, under pain to forfeit ten shillings, nor carry any burden, or do any worldly labor, under pain to forfeit five shillings; both these Forfeitures to be levied by Distress and sale of Goods; and if no Distress be to be had, to sit in the Stocks three hours. *Traveller.*

7. None may on this day, or the days of Humiliation or Thanksgiving, use Dancing profanely, Singing, Drunking, or Tipling in any Tavern, Inn, Ale-house, or Tobacco-house, nor be there, or grinde any Corn at a Mill, but upon cause to be allowed by one Justice of Peace, under pain to forfeit ten shillings a peece; he that is in the Inn, and he that keeps the Inn, the Millard, and he that owns the Corn, to be levied by Distress, and sale of Goods, and for lack of Distress, to be set six hours in the Cage or Stocks. *Drinking, Tipling. Millard.*

8. No Traveller, Waggoner, Butcher, Higler, Drover, or their Servants shall come into their Inn or Lodging on Saturday night, after twelve of the clock, nor go from thence on Monday morning before one a clock, without necessary cause to be allowed by one Justice of Peace, under pain of Forfeiture of ten shillings by the Inn-keeper, and ten shillings by the Traveller, to be levied by Distress and sale of Goods, and for lack of Distress, to be set six hours in the Stocks or Cage. *Carrier.*

9. None may execute any Writ, Order, or Warrant on this day, days of Humiliation or Thanksgiving (but in case of Treason, Felony, breach of the Peace, and profaning of the day) under pain to forfeit five pound to be levied by Distress and sale of Goods, and for want of Distress to sit six hours in the Cage or Stocks, and the serving of the Proces, is void. *Void.*

10. None (but in case to be allowed by one Justice, or for Gods service) may travel with any Boat, Wherry, Lighter, Barge, Horse, Coach, or Sedan on this day, under pain of forfeiture of ten shillings by him that doth carry, to be levied by Distress and sale of Goods, and for lack of Distress, to sit six hours in the Stocks or Cage. *Coach, Bosts.*

11. All Constables, Church-wardens, Overseers of the Poor, Governors of Companies of Water-men, and other Officers, must upon sight and knowledge, or information of any of these offences before named, committed, seize and secure the Goods or Wares cried, shewed forth, or put to sale; and make diligent search, for the discovering, finding out, apprehending, and punishing of them, under pain *Officers. Seize Goods. Search.*

of twenty shillings, to be levied by Distress and sale of Goods. And this punishment they must (as it seems) endeavor, by informing against the offender to a Justice of Peace.

12. If the Justice doth not his duty, he forfeits five pound, to be levied by Distress and sale of Goods, by Warrant from the Lord Chief Justice, Lord Chief Baron, or Judge of Assize, upon view, confession, or proof of one witness.

Forfeitures.

13. All these Forfeitures (save onely something in some few cases) must go to the poor of the Parish, and the overplus in all cases is to be returned to the owner.

14. These Laws are to be openly read at the Quarter Sessions, and there and at the Assises, to be given in charge to the Grand-Jury, and to be read the first Lords-day in *March* every year.

15. If any Book be found against the Morality of the Sabbath, or Fourth Commandment, or to countenance the profanation thereof, they are to be burnt. 1 *Car.* 1. 3 *Car.* 1. Ordinance, 6 April, 1644. *Act*, 19 April, 1650. 17 September, 1650. 27 Sept. 1650. See more in my *Justice of Peace*.

CHAP. CV.

Of Lieu or Place, Linen-Cloth, Lent, and League.

Lieu or Place.



As to Place, these things must be known.

1. When one thing doth come in the place of another, it shall be said to be of the same nature, as that it comes in the place of; as in case of Recovery of Recompence in Value, Exchange; and Rent to make Equality of Partition, and the like: For which see the *Titles*.

2. Place is considerable in pleading; for some things are said to be Local, and can be tried no where but in the County where they were done; and therefore the Action about them, must be laid there, as all real Actions about Land. And if one charge an Inn-keeper for the loss of his Goods, he must not say the Inn is in another County, then that wherein it is: But for Transient Acts, and so Actions about them, they may be said to be in any County; and therefore in these cases, though the wrong be done in one place, the Plaintiff may suppose it to be done in another, and in another County also. And the Jury are bound to finde it.

3. When the Law doth require a thing to be set down in a place certain, as in case of demand of Rent to have a Re-entry, he must in pleading, say it was done at that place.

4. When a thing is to be done upon Request, some place of the Request in pleading must be supposed to be. *Co.* upon *Listl.* 282, 283.

Lent.

FOR the time called *Lent*. See 1 *Jac.* 29. 3 *Eliz.* 3. 35 *Eliz.* 7.

Linen-Cloth.

FOR Linnen-Cloth, how it must be made. See 28 *H.8.* 4. 1 *Eliz.* 12.

League.

League.

For Leagues and Truces, the breakers thereof, and the Office of the Conservator of the Truce. See 2 H. 5. 6. 14 Ed. 4. 4.

CHAP. CVI.

Of Lord and Tenant, Tenure, Services,
Manor and Mesn, &c.



His word Lord or Seignior, is a word of Honor with us, and used diversly. Sometimes it is attributed to a man that is noble by Birth, or Creation, who were sometimes called Lords of the Parliament. So also the Sons of a Duke, and the Sons of an Earl were called Lords.

St. 1.
Lord, what.
Seignior.
Nobility.

This word is also attributed to Men Honorable by Office, as the Lord Chief Justices, and others, and sometimes it is applied to meaner men that have Fee, and are Lords of Manors, and consequently have the Homage of Tenants that hold of them within their Manors; and the Lord and Tenant in this sense, are Relatives: And by his Tenants, and to them onely, he is called Lord, or Land-lord; and in this signification this word Lord is commonly taken. And hence it is that a Manor is called a Seigniorie or Lordship; and so he is divided into Lord above, and Lord Mesn. The Lord Mesn is he that is owner of a Manor, and by vertue thereof, hath Tenants holding of him in Fee, and by Copy of Court-Roll, and yet holdeth himself over of a Superior Lord, who is called Lord above, or Lord Paramount. *Old N. B. 79.*

The kindes.

Lord Mesn:

Tenant is he that holdeth any Lands or Tenements in Fee for life or years, by any kinde of Right or Tenure of another man. And very Lord, and very Tenant, be they that be immediate Lord and Tenant, the one to the other: And Tenure doth signifie the manner whereby Tenements are holden of their Lords.

Lord Paramount,
Tenant, what.
Very Lord, and
very Tenant,
what.

And of Tenures were divers kindes, sometimes Spiritual, as Frank-almoign, which is now gone; and others Temporal, as Escuage, Cornage, Grand-Serjeanty, Knights-service in capite, or in chief; Knights-service or Chivalry, Castle-Gard, Soccage, Petit-Serjeanty, and others. And all these (upon the matter) are either in Chivalry or in Soccage.

Tenure, what.
The kindes.

For Escuage, and Cornage, which were Services the Kings Tenants were to do to his person, in the Wars against the Scots. Grand-Serjeanty, which was likewise a Service to be done by the Kings Tenant to the King by attendance upon his person.

Knights-Service in capite, or in chief, which was likewise a Service by which the Tenant was bound to serve the King in his Wars. And Knights-service or Chivalry, which was a Service whereby another Tenant that held of a comission person, and not of the King, was bound to go with his Lord in the Wars. And the Tenure by Castle-Gard seems to be of the same nature. But all these Tenures and Services, the Incidents to them, of Wardship, Marriage, Primer Seisins, are taken away by Order of Parliament, and turned into tenures in Soccage: For which see Title *Gard*.

Escuage, what.
Cornage, what.
Grand Serjeanty, what.
Knights-service in capite or in chief, what.
Knights-service or Chivalry, what.
Castle-Gard, what.

So that now there is no Tenure, but of the nature of Tenure in Soccage; and this is where a Tenant doth hold of his Lord, to pay him some Rent onely, or to do him some Husbandry-work for all manner of Services. So that to hold by Fealty onely, or by Fealty and Rent, or by Homage, Fealty, and Rent, for all manner of Services, or by Petit-Serjeanty, and Soccage in capite; and so Fee-farm, Burgage, and all other Tenures whatsoever, at this day, are but Soccage-tenure, *Co. 2 part. Inst. 44.* Which Tenures whatsoever, at this day, are but Soccage-tenure, (for which see *Aid*) and a Relief.

St. 1.
Soccage, what.
Petit-Serjeanty, what.
Soccage in capite, what.
Burgage
Fee farm.

For

The nature of
Soccage Tenure.

For these two are inseparably Incident to every Tenure; and not Liveries, Primer Seisins, Wardships, *Onster le Maine*, Homage, Fines, Seisures, and Pardons for Alienation, as some of the other Tenures did, but now taken away also.

And for these things, see *Co.* upon *Littl.* 74, 77, 107, 108, 93. and of *Copibalds*, with many other places, which we shall now pass over.

And for Soccage-tenure, see *Littleton* on *Soccage*, 40 *Edw.* 3. 22. *Westm.* 1. 35. 25 *Edw.* 3. 11. 13 *Ed.* 1. 1. *Co.* 7. 33. *Co.* upon *Littl.* 21. 29 *H.* 7. 15. See more in *Gard.*

Where and
how a Tenant
may be crea-
ted, altered, or
extinct; and
how it shall be
taken.

As concerning Tenures, these things are to be known.

1. A Tenure may be of Houses, Lands, or Tenements, and such like things, but not of Rents, Seigniories, Commons, or such like things.

2. Any man may alter his Tenure, or extinguish it by Release, or the like, but hardly can a common person create a Tenure at this day, *Crompt.* 74r 21. *Dyer* 84 27 *H.* 8. 9. *Broo.* chap. 113.

Priority and
Posteriority.

3. If in case of Priority of Tenure and Posteriority, where one holdeth Land of one Lord more anciently than he doth hold his other Land of another Lord, the Tenant die, the Lord of whom the Land was held by Priority, should have had the Wardship of the Body of the Heir, because that could not be divided as the Land of either Lord might. And in case where the Priority were Incertain, that it could not be discerned, or one Tenure was as old as the other; then he that could first have seised the Body of the Heir, should have had it. And if the King had been one of the Parties, whether the holding of him were by Priority or Posteriority, he would have the Wardship of the Body from all the other Lords: But every Lord shall have the Wardship of his own Land held of him. *Dyer* 12. 24. *F. N. B.* 142. *Finches* Leg, 152.

Non-tenure,
what.

For Non-tenure, see 25 *Ed.* 3. 16. 4 *H.* 7. 24.

Self. 3.
Services, what.
The kinds.

Service is the duty or performance, which the Tenant by reason of his Fee, oweth unto his Lord; and this is the Fruit of Tenure.

And of Services there are twelve parts, Homage, Fealty, Escuage, Knights-service, Soccage, Frank-almoign, Homage, Ancestral, Grand-Serjeanty, Petit-Serjeanty, Tenure in Burgage, in Villainage, and Rents. And there is no Tenure but hath some service incident to it: As for Aid, Relief, and such like things, they reckon these the Fruit or Improvement of, or Incidents to Services; but they are much of one nature, and may be put together, *Co.* upon *Littl.* 94. 61.

And of Services there have been these Divisions. Some were Military and Noble, as Knights-service, and the like; and some were more clownish and base, as Soccage, and the like. Some also were said to be real, as Wards, Marriages, and the like; and some again were called Personal, which were such as were to be done by mens persons, as Homage, Fealty, and the like. Some Services also were said to be for the benefit of the Lord onely, as payment of Rent, and the like; and some again were said to be *pro bono publico*, as the Services of War.

Those for the Lords benefit, some of them are Annual, and certain as Rent, Suite of Court, to be Butler or Baker to the Lord; or else they are once onely, and upon an Accident, as Herriot, Relief, Fealty, Amercements, Forfeitures, or the like.

Those that are *pro bono publico* are, First, For defence of the Realm, as Escuage, and the like, now taken away. Secondly, To make or repair a Common-Bridge, or Common High-way. Thirdly, For advancement of Religion, and Works of Piety, as to maintain a Preacher, or Ornaments of a Church. Fourthly, To do Works of Charity, as to marry a poor Virgin, or the like. Fifthly, For the advancement of Justice, as to aid a Sheriff, to keep a Record, or the like.

Services also are said to be entire, or dividable.

There are four sorts of entire Services. 1. Chattels valuable, as an Ox, Afs, or the like, or things of pleasure, as a Falcon, or the like.

2. Such as are personal, to be done by the Tenant in person to the person of the Lord, as Fealty, and the like; to be Butler, Sewer, to the Lord, and the like.

3. Such as consist of some Manual work, as to cover the Lords House, Stable, or the like.

4. To exercise some Office, as to be Steward, Bailiff, or the like, to the Lord:

Services are also yet further distinguished into Services of profit, and no fidelity; and services of fidelity, and no profit.

Some say Services are free, and they consist, first, in Render, as to pay Rent; secondly, in using, as to have Common; thirdly, in Prender, as to take Estovers in the Lords Woods; or Villain, as to scoure the Lords Ditches, or the like. And again into Corporal, either of Submission, as Homage, Fealty, &c. or of profit, and that either publick, to amend High-ways, and the like, or the private profit of the Lord. For all which see *Co. of Copihold*, 22. *Co. 105. 6. 1. Littl. 322. Co. 10. 106, 108. or Littl. 64. 92. 22 Ed. 4. 3.*

Homage is taken two ways. 1. For a Corporal service or solemnity used by the Tenant to his Lord, and to this Fealty is always incident; and the Receipt of this Service by the Lord from his Tenant, is called the Receipt of Homage. This hath not been used at all for many years, and is now gone, we shall pass it over also. You may read of it in *Littl. sesh. 85, 86, &c.* Homage, what.
Receipt of Homage, what.

Respite of Homage, was nothing but the forbearance or delay of the taking of it: For which, men were wont to pay a small sum of money in the Exchequer every fifth Term. This also is gone, and out of use, but you may read of it in *Co. of Copihold*, and *Fines Law*. Respite of Homage, what.

Fealty is an Oath taken at the admittance of every Tenant, to be true to the Lord, of whom he holdeth his Land. And as to this, these things are to be known. Fealty, what.

1. Although Homage were more honorable then this, yet this is more sacred then that; for this is always done with, but that was done without an Oath.

2. This is a Service that is incident to all Tenures.

3. This may be done often, and must be done by the Tenant to every Lord successively, and for every peece of Land.

4. This is to be performed by every Freeholder, except Tenants in Frank-almoign, and by all Tenants for years, and by Copiholders.

5. This may be made as well to the Lords Steward or Bailiff, as to the Lord himself; otherwise it was of Homage, in all these particulars when it was in use, it was done by none but Tenants in Fee-simple or Fee-tail, and but once; and then to the Lord himself, &c. But see for Fealty, and how it is made, *Co. of Copihold*, 19. *Rep. 11. 17, 81. upon Littl. 71. 67. 92. F.N.B. 250.*

This word Herriot is taken for the best Chattel personal, as Ox, Horse, peece of Plate, or Household-stuff that a Tenant hath at the time of his death, or time of his Alienation, which the Lord is to have. And this is either by Custom, as where by the Custom of the place, time out of minde it hath been so used at the death and Alienation of every Tenant, as it is in divers Copiholds, and other Manors by the Copiholders or other Tenants; or it is by Service, when there is no such Custom, but it is reserved by Grant; That the Tenant shall hold by the Service to pay a Herriot at the time of his death or Alienation of his Land. And this also is certain, as the best Beast, &c. or uncertain, as yielding a Herriot, &c. and say not what *Co. upon Littl. 185.* Sesh. 4.
Herriot or Herriot, what.
The kinds of it.

As to this, these things are to be known:

1. Albeit the Lord cannot shew the original of a Herriot-custom, yet if he can prove the payment of them, after the death or Alienation of his Tenants (as the Case is) from time to time; this is sufficient to maintain the Service.

2. If the Lord have power to chuse the best Beast, and he chuse the worst, he is concluded hereby and cannot chuse again, 16 H. 7. 5.

3. If a Woman be to pay Herriot at her death, the Lord may not seise the Husband's Goods for this, without a special Custom to warrant his so doing, *M. 8 Car. 2. R.*

4. This must be paid before the Mortuary, and the Lord may not by any shifting Devise of the Tenant, be defeated of it, *Co. upon Littl. 185.*

5. In

Detinue.
Action of the
Case.

5. In case of Herriot Custom, the Lord hath property in the Goods as soon as his Tenant dieth, and may take and seize it within or without his Lordship, where ever he finde it, and may have a Detinue against him that keepeth it from him, and an Action of the Case against him that doth esloyn it, *Bro. 348. 8 H. 7. 10.*

6. The Copiholder for life by this Service is, The Lord grants the Seignory for ninety and nine years, if the Tenant live so long, and after makes a Lease for four hundred years, the Tenant is ousted, and dieth; yet a Herriot shall be paid, and the Lessee for ninety and nine years, and not for four hundred years shall have it; *March. 23. pl. 52.*

Señ. 5.
Relief, what.

The kindes.

7. Some hold the Lord also may seise Herriot Service, *Geld. 191. pl. 128.* Relief is a certain sum of money, or other thing which the Heir of a Freeholder that is at full age, at the time of his Ancestors death, is to pay to the Lord, of whom the Land so to him comes, as Heir is held at his entrance into the Land.

And it is either Relief-service, which is a Service due from most Freehold-Tenants, to their Lords in all places; or Relief-custom, which is a Relief to be paid by the special Customs of some places, and Manors, upon the Death, or Alienation of the Tenant. And in some places it is upon the death of the Tenant only, *Mag. Chart. 2. 3. 18. Co. 7. 33.*

What is to be
paid for a Re-
lief, and when.

That which is to be paid, in this case, for Relief, is not certain nor alike in all places, and for all Tenures; for sometimes, and in some cases it is more, and in some cases less; neither is it paid in all places at the same time; For the common course is for the Tenure in capite, or by Knights-service, for an Earldom one hundred pound, for a Barony one hundred marks, for a whole Knights Fee one hundred shillings, and so pro rata. And the Reason hereof, see after in Knights Fee.

If the Tenure be by grand Serjeanty, the Relief is the value of the whole Land for one year; and if the Tenure be by Soccage or Petit-Serjeanty, the Relief is to be double the Rent: As if the Tenant hold by ten shillings Rent yearly, payable at certain times, he shall double this Rent, he must pay ten shillings besides his Rent presently. In some places by Custom it is half a years profit of the Land, and in some places it is a years profit of the Land. And this the Heir is to pay when his Ancestor dieth, as all the benefit the Lord then hath: And for this if it be Relief-service the Lord may distrain, but cannot have an Action of Debt: But if the Lord die, his Executors may have an Action of Debt, but may not distrain: And some have said also the Lord himself may have an Action of Debt: And for Relief-custom, according to the Custom of the place. *Co. super Littl. 83. 84. 91. 162. Co. of Copihold, 3253. Co. 7. 33. Kelw. 136. Littl. 157.*

Where it shall
be paid, or
not, and how.

For Answer to this Question, these things are to be known.

1. Where the Heir was within age at the death of his Ancestor, the King was to have no Relief at his full age, *Mag. Chart. 3.*

2. If one hold some Land of the King in capite, and some of other men by Knights-service, and the King had had the Wardship of all (as he must have had) the Heir, when he had come of age, must have paid a Relief to all the other Lords, for all the Land he held of them, *Co. super Littl. 77. Broo Relief 13.*

3. In case the King when the Heir is of full age, at the death of the Ancestor, or not to sue Livery, a Relief is to be paid to the King. *Co. super Littl. 77.*

4. The Rule generally is this, That where the Heir shall be in Ward, if he be within age, he shall pay a Relief if he be of full age, and whiles the Gardein hath the custody of the Land, the Heir is not to pay a Relief. *Broo Relief, 12. 13.*

5. If the Mefnalty descend to the Tenant of the Land, though the Mefnalty be at the same time extinct, yet the Tenant, for that time, must pay a Relief, *11 H. 7. 12.*

6. If one hold of several common persons, by Knights-service, the Lords by Posteriority shall have no Relief, because they have the Wardship of the Land held of them, unless it be in case where there was Land held of the King, for there the King had all the Land, and then the Heir at full age did pay Relief to the other Lords, *24 Ed. 3. 24.*

7. If the Tenant hold his Land by to do certain days work at Harvest, or to attend at Christmas, or the like; in these cases the Tenant is not to pay Relief; for these Rents are not to be doubled, nor are any corporal services whatsoever to be doubled, Co. upon Lit. 91.

8. If the Tenant be to pay yearly a pair of Gilt-Spurs, or Five shillings in money at Easter; in this case the Tenant may pay which of them he pleaseth for his Relief, so he pay it forthwith. But if he pay not one of them at the time appointed by Law, then the Lord may distrain for which he please, Co. upon Lit. 91.

9. If the Rent to be paid be Ten shillings every second or third year, the Relief shall be Ten shillings, and must be paid forthwith, Co. upon Lit. 91.

Knight's-Fee was taken heretofore for so much as was held a sufficient livelihood for a Knight; and is not to be reckoned according to the quantity and content of eight Hides, which is (as some would have it) eight hundred Acres of Land, nor six hundred and eighty Acres of Land (as others would have it to be) but according to the quality and value; and it was esteemed twelve times the Ploughman or Yeoman's living, which in old times was five Nobles. So that the state of a Knight was esteemed Twenty pounds by the year, be the Acres more or less: And then they esteemed Four hundred Marks by the year sufficient to maintain the state of a Baron; and Four hundred pounds, twenty Knights Fees by the year, sufficient to maintain an Earl; and now of late for the two later Dignities of Marquis and Duke thus, Eight hundred Marks for a Marquis, and Eight hundred pounds for a Duke: which were esteemed antiently to be a competent yearly Revenue for such persons. So that according to these Rates, the Reliefs of these persons is paid still for the Knights relief, and all those above him, which are the Noblemen: For the Knight payeth the fourth part of his Revenue, being five Pounds; the Baron one hundred Marks, the Earl one hundred Pounds, the Marquis two hundred Marks, and the Duke two hundred Pounds. But these Payments being a Charge incident to the Tenure *in capite*, we do conceive they are now gone by the general Order of Parliament. See Co. 2 par. Inst. 7, 8, 9. Mag. char. 2.

Señ. 6.
Knights-Fee,
what.

Relief, how
much.

Before the Statute of 18 Ed. 1. *Quia Emptores*, the Grantee of Land must always have held the Land of the Grantor by such Services as he held over, if other Services had not been reserved; or otherwise the Grantor might have appointed him to hold of the next Lord. But at this day in all Feoffments to one and his Heirs, the Feoffee is to hold the Land of the chief Lord of the Fee, by the same Services that the Feoffor held before. And if the Feoffment be made of parcel of the Land, the Feoffee shall hold of the chief Lord *pro particula* according to the quantity of Land, and the Feoffor shall be set free for that part. And if one make a Lease for life or years, and reserve no Rent; in this case the Lessor shall have Fealty only, and no Rent, although he hold over by Rent. And Donees in tail and their Issues are to do such Services to the Lord Paramount as the Donor, if they do not make some special Reservation upon the Deed, Co. upon Lit. 23. See more after.

By what Ser-
vices one shall
hold, and how.

Seisin of any part of a Service, is a Seisin of all. Seisin of a superior Service, is a Seisin of all inferior Services incident thereunto. And therefore if a Tenure be by Homage, Fealty and Escuage, (which is Knights-Service, and Suit of Court;) and he get Seisin of the Fealty or Homage, this is a Seisin of all the rest. So if he had gotten Seisin of the Escuage. So Seisin of a Rent, is a Seisin of all the rest of the Services; and payment of a Penny in the name of Attornment, is a sufficient Seisin of all the Services; and Seisin of an annual Service, is a good Seisin for all casual and accidental Services, Co. 4. 8. Upon Lit. 69. 153. 159. 165. 102. 314. 315.

What shall be
said a Seisin of
Services, or
not.

For answer to this question, these things are to be known.

Where Servi-
ces shall be
multiplied by
the Alienation
of parcel of
the Tenancie,
or not, but
shall be divi-
ded and ap-
portioned.

1. All such Services as are not entire by the Statute of *Westm. 3. De quia Emptores terrarum*, shall be apportioned and divided *secundum valorem*, upon every Feoffment by the Tenant upon any part of the Land in severalty. But not so upon Alienation of a Moyletie, or a third part of it. As if one hold two Acres in Fee at Two shillings Rent, and the Tenant make a Feoffment in Fee of one Acre by name; in this case the Rent shall be divided, and the Feoffee must pay Twelve pence of this

X x x x

Rent.

Rent. But if the Feoffment were of a Moyetie of the two Acres, it were otherwise.

2. But if in these cases the Services reserved be entire, whether annual or accidental, and for a time only; in this case they shall not be divided, but they shall be multiplied, and the Feoffor shall perform the same Service he did before, and the Feoffee shall do as much more. *Qua in partes dividi nequeunt, solida à singulis præstantur.* As if a Tenant hold his two Acres by the Service of an Oxe or a Falcon, or Fealty, or the like, and make a Feoffment of one Acre; now in this case each of them, the Feoffor and Feoffee both, shall pay a Horse or a Falcon. For the Rule is in this, *Res inter alios acta nemini nocere debent, sed prodesse possunt.*

3. And yet if Land out of which Suit of Court is due, do come to divers persons by descent as Coparceners, or by purchase of the Land by Parcels, one of them alone shall do the Suit, and all the rest shall be contributory. And if one hold by the Service to be Butler, Baker, or to ride with the Lord, or to cover his house, or to be his Steward, Bailiff, or the like; in all these cases the Services shall not be multiplied, but one alone shall do them, and the rest shall be contributory, and the Lord may distrain which he will of them for it. And yet if a Harriot be to be paid, this shall be multiplied, and every one that hath any part of the Land must pay a Harriot, by what means soever he come by the Land.

4. Where Land is divided by act of Law; as if a Feoffment be of two Acres rendering an Oxe, and one is Burrough-English land, and the other Acre is other land, and this land is divided at the Feoffees death and goeth to his two sons; in this case it seems there shall be but one Oxe paid. So if a Lease were made of such Land rendering that Rent to the Lessor and his Heirs, and he die, the two Heirs in this case shall have but one Oxe. So of a Lease made by two Tenants in Common rendering such an entire Rent.

5. But in all cases where the entire Services are not valuable, as Homage, Fealty, or the like, or they be *pro hand publico*; there let the Land be divided by the act of the Law, or the act of the party, the Services shall be multiplied. See for all this, Co. 6. 1. 8. 105. upon Lis. 149. Co. 10. 106. 108. Lit. 222. 23 Ed. 4. 36. Wilm. 3. chap. 2.

The Lord by Release or Purchase of the Tenancie, and by other means, may alter or extinguish his Services: Also by other means this may be done. But for this see *Extinguishment, sect.* and *Apportionment* throughout.

For most of these Services, if they be denied, or not paid to the Lord, his most apt and proper remedy for them is to distrain. And for this see *Distrain, chap. sect. 3.* and *Rent, chap. sect.* And if the Lands and Tenements lie fresh for two years together, that he can have no Distrain for those two years, then he may have a *Cessavit*, and recover the Land it self. And in some cases the Lord may have an Action of Debt; and for this see *Debt*.

But for accidental Services, as Harriot, Wardship, and the like, the remedy is by Seizure. See *Gard, chap.* And for Harriot-Custom, the property of the Goods being in the Lord presently by the death of his Tenant, he may seize it where-ever he find it: And if it be detained, or elained and conveyed away, he may have an Action against him that doth it; (a) or he may distrain for it at his choice, (as is held of late.) But if it be in a Copihold or Customary Manor, we do not think it safe to distrain, unless the Lords have been used to restrain. And for Harriot-service, if it be certain, (i.) the best Beast, or any goods in certain; (b) it is held that the Lord may seize and take it also: But if it be uncertain, he cannot seize it, but must distrain for it; and so he may also do for Harriot-service certain, if he will, for in this case he hath election which to do. (a) So ruled by Just. Jones at Sarum Assizes, 9 Car. (b) M. 39. 40 Eliz. B.R. Goldsb. 191; pl. 128. See for all this, 21 H. 7. 13. 8 H. 7. 10. Bro. Distr. 43. Kelw. 184. D. & St. 76. Plow. 96. Co. of Copihold 51.

For a Relief the Lord may distrain, but cannot bring an Action of Debt; but his Executors may bring an Action of Debt, and cannot distrain. Co. upon Lis. 83. 84.

For Aid to make the Lords eldest son Knight, or marry the Lords daughter, it is said the Lord may distrain, or have a Writ to recover it, F.N.B. 82. Ca. upon Lit. 91. See ch. 9. sect. 1.

Sect. 7.
Where and
how Services
may be alter-
ed and extin-
guished.
The Remedy
for these Ser-
vices where
they are not
performed.
For Harriot:

Sect. 8.
For Relief.
For Aid.

For

For Suit to the Lords Court, if it be denied, the Lord may compel him to it by Distress, or a Writ called *Seffa ad Curiam*. See *F.N.B.* 158. 11 *H.7.* 17. See *Suit*, chap.

But for some kind of Rents the Lord may have a Writ of Debt; for which see *Debt*, in my First Part of *The Marrow of the Law*. For other Rents, and for Corporal Services, as Homage, Fealty, amending High-ways, Bridges, discharging offices to the Lord, and in other cases the proper remedy is by Distress. See *chap.*

seff.3.

Cessavit is a Writ that lieth where my very Tenant that holdeth of me by a Rent, and the Rent is behind two years, and no sufficient Distress is to be found upon the Land, then I may by this Writ recover the very Land it self. But this Writ lieth for annual Services only, and not for Homage, Fealty, or the like accidental Services; nor will it lie for a Rent-seek. And the Heir cannot have this Writ for a Cesser in the Ancestors time; nor one Lord for a Cesser in another Lords time. And therefore if the Tenant cease one year in one Lords time, and after another year in the time of another Lord to whom the Seignory is granted by the first Lord; this is dispensable. And if in this case when the Action is brought, the Tenant will come into Court and pay the Arrearages, and give Bond with Sureties duly to pay the Rent afterwards, the Lord must accept it. Also it is said, the Lord upon such a Cesser may enter, or have a Writ of Escheat. See for these things, *Glouc.ch.* 4. *Westm.* 2. 21. *Co.* 2. 93. *Keln.* 74. *Plow.* 132. *Co.* upon *Lit.* 154.

Cessavit, what.

There is a Writ called *Cessavit de cantaria* of no use at this day. *Westm.* 2. 41.

Writ of Escheat, what.

Cessavit de cantaria.

Seffa ad Molendinum, what.

Seffa ad Molendinum, is a Writ lying where one doth hold Land of me by the Service to grind at my Mill, and he doth not so, but grinds at another Mill; in this case I may have remedy by this Writ, *F.N.B.* 122.

Seffa ad Curiam, is a Writ that lieth against him that refuseth to perform his Suit either to the County or Court-Baron, *F.N.B.* 158.

Seffa ad Curiam, what.

Encroachment of Services is, where a Lord hath gotten more Rent or other Services of his Tenant then are due. And if the Lord distrain for this incroached Rent, the Tenant may be relieved by the Writ called, *Ne injuste vexes*. *Terms of the Law.* *Co.* 8. 64. 10. 108. 9. 33. *Plow.* 94. *F.N.B.* 10. 11.

Seff. 9.
Encroachment, what.
Ne injuste vexes what.

A Mesne is he that is Lord of a Manor, and thereby hath Tenants holding of him, and yet holdeth himself of a superior Lord. And a Mesnalty signifieth nothing but the Right of the Mesne.

Mesne, what.
Mesnalty, what.

Forejuder is a Judgment given in a Writ of Mesne brought by a Tenant against the Mesne Lord, which should and ought to acquit the Tenant of Services demanded by the Lord above of whom the Tenement is holden, and the Mesne will not appear; then Judgment is given, that the Mesne Lord shall lose his Seignory, and the Tenant shall ever after hold of the Lord Paramount by such Services as the Mesne held before, and shall be discharged of the Services he yielded to the Mesne. The word *Forejuder* is also used for the putting of an Attorney out of the Roll, and forbidding him to practise, *F.N.B.* 135. *Co.* 11. 17. 18.

Forejuder of a Mesne, what.

The Writ of Mesne, is a Writ given to the Tenant that is distrained for the Services which the Mesne ought to do to the Lord Paramount, *F.N.B.* 135. This is also called *Medio Acquietando*.

Writ of Mesne or Medio Acquietando, what.

Acquitall is, where the Tenant holdeth of the Mesne certain Lands, and the Mesne holdeth over of the Lord above; in this case the Mesne must acquit the Tenant paying his own Services due to him, of all other Services due to the Lord, *Co.* upon *Lit.* 100.

Acquitall, what.

Owelty of Services, is where the Tenant holdeth of the Mesne by the same Services that the Mesne doth hold of the Lord Paramount, *Co.* upon *Lit.* 100.

Owelty of Services, what.

A Manor by some is defined to be a thing compounded of divers parts, as of a House, Land arable, Meadow, Pasture, Woods, Rents, an Advowson, Court-Baron, and the like. It is called also a Seignory or Lordship; and he that hath it, the Seignior or Lord. And of a Manor there are two principal parts; the Demesne, and the Services. By Demesne is sometimes understood all the parts of the Manor which are not in the hands of the Freeholders, whether they are in the hands of Lessees for life, years, or at will.

Manor or Seignory, what.

Seignior.
Demesne, what.

But most properly and usually by Demefns is understood the Lords chief Manor-place, which he and his Ancestors have time out of mind kept in their own hands and occupied; with all the Houses, Lands, Meadows and Pastures thereunto belonging, which were never in Lease; and this place or house was anciently called the Lords Mansion-house. And by Services are to be understood the Rents and Duties that Tenants are to pay and do to the Lord of the Manor for the Tenements they hold of him: And these are either certain, as Rents and the like; or casual, as Perquisites are.

Self. 10.
Mansion-house,
Services, what.

Court-Baron.

Freeholders.

Some say a Manor is, where Lands are holden by divers of one man by certain Services. Some define it to be, Lands in the hands of a Lord, of whom many Tenants, two at the least, do hold to do suit of Court there: And they hold, that the Land considered apart from the Service, is termed Demefns. And others define a Manor to be a Rule or Government which a man hath over such as hold Land within his Fee; and they seem to intend rather the Court-Baron which is incident to every Manor, and doth stand and fall with it. And for the support and continuance of this Court, there must be two Freeholders at the least left which do hold of the Manor: And therefore it is held, that if all the Freeholds but one do escheat, or be bought in by the Lord, the Manor, and consequently the Court-Baron is dissolved: For a Manor cannot continue without a Court-Baron, which cannot continue without Freeholders to be Judges of the Court. Yet here we do distinguish, and we must know, that in all Manors where there are Freeholders and Copiholders (as there are in many Manors) there are two Courts; the one called the Court-Baron or Court of Freeholders, wherein they are Judges, and this is to try Actions between party and party; and the other for Copiholders, called the Copiholders Court, which is for the surrendring and granting of Estates, and making of Admittances, and the like, and in this Court the Lord or his Steward is the Judge. And one of these may subsist without the other: As if the Lord sell all his Copiholds in Fee to one man; in this case the Purchaser may keep the Copiholders Court, and do all that doth belong thereunto; and the Seller may keep the Freeholders Court, and do all that doth belong thereunto: And therefore the Manor may continue, where either of these Courts do continue. *Bro. Manor 3. Sait 17. Co. 4. 26. 6. 64.*

The kinds.

A Lord; and a Lordship or Manor is either in gross, when it is held of the person of another, as sometimes it was of the King; or else it was because of a Manor, when it was held of the King, as of his Manor, or of his Honor of Dale. *Finches 145. 34 H. 8. 49. Bro. chap. 210.*

How Manors
did begin at
the first.

It is supposed that Manors at the first did begin thus. The King at first granted a certain Circuit of ground to a certain great man, a Baron, or the like, for him and his Heirs to dwell upon, and to exercise some Jurisdiction within it, paying such Rent and doing such services for the same as the King thought good: And then this great man, by example and in imitation of the Kings police, parcelled out a great part of this Land to others, some to one, and some to another, and reserved such like services for war and peace from his Tenants, as he was bound to do to the King. As for example, the King granted two thousand Acres of land together to one great man to hold of his person, to do such service to him in the time of War or Peace, as to provide a Horse or Armistition, or to go with him in the War, or to be his Carver, or the like. This great man then doth grant a thousand Acres of the uttermost parts of this land, some to one to hold by one service, and some to another by another service; and some service was for the time of War, and some for the time of Peace; some to go with the Lord, some to provide horse, some to pay money, and some to plow and dress his land, some to repair his house, some to be his Butler, some to be his Bailiff, or to be his Steward, and the like; and a thousand Acres of this land he kept to himself, which the Lord did use to manure by his Tenants or Bondmen, such as they had then: And then did the Lord appoint at his Courts of his Manor, which were set up with the Manor, how his Tenants should hold their land, making an Entry thereof in the Rolls of the Court; much of which was still in the Lords power, and therefore those Tenants were called Tenants at will; and such were those who are now Copiholders, who hold to this day at the will of the Lord,

Lord, according to the Custom of the Manor. And at the Lords Courts did the Lord use to assemble his Tenants before his Steward at a time appointed; and there he swears by the Oath of his Tenants, Copiholders and Freeholders, to be informed by their Presentment, of all such Duties, Rents, Reliefs, Wardships, Forfeitures, and Profits that did happen to him; and then the Bailiff did use by Seisure, by Distress, Amercement, and the like, to do execution amongst the Tenants, and help the Lord in his duties. And in these Courts they had power also, the Tenants to sue one another under Forty Shillings, and the Freeholders were (as they still are) the Judges in this Court, called the Court-Baron, or Freeholders Court. But the Copiholders of these Manors have now gotten Freedom for their Persons, and Assurance for their Estates by the Custom of the place; they are not now under the bondage they formerly were. (See in my Book of Copiholds.)

But at this day no Subject can make such a Manor: For since the Statute of *Quia Emptores terrarum*, it is held that no man can well create a Tenure; and therefore it is held, the King himself cannot create a Manor at this day: For a Manor was made by continuance of time, when there was a Messuage, and the Inhabitants of it have time out of mind occupied Land, Meadow and Pasture as belonging to it, and have had such Rents and Services belonging to it; and have been used to present to the Advowson, and the like. And therefore if a man shall now give Land to divers men in Tail by the Service of Suit-Court, albeit this Service may be well raised, yet is not this a Manor. Nor can a Lord purchase other Land and lay to his Manor, though the Tenant be never so willing to it.

But the changeableness of mans estate, and mutability of time hath brought it so to pass, that these great men or their posterity have alienated these Lands and Mansions, and others that had none, have by their wealth purchased many of them; and some of them are sold to meaner men, who by their skill in Physick, Law or Merchandise, or otherwise, have gathered wealth and enabled themselves to purchase the same. And many of them for Capital offences have forfeited them into the Kings hands; and some of these remain in the Crown, others are gone to others from the Crown, *Park. 114. Restru. Plow. 189. Co. of Copiholds 524 55. Bro. Tenure 103.* And to this Manor do belong two principal Officers: A Steward, which the Lord may make or discharge by word or writing; and being made, his office is not to make a benefice by it to himself, but to keep the Courts, and therein to enter the Plaints, Pledges, Surrenders, Admittances, Fealties, and the like: For which see *Officer, chap. 1. sect. 1. Co. 3. 61. of Copihold 123. Co. 4. 30. 9. 48.* And a Bailiff, who may also be made and discharged by word without writing; and being made, he is to dispose the affairs of the Lord, to pay and receive his Rents, and give him an account for them, order the Husbandry, distrain Beasts damage-tenant, repair the Lords houses, pales or hays, and for this purpose he may cut down timber: He is also (if need be) to tack in Cattel, sell and sell saleable Underwoods, and do other things for the bettering and improvement of the Manor: But he may not set up any new house, nor old house fallen, nor make any additions or alterations, as tile a house before thatched, pale it where it was before hedged, or the like, without special commandment of his Master, but he will be a Trespassor, *Co. 4. 30. Dyer 148. 12 H. 7. 23. 8 Ed. 4. 13. Bro. Bailiff, 31.*

SeH. 11.

Steward of a Manor.
His power.

Bailiff of a Manor.
His power.

If the Demesns of a Manor be once by the act of the party severed from the Services in Fee-simple, or the Copiholds from the Manor in Fee-simple, although it be but for an instant, and that there be no Transmutation of possession, by this means the Manor is dismembred, and is but a maimed Manor. So that if one of the Courts continue, it is a Manor (as we have shewed before) but an imperfect Manor. As if one be seised of a Manor for life, the Remainder to B. and his heirs, and B. levy a Fine to D. of the Demesns, and he doth render it back to D. for forty years, and assign to B. and his heirs for ever; by this the Manor is destroyed. So if the Lord of the Manor sell away the Inheritance of all the Copiholds to several persons, hereby the Manor and Court of Copiholders is destroyed: And so it is if he sell away all the Freeholds, or all but one, hereby the Manor and Court of Freeholders is gone: And so it is, if they do all escheat into the Lords hands: And so it is if the Lord do purchase

Where and how a Manor may be destroyed or suspended, and afterward again revived.

purchase into his own hands all the Freeholds, or all but one; hereby the Manor and Court of Freeholders is dissolved. But when the Alteration is by act of Law, it is otherwise: And therefore if a Manor be divided between Parceners, and one of them hath one part of the Demefns and Services, and another another part of the Demefns and Services; in this case each of them shall have a Manor and a Court. And if upon the Division of the Manor between them, one of the Parceners have all the Demefns allotted to him, and the other all the Services allotted to him, and after one of them die without issue, so that his part come to his companion; in this case it shall be said that the Manor and Courts were only suspended while they were divided; and when they come again together, the Manor is revived again.

If one that hath a Manor grant away the Moyetie of it, hereby the Manor is destroyed. By *Just. Jones*.

If one Manor that is held of another escheat, so that they come into one hand; in this case both of them are united and do continue, and are neither of them destroyed. But if once a Manor be destroyed by the act of the party, he can never after be revived. *Fortior est dispositio legis quam hominis.*

Sec. 12.
Where Land that is part of a Manor, shall be said to be divided from the Manor, and where it shall be united again, or not.

For answer to this, take these things.

1. If the Lord make a Feoffment of a Copihold by Deed, or without Deed; by this the Copihold land is absolutely severed from the Manor, and shall never be reunited again, *Co. 11. 47. Dyer 281.*

2. If one convey a Manor, excepting one Acre; by this, this one Acre is perpetually severed from the Manor, *Co. 11. 47.*

3. If a man be seised of a Manor in right of his wife, and he grant four Acres of it for life, and after the husband grant the Reversion of them to *J.S.* in Fee, and after the husband and wife levy a Fine to *J.S.* in Fee; by this the four Acres are united to the Manor, and are parcel thereof, *Plow. 104. 18 Aff. pl. 3.*

4. If the Lord of a Manor make a Lease for years of part of his Manor by particulars; in this case during the Term this is no part of the Manor, neither will it pass by the grant of the Manor: And albeit the Lessee do lease it back again to the wife of the Lessor, yet during this time it is not reunited. And yet the Reversion of these Lands in these cases is still parcel of the Manor, *Plow. 431. Co. on Lit. 324, 325.*

Perquisites,
what.

Perquisites are advantages and profits that come to a Manor by Casualty, and not yearly; as Escheats, Hariots, Reliefs, Waifs, Estrays, Forfeitures, Amerciaments in Courts, Wards, Marriages, Goods and Lands forfeit, or purchased by Villains, Fines by Copiholders, and the like. *Co. upon Lit. 119. Perk. sec. 94. Crump. Jur. 109.*

For the old Statutes concerning Tenures and Services, see *Mag. char. 10. 31. 32. Quia Emptores, &c. Stat. 1 Ed. 3. 2. 12. 13. 34 Ed. 3. 15. 7 Ed. 4. 5. 35 H. 8. 14. 37 H. 8. 20. 1 Ed. 6. 4. Marl. 9.*

Lords and Tenants, see *Marlb. cap. 22. 15 R. 2. 12. 16 R. 2. 2.*

CHAP. CVII.

Of Maintenance.

IT is a taking in hand, bearing up or upholding of Quarrels and sides, to the disturbance or hinderance of Common right, Co. what. *1. Maintenance, super Lit. 368.*

It is where a man doth give to another that is Plaintiff or Defendant in any Suit, or to any other in his behalf or to his use, any sum of money or other reward for to maintain his Plea or Suit, or otherwise useth perswasion or maketh labour for him, or useth means to countenance, aid or assist him, when he himself that so doth hath nothing therewith to do. And this may be either by Champerty, Conspiracy, Embrocary, Jurors in giving their Verdict, Buying of Titles, or the like: And he that so doth is a Maintainer, called also a Bearer, *26 Ed. 3. 5.* Of all which see beneath the particulars.

Conspirators, Maintainers, Bearers.

And this if a man do, the party that is grieved hereby may have a Writ called *A Writ of Maintenance*, which is given against the Maintainer in this case; or he may follow him upon the Statutes that are made against this offence: Which see after. See for this, *Gramp. Jurisd. f. 38. ab. 39. a. 50, 51. 77, 78. Westm. 1. 28. 32. 33. Ed. 1. chap. of Conspirators and of Champertors. 20 Ed. 3. c. 4. 7 R. 2. c. 15. Terms ley, 1 Ed. 1. 14.*

Writ of Maintenance.

If any the Kings Counsellors or Officers, or other great men, shall by sending of Letters, Messengers, giving of Liveries, or the like means, sollicite matters, maintain or meddle with quarrels or questions that concern not them, or take parts to the hinderance and let of the Common Law and Justice, (whether it be in the Country or elsewhere:) If he be a Privy-Counsellor or other great person, he shall be punished by advice of the King and his Council: If he be an Officer or Servant of the King in the Exchequer or other Court, or any Menial Servant of his, he shall lose his Office and be imprisoned during the Kings pleasure, *21 Ed. 3. 44. 23 Ed. 3. 3. 1 R. 2. 4. 19. 10 Ed. 3. 4.*

If any bind themselves by Oath, Covenant, or other alliance, That every one shall help and sustain the other falsely and maliciously to indict, or falsly to move or maintain Pleas: And also such as cause Children within age to appeal men of Person, whereby they are imprisoned and sore grieved: And such as retain men in the Country with Livery or Fees to maintain their malicious enterprises, (and this doth extend as well to the giver as the taker;) and Stewards and Bailiffs of great Lords, which by their seigniorie, office or power undertake to uphold or maintain quarrels, pleas or debates that concern not them, nor their Lords and Masters, *33 Ed. 1. 1 R. 2. 7.*

Giving of Liveries, Badges, Signs and Tokens, and retaining unnecessary Servants by Great men, to maintain quarrels and suits, forbidden by divers Statutes, as *1 R. 2. 7. 7 H. 4. 14. 8 H. 8. 4. 1 H. 4. 7. 3 Ed. 4. 2. M. See Statutes of Westm. 1 Ed. 3. 14.*

A Feoffment made for Maintenance shall be void, *Statute R. 1. c. 10. 8 H. 6. c. 4.*

Maintenance is twofold in Court, called *curialis*. When one is to have part of the thing, called Champerty. 2. Without having any thing, and this is general, or special. 3. When one labourerth a Juror. All this is *pendens lite* in the Courts of Justice; or it is *curialis* in the Country, by taking or keeping possessions. *1 Ed. 1. 14. 1 R. 2. 7. 7 H. 4. 14. 8 H. 8. 4. 1 H. 4. 7. 3 Ed. 4. 2. M. See Statutes of Westm. 1 Ed. 3. 14.*

The kinds of

2. What shall be said to be Maintenance, and punishable. By a great man.

If any man of great authority in the County, will in the presence of a Jury and the standers by at the Trial of an Issue, say openly, That he will spend money in the Cause in question in the behalf of the Plaintiff or Defendant, or that he will give money to labour the Jury, or will speak other great and high words in favor of one of the parties; this is an unlawful maintenance, though he do spend no money, or do not labour the Jury, 22 H.6.5. 13 H.4.19.

So if any such great person, when any Issue is to be tryed, having nothing to do in the cause, shall come to the Bar with the Plaintiff or Defendant, and standeth by only; this is an unlawful Maintenance; though the Jury respect him nor, but give their Verdict the right way, 22 H.6.6.

If A. do owe to B. Twenty pounds, and B. promise to C. part of this Debt to prosecute and maintain the Suit; this is unlawful Maintenance; but this is more properly to be called and accounted Champerty, 15 H.7.2.

By a Juror.

If one of the Jurors in an Inquest will give or promise money to another of his Fellows, to give or say his Verdict for Plaintiff or Defendant; this is Maintenance, though it be according to the truth of the cause: But if one of them do persuade his Companion to pass for one side or other, as he conceiveth the truth of the cause to be, and as the Evidence doth induce; this is no Maintenance, 17 Ed.4.5. 18 Ed.4.4.

If a Juror take money to say his Verdict for the one side, See for this 34 Ed.3.8. 38 Ed.3.12.

If two be in suit and do join issue, and the Master of one of the parties to the suit, or any other deliver money of his own head to a stranger to labour the Jury to try the issue, to give Verdict for his servant or friend; this is Maintenance in the Master or friend, though he never do or say any thing to the Jury; or though he do, and the Jury pass against him, Dyer 95. 28 H.6.7. 21 H.6.15.

If one give a Juror money to appear and say his Verdict of one side, this is Maintenance, though he do never appear, or do appear and not serve, 22 H.6.6. Dyer 95.

By a Witness.

If one do threaten to beat or kill a Juror, if he do not give his Verdict on the one side; this is Maintenance, though he give his Verdict on the other side, Stat. 22 H.6.6.

If one come to a Juror of his own head, and offer to instruct him of the matter in question, this is Maintenance: But if the Juror come to the party and desire him to instruct him, *contra*. 22 H.6.6.

By another person.

If one will come when a Cause is in hearing, and offer himself of his own head to give Evidence for the one part or the other; this is Maintenance. But if he be sent for and required by the Court, *contra*. *Quare* of this: For I have heard Chief Justice *Bridgman* of *Marches* say, It was no fault to offer ones Evidence, Stat. 28 H.6.6.

If any person after a Suit is begun, shall encourage either of the parties, or yield either of them aid or help, as give them money, retain Counsel, or the like, unless it be in the cases hereafter following: All these, and such like Acts as these, are unlawful Maintenance and punishable. *Vide plus infra*. 22 H.6.6.

It may be Maintenance in a man to take parties, though he be to have no part of the thing in question, *Co. sup. Lit.* 365.

If any man that is not a Lawyer, and have no interest in the cause in question, will take upon him to do the part of a Counsellor, as to open the Cause, or instruct the Jury, or the like; this is Maintenance. So if a man have Land in question, and he will shew his Writing to a Nobleman or other that is no Lawyer, and he tell him his cause and title to the Land is good; this is Maintenance, 22 H.6.6. *Fitz. Main.* 11.

If a Solicitor retain an Attorney for his Master, and promise him payment of his Fees; this is no Maintenance, *per two Justices in Hil.* 16 Jac. Upper Bench. For in doubtful things, the best shall be taken: See *Gramp Jurisd.* 97.2.

3. What not, but is a Maintenance justifiable.

By a Lawyer or Attorney.

If any Sergeant or other Counsellor being retained for his Fee, do give his Client the best Counsel he can for defence or recovery of his right according to the course of Law, or doth enforce the Evidence of his Client at the Bar; this is no Maintenance, but that which is lawful. But if he shall pay or promise money or reward to any of the

the Jury to give his Verdict for his Client, or threaten any of them to be killed, beaten, or otherwise evil intreated if they do give their Verdict against his Client, or if he do spend or offer to spend his own money in his Clients cause, this is unlawful Maintenance, 6 Ed. 4. 5. 22 H. 6. 6. 11 H. 6. 13.

If one that is retained an Attorney in any Cause, do any lawful Act touching the Suit for the benefit of his Client, as retain Counsel, bring forth Process of *Capias*, of Execution, or *Superfedeas*, or the like, procure a Jury to be impanelled and returned by the Sheriff, give in Evidence to a Jury, or request any of the Jurors to appear; this is a maintenance lawful. But if an Attorney shall give or promise money or reward of his own or of his Clients, to give his Verdict for his Client, or threaten him if he do otherwise, or defend or offer to defend his Clients cause at his own charge, or procure the Sheriff to return a Jury of his naming; every of these acts is an unlawful maintenance, *Kelw. f. 15.* 13 H. 4. 19. 36 H. 6. 37. 11 H. 6. 10.

If a Sheriff or Bailiff shall impanel and summon a Jury, this is no maintenance in him, but that which is justifiable: But if he shall give money or reward to a Jury, or do any such unlawful act as before, this is maintenance in him, 22 H. 6. 24. 13 H. 4. 19. By a Sheriff.

If one be like to be arrested upon a Writ, come to his Neighbour and pray him to advise him what to do, and he advise him to yield his body to the Justices, and to have a *Superfedeas*; this is a lawful maintenance, *St. 22 H. 6. 35.* 12 Ed. 4. 14. 19 Ed. 4. 3. By a Neighbour.

So if one tell his Neighbour, another doth owe him money, and ask him what he shall do, and he advise him to sue him. So if one tell his Neighbour, he must have a Suit in such a matter, and ask him what Counsellor or Attorney he were best to have, and he tell him, or go with him, or speak for him to his Counsellor or Attorney, or stand by at the hearing of his Cause, if he be not a great man; all these things one Neighbour may do for another: But if he give money or other reward to the Counsellor or Attorney, or to the Sheriff or Bailiff to arrest a man, this is maintenance, 19 Ed. 4. 37.

It is no maintenance for Jurors that are compelled to come, to give a Verdict for one side or the other: But if such a Juror shall labour the Judge after Verdict to give Judgment, this is maintenance, 18 Ed. 4. 2. 28 H. 6. 6. By a Juror.

Every one that hath Interest into any thing whereof, or concerning which any Suit is, may take part or maintain in the same Suit: As if a Tenant for life, years, or Entail of Land be impleaded for the same, he in Reversion or Remainder may maintain the Suit at his own charge: But if one that is Grantee of a Reversion or Remainder will maintain before he hath Attornment of the Tenant, this may be maintenance, *Br. mains. 58.* 6 H. 5. 4. 2 Plow. 52. 9 H. 6. 64. 39 H. 6. 16. By one that hath interest.

If a man have one only Daughter, and he is seised of Land, and is impleaded for it; she, or her husband (if she be married) may maintain the suit, and justify it: But if she be dead without issue begotten by her husband before the Suit begun, or the Action brought for some other thing, as upon a Covenant, Account, or the like, and they maintain, this is unlawful, 14 H. 7. 2. 6 Ed. 4. 4. 19 Ed. 4. 3.

If one seised of Land in Fee, make a Lease thereof to another for life, and after grant to a stranger, That if the said Lessee for life do die during the Lessors life, that then the stranger shall enjoy the Land for twenty years; if the Lessee for life be impleaded, the Grantee may maintain him, 9 H. 6. 64.

If one that hath the Fee-simple of Rents grant it with Warranty, and after the Grantee be impleaded for it, the Grantor in this case may maintain it, 11 H. 6. 49.

If a man hath a Rent-charge in Fee out of Lands, and another man hath in custody a Box of Writings concerning the same Rents, and after he that hath the Rent doth grant it to a stranger and his heirs, and doth grant also, that if he can recover the Writings, the other shall have them; an Attornment is made to this Grant, and the Grantor doth bring a Detinue for the Box; the Grantee in this case may lawfully maintain, 9 H. 6. 64.

If the Tenant be impleaded, the Lord may maintain in respect of his Services, A.

If A. owe to B. Twenty pounds, and C. owe to A. Twenty pounds by Obligation,

gation, and *A.* deliver to *B.* the Obligation from *C.* in satisfaction of the Twenty pounds; in this case *B.* may sue *C.* in the name of *A.* on this Obligation, and retain Attornies and Council, and so may *A.* also; for both of them have interest in this Debr. So if one be bound to pay *J.S.* Twenty pounds to the use of *W.S.* *J.S.* and *W.S.* may both meddle in the Suit, 10 *H.6.47.* 15 *H.7.2.* 34 *H.6.30.*

If one deliver a Writing to one to be kept, and a stranger bring a Detinue for it, he that delivered it may maintain, 39 *H.6.20.*

If one of a Parish be questioned for Burial in the Church-yard, the rest of the Parishioners may maintain the Suit, 18 *Ed. 4.2.*

If one be bound for another's appearance, he may go into the Court and see if the same be recorded; this is justifiable. But if he do more, as retain Council or the like, this is unlawful maintenance, 18 *Ed. 4.12.* See more, 24 *H.6.25.* 14 *H.6.6.* See more, *Bro. Chose Exult.* 13. *Fike Maint.* 14. *Bro. Maint. in toto.*

By a Master.

If a mans servant be sued, and his master request a Lawyer to be of Council with his servant in the suit, or go with his servant to Council, or pay the Counsellors Fee with part of the wages of his servant, or go with his servant to the Bar when his cause is to be tryed; or if the servant be arrested in a privileged place, and he at his own charges deliver him, this is a lawful maintenance in respect of his service. But if the servant be impleaded in any real Action, or otherwise where he may appear by Attorney, and his presence is not requisite; there if the master do any such act, it is a maintenance punishable. So if the master give him money to go to Law out of his own purse, *per Just. Haughton, Hil. 16 Jac. B.R.* Or lay out any money for him, unless it be one of his wages due to him. And this was the opinion of Justice *Bridgman* and of the whole Court, 8 *Car. Trin.* in the Marches of *Wales.* 23 *H.6.33.* 9 *H.6.64.* 28 *H.6.12.* 19 *Ed. 4.3.* 41 *H.7.40.*

By a Servant.

The Servant in any Suit commenced by or against his Master, may at the commandment of his Master travel in the furtherance thereof, retain Council with his Masters money, instruct the Council or the Jury when the cause is tryed, or the like. But this must be such a Servant as is hired for a year or more, and retained to do all his Masters services; and not one that is hired for a day or two, or hired to go a journey, or do some special service: For if such a Servant shall so maintain his Master, or his Master him, this will be an unlawful maintenance.

So if either of them shall give or promise money or other reward to any of the Jurors to give his Verdict, or do threaten any of them to be killed, maimed, beaten, dispossessed of their Farms or Goods, or give his own money to the Sheriff to get the party arrested, this is an unlawful maintenance, 19 *H.6.31.* 19 *Ed. 4.30.* 39 *Ed. 4.31.* 2 *Ed. 4.4.* 19 *Ed. 4.31.*

By a Kinsman.

The Father may maintain his Son and Heir; the Son, the Father or Mother; one Brother, or one Ally or neer Kinsman another, by going to the Bar with them and standing there to comfort them, or go with them to Council, or speak to one to be of Council with them in their cause: But such a one may not retain a Counsellor of himself, or give him money of his own, or give or promise money or other reward to a Juror to give his Verdict for him; for this is an unlawful maintenance. And he that will justify by reason of any such affinity through marriage, must shew that the party by whom the affinity was, is yet living, or some issue of the body of that party; for otherwise the maintenance of such a person is unlawful: But it seems one Kinsman may not aid another in any case but in a real Action, and there where he that doth maintain hath some possibility to have the Land it self, *Stat. 9 Ed. 4.32.* 34 *H.7.2.* 20 *H.6.1.* 34 *H.6.26.* 6 *Ed. 4.5.* 49 *Ed. 4.2.* *Str. 6 Ed. 3. ch. 33.*

By a Gossip.

If one that is a Gossip to another do maintain him, this is lawful; for this makes a kind of affinity, 6 *Ed. 4.5.*

Any one may go with an outlandish man that cannot speak English, to help to make his mind known, and so instruct his Council, this is a maintenance justifiable, 15 *H.7.2.* 34 *H.6.16.*

By any other.

Any one may give a poor man that is not able to defend his Suit, money of charity to help him; and this is justifiable, 94 *H.6.64.*

If any give to another money to begin and prosecute a Suit, this is not maintenance: for no maintenance can be unlawful till the Suit begun, unless it be in the cases following of Champerty. But if I give any man money to follow a Suit, and I do promise him what he layeth out more I will pay him; unless this be an Attorney, in such case this is unlawful. 3 H. 6. 55. 8 H. 5. 8. 10 Ed. 4. 19.

No maintenance in any Spiritual Court is such, for which the party grieved may have the Writ of *Maintenance*; but it must be in the Common-Law Courts. *Tisdale against Resington*, Mich. 39 & 40 Eliz. Co. B. & P. 37 Eliz. *Constantly & Barns Case*.

Champerty is, and Champertors be they that move Pleas and Suits, or cause to be moved either by their own procurement, or by others, and sue them at their proper costs, for to have part of the Land, or part of thing in question and variance. And this is a species of Maintenance, for every Champerty is Maintenance, *Co. sup. lit. f. 368. Westm. 1. ch. 25. Westm. 2. 48. 28 Ed. 1. 71. 33 Ed. 1. 3 Ed. 1. 25. 13 Ed. 1. 48.*

4. *Champerty*,
what.
Champertors.

And in this case, and for this offence, the party grieved may have either a Writ called a Writ of *Champerty*, or the Writ of *Maintenance* to relieve himself, or he may prosecute the offence upon the Statute mentioned *infra*. And this Writ may be brought against the Buyer alone, or against the Seller alone; and the party grieved may have this Action against the Champertors, though he do recover, and so lose nothing by the Champerty, 30 Ass. 5. 9 H. 6. 64. 7 Ed. 4. 15.

No Officers of the King by themselves or others shall maintain Pleas, Suits or matters hanging in the Kings Court, for Lands, Tenements, or other things, for to have part or profit thereof by Covenant made between them; and he that doth shall be punished at the Kings pleasure, 3 Ed. 1. 25.

No person whatsoever shall receive any Lands or Tenements, or any thing by Gift, Purchase, or otherwise in Fee, or to Farm, so long as the thing is in question, (nor for to obtain part of the thing in Plea) or for other reward shall maintain any matter that is in suit, nor upon any such covenant or agreement shall give up his right to another: And he that doth so, the taker shall lose as much lands and goods of his, as doth amount to the value of the part that he hath purchased for such maintenance; and he shall be three years imprisoned, and further punished at the Kings pleasure. See the Exposition of this *infra*. *Westm. 2. ch. 48. Stat. 21 Ed. 1. ch. 11. 33 Ed. 1. 28.*

By this Statute, as well he that selleth or demiseth his Land for life or years, or any part thereof during the time it is in suit, shall be punished, as he that purchaseth the same, *Fitz. Champert. 5.*

If any person shall unlawfully maintain or procure any unlawful maintenance in any Action in any of the Kings Courts where Title of Land may be tryed, or shall unlawfully retain, for maintenance of any Suit or Plea, any persons to embrace any Jurors or Freeholders, to suborn any Witnesses by letters, rewards, promises, or by any other sinister labour or means, to the end to maintain any matter or cause, or to disturb or let Justice, or to procure or occasion any manner of perjury by false Verdict or otherwise in any such Court, shall forfeit Ten pounds, *Stat. 32 H. 8. 9. Westm. 2. 28.*

Justices of Assises or of either Bench may hear and determine matters of Maintenance, Conspiracie, and Champertie; and that which they cannot end, they may adjourn to the Court where they are Justices, 4 Ed. 3. 11.

If any one by Covenant or Agreement, or Writing, doth bargain to have parcel of the Land, Debt, or other thing which is in Suit, if it be recovered, to aid and maintain the party to that Suit; this is Champerty, and punishable by the Statute before-mentioned. As if I have title to land or goods, and I agree with another that if he will maintain me in the Suit for the recovery thereof, that then he shall have a moiety or a part thereof to himself. So if one owe me Twenty pounds, and I offer to a stranger part of it to recover it for me, *F. N. B. 171. 15 H. 7. 2. 8 Ed. 4. 13.*

It seems that the Assignment of Statutes or Bonds for money, is Maintenance or Champerty: See Co. 10. 102. in marg.

5. What shall
be said to be
Champerty, or
not.

If a bargain or agreement be by word, to have part of the thing in suit, to this end to maintain the suit; this is Champerty, as well as if it were by writing, 7 E. 3. 9. *Fitz. Champ. 6.*

If one give his Land freely without consideration, if it be hanging the Suit, as well as where he selleth it for money or other consideration, 8 E. 4. 13. See *Crompt. Jurisd. 66. a. 76. Fitz. Champ. 5. 30 Aff. p. 3.*

If one bargain for Land before any Suit begun for it, and after a Suit begun the party make a Conveyance of the Land according to the bargain, *pendente lite*, yet this is no Champerty, *Fitz. Champ. 15. Plow. 465.*

If one make a Feoffment of Land to his own use, during the time that a Suit is depending against him for this Land; this is no Champerty, 8 E. 4. 13.

If one give Land to his Son in Frank-marriage, or for his life, during the time that a Suit is depending against him for the same Land; this is no Champerty within the Statute of 28 E. 1. For next Friends may maintain one another by that Statute, 6 E. 1. 33. *Plow. 305. Fitz. Champ. 10.*

If one make a Lease for life of Lands, and after the Tenant for life is impleaded, and hanging that Plea he doth surrender to him in Reversion, this is no Champerty, *Fitz. Champ. 14.*

If a Judgment be had for Land, and after the Recovery, the party that hath recovered sell the Land; this is no Champerty.

So if one that hath given him Counsel in the case, do take part of the Land recovered for his Fees. But if there were any Contract or Bargain made before the Recovery depending the Suit, then it may be Champerty, *Stat. 13 H. 4. ch. 19. 47 E. 3. 9.*

6. Embracers, what.

Embracers are such, as when a matter is in Trial between party and party, come with the party to the Bar (having received some reward so to do) and speak in the case, or privily labour the Jury, or stand there to survey and overlook them, thereby to put them in fear or dread of the matter, or the like. And if in this case he take money, it seems a *Decies tantum* may be brought against him, *Stat. 38 E. 3. 12. See more, Crompt. Jur. f. 32. 38. 6. 39. 28 E. 1. 11. 10. 19 H. 7. 13. Term. 19. Co. on Lit. 369.*

7. Who shall be said to be an Embracer, and what Embracery, or not.

He is accounted an Embracer, who will threaten the Jury, or any of them, if they do not give their Verdict by his direction: Or if one will instruct the Jury beforehand, *Co. super Lit. 369.*

Also he that is Procurer of a Jury to appear, who is commonly called a Leader of Inquests. And whether the Jury pass for him, or no, or give any Verdict, or no, it is not material, for he shall be punished notwithstanding, *F. N. B. 171: Co. on Lit. 369.*

If one take money to embrace, and do not embrace, this is no Embracery.

If the Counsellor for his Fee speak to the Jury, and inform his Clients Evidence unto them so much as he can openly upon the Trial of the Cause, this is no Embracery: But if he otherwise labour to the Jury to give their Verdict, and receive money to that end, this is Embracery, 41 E. 3. 9. 6 E. 4. 5.

8. The punishment of it.

The party that is attainted of this offence, shall pay ten times as much as he hath received; as a Juror shall do that hath taken money to give his Verdict: which by a *Decies tantum* in this case, as well as in the former, may be recovered against the party. See *Decies tantum, & Stat. 34 E. 3. ch. 8. 38 E. 3. 12.*

If a Juror take money to give his Verdict on one side or the other, he is to be punished as a Maintainer by a *Decies tantum*.

So if a Juror will take money on both sides, who is called an *Ambudexter*; such a one shall never be put in Juries or Inquests, but be sent to Prison, and punished further at the Kings pleasure; and he may be punished by a *Decies tantum*, 39 Aff. p. 19. But if a Juror take money after Verdict given for the party, where there was no Covenant before, this is out of all the Statute, but he may be fined for this, 5 E. 3. 10. 44 E. 3. 39. *Fitz. Decies tant. 12.*

If

If any person shall bargain, buy or sell, or by any means get any pretended Rights or Titles; or takes Promise, Grant, or Covenant to have any Right or Title of any person or persons in or to any Lands or Tenements, but where such persons which shall so bargain, &c. their Ancestors, or they by whom he or they claim the same, have been in the possession of the same, or of the Reversion or Remainder thereof, or taken the Rents or profits thereof by the space of a year before the same Bargain or Covenant, he shall lose the value of the Land so held or covenanted for; and the Buyer knowing thereof, shall lose as much also. See *Crompt. Jur. f. 38. a. Co. on Lit. f. 214. 369.*

9. Buying of pretended Titles.

But any man that is in lawful possession may get any pretended right or title, notwithstanding this Statute, 32 H. 8. 9.

For which note: Title or Right is either merely in pretence or supposition, and nothing in truth: Or when it is good Right and Title in truth, and made pretended by the act of the party; and both these are within the Statute. Also a Right is naked without possession, when the absolute Right cometh by Release, into wrongful possession, and no third person hath either *Jus proprietatis* or *Jus possessionis*. When he hath a good Right, and a wrongful Possession, *vide supra. Co. on Lit. 369.*

If one make a Lease for years for a Term of years to another of Land, according to this Statute; this is as well within the Statute, as if he had made an Estate in Fee simple, Fee-tail, or for Term of life: And for making such a Lease of a pretended Title or Right, the Lessor and Lessee shall forfeit the value of the Inheritance of the Land. See a Case more in *Co. super Littleton, fol. 369. Dyer 374. 74. Plow. 87.*

10. What shall be said a buying of a pretended Title, or not.

So if one have a pretended Title or Right to Copihold-land, and sell it, this is without the danger of this Statute. But if one make a Lease for years to another only to try a Title, this shall not be within this Statute, *Co. 4. 26.*

If *A.* be lawful owner of Land and in possession, and *B.* that hath no right thereunto, granteth to, or contracteth with another for the Land; though the Grant be void, yet the Grantor and Grantee be within the danger of the Statute, if *A.* in this case be disseised, *A.* hath a good right: yet if *A.* being out of possession granteth to or contracteth with another for the Land, they are both within the danger of the Statute. *A fortiori* of a Right in Action, unless it be to a great man, &c. *Co. on Lit. 269.*

He that hath a good Title at the time of his Bargain or Lease, is not within this Statute, though neither he nor his Ancestors have been in possession thereof, &c: according to the Statute, by the space of a year before. And therefore if a man do enter into Lands that be holden of him for an Alienation in Mortmain, or if he recover Lands by a Real Action, he may sell the same Land, or make a Lease of it within a year after the Entry or Recovery, without any danger of this Statute, *Plow. 47. Dyer 74. Co. on Lit. 369.*

So if one mortgage his Land for a long time on Condition, and after he redeem it, he may sell it, though he have not been in possession a year. For by pretended Rights is not meant good and clear Rights. But where one man is in possession, and another that is out of possession doth claim them or sue for them, doth bargain, sell, or make any agreement to part from the Land, or to make any assurance thereof after he shall recover the same; this is within the danger of the Statute, whether he hath a good Title, or not. As if a Disseisor die seised, and the Disseisee enter and disseise his Heir; though he hath an ancient Right, yet because he hath unlawful possession, if he sell or contract the Land before he hath been in possession a year, he is within the danger of the Statute. But if one be disseised, and the Disseisee release to him; now he may sell it presently, and need not stay the year.

But where he that hath a pretended Right, and none in truth, gets the possession wrongfully, and then sels; this is within the Statute. But if there be Tenant for life, the Remainder in Fee by a good Title, he in Remainder may get the pretended Right.

See

See for these things, Statutes of Westm. 1. 28. 1 Ed. 3. Parl. 2. 14. 20 Ed. 3. 4. 1 R. 2. 4. 9. 7 R. 2. 15. 32 H. 8. 9. 1 Ed. 3. Parl. 2. 14. 4 Ed. 3. 11. Co. 3 par. Inst. 76 & 77.

CHAP. CVIII.

Of Merchant and Merchandises, Trading and Traffique.

Trading and
Traffique.



One that sell out of a Market-Town or Corporation in the Country, may sell by Retail (but in Grofs) any Cloth, Haberdashers wares, Grocery wares, in any such Corporation or Market-Town, or the Suburbs or Liberties thereof, but in an open Fair there, under pain to forfeit the Wares sold or offered to be sold, and Six shillings eight pence, Stat. 1. a Ph. & M. 2.

There are many other Laws concerning Trading and Traffique, to this effect.

1. None may use Trades that they have not been trained up in.
2. They in their Trades, especially if they sell any thing that is to be eaten or drunk by men, must sell true, not false and sophisticated Commodities, nor use deceit.
3. They must sell (especially Provision) at reasonable prices; and for moderate gain.
4. Bakers, Brewers, and such like Tradesmen must keep the Assise.
5. They must buy and sell by just Weights and Measures.
6. Trading with some Countries is forbidden: See for these things my Justice of Peace Book. Co. 2 par. Inst. ch. 30. Acts, Aug. 2. 1650, and 3 Octob. 1650, and 6 Novemb. 1650.

Merchants and
Merchandises.

There are four sorts of Merchants, Merchant-Adventurers, Merchants-Dormants, Merchants-Travailing, and Merchants-Residents.

What Merchant-Strangers may sell and buy in this Country, and how, and what Custom they shall pay, See Stat. 9 H. 3. 30. 9 Ed. 3. 1. 25 Ed. 3. 2. 2 R. 2. 1. 1 R. 2. 7. 19 R. 2. 1. 19 H. 7. 8. 5 Eliz. 7. 1 Jac. 25. 4 H. 4. 15. 17 Ed. 4. 1. 3 H. 7. 8. 1 Eliz. 11. Co. 2 par. Inst. 58.

What Merchandises may be brought into this Country, bought and sold here, and how, Stat. 1 Eliz. 11. 5 Eliz. 7. 1 Jac. 25. 4 H. 4. 15. 17 Ed. 4. 1. 3 H. 7. 8. 4 Jac. 9. 1 & 2 P. & M. 2. 3 Jac. 9. 12 Ed. 4. 3. Act of Parliament, Aug. 28. 1649.

What Merchandises may be transported, and how, Stat. 5 Eliz. 22. 2 H. 6. 6. 3 Jac. 7. And with whom we may trade, or not, Act of Parl. 3 Octob. 1650.

Policy of As-
surance, what.

Policy of Assurance, is a course taken by those which do adventure Ware or Merchandise by Sea; whereby they being loth to hazard their whole Adventure, do give to some other a certain rate or proportion, as Ten in the Hundred, or such like, to secure the safe arrival of the Ship, and so much Wares at the place agreed upon. So that if the Ship and Wares do miscarry, the Assurer maketh good to the Venturer so much as he promiseth to secure, as Twenty, Forty, a Hundred, more or less. And if the Ship do safely arrive, he gaineth that clearly which the Venturer doth compound to pay him. And for the more even dealing between the Venturer and the Securer in this case, there is a certain Clerk or Officer ordained to set down in writing the sum of their Agreement, that they may not differ thereupon afterwards; and this Writing is called a Charter-party. If any difference be about it, the King hath been used to grant a Commission to certain men to hear and end it.

Charter-party,
what.

See

See Statutes, 43 *Eliz.* 11, 12. *Co.* 5. 23. For Merchant-strangers, and how they are to buy and sell, and employ the Wares and Money, See 14 *R.* 2. 1, 2. 2 *H.* 4. 5: 4 *H.* 4. 15. 5 *H.* 4. 9. 6 *H.* 4. 4. 11 *H.* 4. 8. 9 *H.* 5. 9. 8 *H.* 6. 24. 27 *H.* 6. 3. 17 *Ed.* 4. 1. *Co.* 2 *par.* *Inst.* 7. 41.

The Weigh of Cheese is thirty two Cloves, every Clove eight pound of Averdopoys weight; some make seven pound to a Clove. The Weigh of *Suffolk*-Cheese is two hundred fifty six pound of Averdopoys weight; and their Barrel of Buter is of like weight with the Foist. But the Weigh of *Essex*-Butter and Cheese is three hundred pound, after the rate of an hundred and twelve pound to the Hundred, which is three hundred thirty six pound of Averdopoys weight. *Dalton's Justice of Peace*, 185.

Beef and other Flesh is sixteen ounces of Averdopoys, and eight of them pounds make a Stone, *Dalton*.

Herrings are sold by the Barrel, Half-Barrel, and Firkin; and these according to the measure of Ale and Beer: The Firkin, eight gallons; the Kilderkin, sixteen gallons; and the Barrel, thirty two gallons. Also Herrings are sold by the Hundred, a hundred and twenty to the Hundred, ten hundred to the Thousand, and ten thousand to the Last, *Stat.* 11 *H.* 7. 23. 13 *Eliz.* 11. 31 *Ed.* 3. 2.

Hemp, twenty pound weight maketh the Stone, 2 *H.* 8. 12.

Of Sugar, Spices, and Wax, eight pound maketh the Stone, and thirteen Stone and half, or a hundred and eight pound maketh the Hundred. *Rassal's Abridgment*, weights, 8.

Tile is a hundred and twenty to the Hundred, 17 *Ed.* 4. 17.

Of Hops, a hundred and twelve pound maketh the Hundred.

For Salmon, Eeles, Lead, Leather, Iron, Glas, see *Rassal* of Weights. So for Coal, Falwood, Billet and Faggot, *St.* 7 *Ed.* 6. 7. 43 *Eliz.* 14.

All other Commodities of Tale or Number, are sold by the Hundred: whereof Cattel, Carrel and Fish are sold a hundred and twenty to the Hundred; and yet the hundred of Hard-fish must be a hundred and sixty, *Rass.* 8.

All other beaded things, as Nails, Pins, &c. are a hundred and twenty to the Hundred. And all other things are but five-score to the Hundred.

Of Timber well hewn and squared, fifty foot maketh a Load; a Lath is in length five foot, in breadth two inches, and in thickness half an inch. The Assise of Wood, see 7 *Ed.* 6. 7.

A Bale of Paper is ten Reams, a Ream twenty Quires, a Quire twenty five sheets.

A Roll of Parchment is five dozen or sixty skins. But all these things come best to be known by the usage of the Country; and according to this generally it is to go in Trading and Traffique.

See *Ship* and *Shipping*, *Weights* and *Measures*.

CHAP. CIX.

Of Marriage.

Marriage.

Affiance or
Sponsality.Contract of
Marriage.Affiance Quo-
tuplex, and the
validity and
fruits thereof.Sponson,
Simple:
Conditional.

Contract legal.

Sect. 1.



Marriage is the copulation of a man and a woman together, by agreement to be man and wife, by an inseparable conjunction to live together all the days of their life. And the inception of this first is, when wedlock is promised and vowed by words in the Future-tense, which is called *Affiance* or *Sponsality*; which therefore is defined to be, *Futurum nuptiarum conventio & repromissio*: For, the full contract of Matrimony is, when it is made by words *de presenti*, in a lawful consent. And so two be made man and wife before God,

without lying together, and that without consent of Parents or Tutors; which is not of necessity, though it be meet and convenient to be had. But Matrimony is not accounted consummate by our Law, until it be celebrated and solemnized in facie Ecclesie. Co. super Lit. 76. a. Braet. l. 4. f. 298. Glanv. lib. 1. cap. 1. Wo. Lawyer, 117.

This Sponson or first promising is also sometimes naked, (i.) when they do promise simply and barely by their word only each to other, to contract Matrimony hereafter: And sometimes confirmed, (i.) when there is an Oath made, or somewhat taken as an earnest or pledg between them on both parts, or on the one part, to be married hereafter. And it also is either publique, and that is either by the parties by themselves present together, or by Message and Letters when they be apart, and of and to which there be some privy and witnesses: Or else it is secret, *Solum cum sola*, to which none are privy but themselves; which being proved well, is of the same force with the former; save only that a Promise made after to another in publique, shall be preferred and prevail against it.

This is also sometimes simple, and sometimes it is conditional. If it be conditional, it suspendeth the Promise till the Condition be performed; unless by a new agreement the Condition were discharged. But if the Condition be against the right of Matrimony, it maketh the Promise void, as, To poison the child she first conceived, &c. But though otherwise dishonest or impossible, yet if it be not against the Law of Wedlock, it is good enough. But this Affiance, be it naked or confirmed, publique or private, is not of that force as to compel the parties to marry, but is an obligation only, or being bound in a sort to marry hereafter: For after such a Promise only, the parties may marry themselves to others; and yet it seems the party that doth break his or her Promise in this case, is subject to suit and some punishment in the Spiritual Court. But a legal Contract containeth more in it, and is compulsory: And yet neither Affiance nor Contract is of the force of Marriage; for by this only without Marriage, neither husband nor wife shall have any benefit by the others death, and till then they are several persons in Law, and may enfeof one another, Perkins.

Note, that in all these Promises the Law requireth not a curious form of words; for any words whereby their Agreement may appear, will be sufficient. Wo. Lawyer, f. 51.

All persons may lawfully marry, that be not prohibited by Gods Law to marry, that is, that be not prohibited by the Levitical degrees. All Clergy-men may marry as well as others, and their children shall be legitimate, and they themselves shall have all the privileges of Marriage that other men have. Stat. sect. 6 Ed. 6. c. 12. 32 H. 8. 38. & 2 & 3 Ed. 6. c. 21. See Co. 2 par. Inst. 683.

The six Clerks of the Chancery, and other Clerks there, may marry, notwithstanding the old custom to the contrary. Also all such as exercise any Ecclesiastical jurisdiction may be married, notwithstanding their office and employment, Stat. 14 & 15 H. 8. c. 8. 37 H. 8. c. 17.

In this conjunction many things are prohibited, and divers things required, 1. In the parties themselves. 2. In the making of their agreement, Cap. 434.

In

In the parties themselves, 1. That there be no Impediments natural, or accidental; that they be not either of them within age of consent, (A.) the man under fourteen, and the woman under twelve, for then may they after when they come to this age, avoid the marriage by their disagreement, without any divorce at all, and marry others. But by the Civil Law, it seems they are deemed able to consent when they are *Puberes* ripe, and fit for marriage, though they are not of this age.

2. That they be of a sound and whole minde to consent; and not *Insens* *mentis*, for he that is mad, without intermission of fury, cannot marry, but he that is deaf and dumb may Contract Matrimony.

3. The persons must not be in relation one to another, *Infra gradum prohibitus* (that is) in respect of Consanguinity, for marriage is forbidden betwixt those that are of Kinred Lineally, (i.) Parents and Children in *infam*. Also betwixt those that are Kinred in the *transverse* or Collateral line, until the fourth degree be past, or in respect of Affinity or Alliance, and this riseth between them that are married, and the Kinred of one of them, as betwixt the Husband and the Kinred of his Wife; but this prohibiteth marriage onely to the persons contracted, &c. for the Cousins or Consanguinity to my Wife, are Affinity onely to me, and not to my Brothers or Children by: a former Wife, and so *converso* my Blood, to my Wife. Hence it is, that Father and Son may marry the Mother and Daughter, and that two Brethren may marry two Sisters. And after the fourth degree be past, a man may marry any of his Affinity: And those that are not within the Levitical degrees, are not forbidden, (A) therefore a man may marry the Daughter of the Sister of his first Wife.

4. The persons should be of the same Religion, for by the Laws of the Church, Marriages are not good betwixt Jews and Christians.

5. The persons must be fit for generation, and therefore those that by coldness of nature or enchantment, are impotent, are forbidden to marry.

6. The persons must be also free, and not be engaged to any other, either of them by Precontract; secondly, in the making of the Contract.

1. It must be free; and therefore if both, or either of the parties be compelled by threatnings, imprisonment, or the like, or drawn by enchantment, &c. Fraud or flattery, or other such means against their wills to agree; this will make the marriage void.

2. It must be lawful; and therefore if it be corruptly made, as when one hath adulterously polluted a Woman, If he promise her to have her when his Wife dieth, &c. See more in the *Womans Lawyer*.

They were then by the Laws formerly to be married by a Minister before Witnesses, according to the Substance of the *Common Prayer*. See.

If any Marriage had been made where any such impediment is as aforesaid; either in the persons that make it, or the manner of making it, it was to be avoided again afterwards by Divorce at the Suit of the party grieved, by sentence in the Ecclesiastical Court; for to that Court, these matters did then belong, and the Ordinary was the onely Judge to judge, discuss, and determine this question and matter of Marriage. But it was not void, until by sentence of the Spiritual Judge, it was avoided; and therefore if that had not been in the life time of the parties, the issue was inheritable, and it could never be avoided after; for a Divorce cannot be after the death of either of the parties. But now the lawfulness and unlawfulness of Contracts and Marriages, and all Exceptions against them shall be heard, and ended by the Justices of the Peace, at their General Quarter Sessions by the new Statute, *24 Aug. 1653*. Also in case of a Marriage by Force or Fraud, the Lords Commissioners of the Great Seal, may give Commission to men to hear and end it. See *Womans Lawyer*, 10 Jan. 1650. 14, 15 H. 8. 37 H. 8. 17. & 437. *Co. super Lit.* 79. a. b. *Bro. rit. Gard.* 124: *Womans Lawyer* 57, 58. 32 H. 8. 38. *Levis.* 18. (A) *Trin.* 3 fac: *Rich. Parsons case.* *Co. B. Womans Lawyer* 59. *Kelw.* 332 12 H. 8. 6: *Dyer* 305. 12 H. 7. 22: *Bro. Bastardy* 23, 37, 44, 47. But now by the new *Act*, the Law is altered herein, and Marriages are to be made up by the Justices of Peace, and not by the Ministers.

2. What persons may marry, who not. Impediment of Marriage is lawful, what not.

3. Things required to make a good Marriage.

For the knowledge of which Law, take these things.

1. The Man married must be sixteen years old, or more, and the Woman must be fourteen years old, or more.

2. The parties must freely consent, and neither party be brought to it, by Force or Fraud; and their Parents, Gardians, and Overseers also, if they have any, and they be under one and twenty years of age, either of them must consent to it.

3. They that are to marry, must one and twenty days before the marriage, deliver to the Register of each Parish, where the parties do dwell, the Christian names and surnames of the persons to be married, with the additions of the places where they dwell, and the names of their Parents, Gardians, or Overseers, if they have any.

4. This Marriage must be published by the Register in the Churches of both places, or by some other, by his appointment and procurement, three Lords days before, at the close of the Morning Exercises, or in the next Market Town, on three Market days together, in three weeks, one after another in the Market place, between eleven and two of the clock, and then certify to a Justice of Peace of the County where one of the parties dwelt: And if any Exception be against the Marriage, this must be certified also to the Justice.

5. This Publication being thus certified by the Register of the places to a Justice of Peace; and he being satisfied of this Publication, and Consent of Parties, and their Parents, and Gardians, as before; This Justice must marry them after the Form herein set down afterwards.

The Man taking the Woman by the Hand, must say these words.

J. A. B. *Do here in the presence of God, the Searcher of all Hearts, take thee*

C. D. *for my wedded Wife; and do also in the presence of God, and before these Witnesses, promise to be unto thee a Faithful and Loving Husband.*

Then the Woman taking him by the Hand, must say thus.

J. C. D. *Do here in the presence of God, the Searcher of all Hearts, take thee*

A. B. *for my wedded Husband; and do also in the presence of God, and before these Witnesses, promise to be unto thee a Loving, Faithful, and Obedient Wife.*

And this being done, the Justice is to declare them Man and Wife; and the Substance hereof is to be observed, or otherwise the Marriage is not good.

If either of the Parties be dumb, the words may be spared; if they have no Hands; the taking of hands may be spared.

This done, he must, if the Parties desire it, give a Certificate hereof in Parchment, under his Hand and Seal, of the Marriage, Witnesses, and all the Circumstances thereof to the Parties.

He is to see the Register to make an Entry in his Registers Book of the Publication, Consent of Parties, Parents, or Gardians, and Exceptions if any be in the case. *Alt. 24 Aug. 1653.*

The Marriage being thus consummate, they are then reputed Man and Wife.

Husband and Wife, are a Man and a Woman coupled together by Marriage, and then is this Woman so married, said to be a Feme-Covert, which is defined to be a Woman legally married to a Husband, and married she must be; for until she be married, although she be Espoused or Contracted, yet she is not reputed a Feme-Covert. But when she is married in *Facie Ecclesie*, then is she reputed a Feme-Covert, though her Husband never have any Carnal knowledg of her; and hence is the word Coverture for so long, as these persons do so continue married, so long there is a Coverture between them, and the Coverture is said to continue: And whatsoever is done during the continuance of this Marriage, is said to be done during the Coverture. See the *Womans Lawyer*.

This Marriage of two such persons doth knit them so fast, and make such a strait fellowship between them, as that they are said to be but *Una persona, una caro & sanguis unus*: And hence it is, That howsoever in the obliquity of Fines, Recoveries, and Uses, there is a way, yet a man cannot by down-right Livery or Bargain, Feoffment, Gift, or Lease, pass Lands to his Wife, during the Coverture, not

St. 2.

Husband and Wife.
Feme-Covert.

Coverture.

4. To what purposes they shall be reputed, but as one person in Law, and to what purposes they shall be reputed divers persons in Law.

nor make any Covenant or Obligation to her: And if one enter into a Covenant to make his Wife a Feoffment, it is impossible; and therefore void, yet one may binde himself in an Obligation or Covenant before or after Marriage to a stranger, to let his Wife have necessaries, or so much clothes, or to pay her so much money by the year to do it, and this is good.

2. The one of them cannot sue the other, neither can the Wife sue any stranger, unless her Husband be joyned with her.

3. The Wife as she doth participate of the name of her Husband (for she changeth her name into his.) So also she doth partake of the Nature and Condition of her Husband. Hence it is, That if he be an Earl, she is a Countess; he a Knight, she a Lady: If he were an Alien, and be made Denizen, the Wife shall be so also: If a Freeman marry a Bond-woman, she shall be free, during the Coverture: And if a Lord marry his Wife, she shall be free, during the Coverture, and *è converso*: If a Dutchesse or Countess that is not so by birth, marry with a Gentleman or Esquire, she loseth her name and dignity, and must follow the Condition of her second Husband, *Uxor censetur dignitate mariti*.

4. Hence it is also, that the wife cannot be produced as a witness for, or against her Husband (b) a Writ of Conspiracy will not lie against Husband and Wife. (c) If she deliver her Husbands Goods to a stranger, Trespass doth not lie against the stranger, but some other action. (d) If T. enfeoff W. and A. his Wife, and after it is by Parliament enacted, that all estates made by T. to W. shall be void, the Feoffment shall be void, as well to the Wife as to the Husband. (e) If one purchase Lands held *à capite*, to him and his wife, and his Heirs without Licence, and after have a pardon of all offences, *Pro quacunque alienatione sibi facta*, and do not speak of his wife, yet it is a good pardon (e) if a Feoffment.

5. If a Feoffment be made of Land to them two, and a third person, they two shall have but a moiety: If to them two, and two others, they shall have but a third part; and if it be made to them two after their marriage together, there shall be no moieties between them, therefore the Husband can neither grant nor forfeit any part of it. And if the Husband alien it, she may after his death recover the whole by a *Cuius in vita*. If a Villain and his wife purchase Land, the Lord enter, and the Villain die, she or her Heirs shall have it. So if the wife take and convey away her Husbands Goods, this is no Felony in him. So if the Husband joynt purchaser be an Alien born, or attain in a premunire, or for Felony: *Co. on Litt. 112. 187. Plow. 294. F.N.B. 78. 27 H. 8. 27. 4 H. 7. 4. Perk. sect. 763. 764. 39 H. 6. 45. Exod. 213. 4 H. 7. 31. D. & St. 139. Broo. sect. 499. Co. 4. 113. 6. 53. Co. on Littl. 5. b. (b) F.N.B. 116. Stamf. pl. Corona 174. (c) 11 H. 4. 24. Hawk. (d) 5 H. 7. 31. (e) Dyer 196. Littl. sect. 293. 39 H. 6. 45. Plow. 483. Co. on Littl. 187. 40 Ass. pl. 7. Broo. Parl. 43.*

But in other cases they are considered as divers persons in Law, and so one of them may do an act to another: As first, when they do it in *aufer drais*, or as in the person of another. As if a Feoffment be made to one of them, and a Letter of Attorny to the other to give Livery, this the one of them may do to the other. So if the wife be an Executrix, she may pay or deliver a Legacy to her husband: So if she have power to sell Land by Will, she may sell it to her husband. *Perk. sect. 189. 11 H. 7. Co. super Littl. 187.* If an estate be made to the husband and wife before marriage, and after they marry, they shall have moieties between them, and one hath not all as in the cases before (see more Cases for this *Infra*) *Co. super Littl. f. 187. 355. b.*

Though by no Conveyance at the Common Law, by plain Livery or Bargain, a man could during the Coverture either in Possession, Reversion, or Remainsder, limit an Estate to his Wife; yet by *over Testament* one might, and still may, either by Custom or Statute devise his Land to his wife in Fee-simple, Fee-tail, or for term of life or years; and one may now upon the Statute of the seven and twentieth of Henry the Eighth, limit a use upon a Feoffment to, or a Covenant with others to stand seized to uses, to the use of his wife: So that now in the obliquity of Fines, Recoveries, and Uses, there is an expedite way of transporting of Inheritance between them: As a Feoffment, Fine, or Recovery may be had and suffered to the use of the Wife of the Feoffor or Conusor, and her Heirs. Also a man may make a Feoffment

See 3.

5. What acts the Husband may make to his Wife, during the Coverture, where not.

to a stranger on condition to reinfesoff the Wife of the Feoffor, and this is good by the Common-Law, 4 H 7: *Co. super Litt. fol. 112. Perk. fess. 763.*

Also he may give her any of his Goods or Chattels by his Will, for that is not to take effect untill after his death. If an other man make a Feoffment to my Wife, and a letter of Attorney to me give her seisin, I may do it, and it will be good enough. *Perk. fol. 41.*

6. What acts the Wife may do to her husband, where not.

If *Cry q. nfe* had devised that his wife should sell his Land, and made her Executrix and died, and she took another Husband, in this case she might sell the Land to her Husband. 10. H. 7. 20. *Co. super Litt. f. 112.*

But if a *Feme Covert* be seized of Land in Fee-simple, she cannot devise it to her Husband, for she is *sub potestate viri*, and can do nothing in her own right without him, for the Law will presume it done by Coertion of her Husband. *Co. super Litt. 112.*

7. How acts done to the Feme covert al. one shall enure

A *Feme Covert* cannot take by grant from the Husband: but she may, and that without any precedent assent or agreement of the Husband, be capable of, and take Lands or goods by the gift or grant of others; and therefore all Feoffments, Leases, Obligations, &c. made to her are good, and this is good, untill the Husband disagree to it by word or deed, or both. And if he do neither agree nor disagree in his life time, then is it unavoydable by any from or under him: But if he disagree to it, he makes it all voyd; but after he hath once agreed, he cannot by disagreement avoid it. And if an estate be made to the Wife, and the Husband do agree to it, yet the Wife or her Heirs after his death, may disagree to it, and avoid it. *Vide agreement. 21. H. 7. 20. Br. Cons. 3. 27 H. 8. 25. Perk. c. 43. Co. super Litt. f. 3. 1 H. 7. 16. H. 4. 17. 18 H. 6. B. 15. Ed. 4. 1.*

8. How acts done to the Husband and Wife shall enure.

If a reversion be granted to a man and a woman and their Heires, and before Attornment they two enter-marry, and then attornment is made. Or if a feoffment were made to them, and after they marry, and then livery of seisin is given to them, *secundum formam Chartae*; In both these cases they shall take entirely, and not by moyties. But if a Feoffment were made before the Statute to the use of a man and a woman and their heires, and they entermarry, and then the Statute is made; in this case they have moyties, and the Husband may alien a moytie during the *Coverture*. *Fitz. Discent. 52. Co. 4. 68. Plow. 483. Co. super Litt. fol. 187.*

If an Estate be made to a Villayn, and his Wife being free and to their Heires, and the Lord of the Villayn enter, yet if she survive her Husband, she shall have the whole. 40 *Aff. p. 7. Co. super Litt. 187.*

If one make a Lease to A. and to a Husband and Wife, *viz.* to A; for life, to the Husband in taylor, and the Wife for years, it seemes each of them hath a third part, in respect of the severality of the estates. *Co. Idem.*

If a Feoffment be made to a man and a woman sole, and their Heirs with warranty, and they intermarry, and after are impleaded, and vouch and recover in value; now of this land so recovered in value, there shall be no moyties between them, because they are not now capable of moyties. *Plow. 485.*

If I let land to a Feme sole for her life, and she taketh a Husband, and after I confirm the state of the Husband and Wife, to have and to hold for term of their two lives, in this case the Husband doth not hold joyntly with his Wife, but holdeth in right of his Wife, for the term of her life, and after for term of his own life by way of remainder, if he survive his Wife. And if it had been made of his Estate to him alone, to have and to hold the land to him and his Heirs, this had been good: And hereby he should have had the Fee-simple after the death of his wife. But if the Confirmation had been made to the Husband and Wife to have and to hold the Land to them two, and their Heires, they are Joynt-Tenants of the Fee-simple, and the Husband is seized in the right of his wife for her life, for they cannot take by Moyties during the *Coverture*, *Co. super Litt. 299. Fitz. Release. 45.*

If a Deed be made to the Husband and Wife of land, and after his death she do accept of the state, now she is bound to perform all the inherent Covenants as much as her Husband. *See Covenants 45 Ed. 3. 11. Dier. 13.*

If a man letteth land to the Husband and Wife, To have and to hold the one moytie

moitie to the Husband for the term of his life, and the other moitie to the Wife for the term of her life, and the Lessor confirm the estate of them both in the Land *Habendum* to them, and to their Heirs: by this Confirmation, as to the moitie of the Husband it enureth only to the Husband and his heirs, for the wife had nothing in that. But as to the moitie of the Wife, they are Joint-tenants, for the husband hath such an Estate of the Wifes moitie as is capable of confirmation. *Co. super Litt. 399. Fitz. Confirmation. 17.*

And if one disseise me, and after I take a Wife, and then after the Tenant doth make Feoffment of this Land to me and my wife, this shall enure to me only, and my wife shall have no benefit by it. *Dier. 10. a.*

Sett. 4.

If Lands be given to a man and his wife, *Habendum*, the one moitie to the Husband, and the other moitie to the Wife, in this case they shall take severally, and be seised of Moities as tenants in Common, *per Knightsly* (See more to this, *supra*.)

Howsoever it be so, That whatsoever the Husband had before coverture either in Goods or Lands, is absolutely his own, and the wife hath neither seisin nor property therein; yet all that was the Wives, by inter-marriage is now made the Husbands, &

non habet uxor potestatem nisi sed vir, & res licet sit propria uxoris, vir tamen ejus custas cum sit caput mulieris. But it is the Husbands, *diverso modo*. For as for all the Lands and Tenements whereof she hath any Estate in Fee-simple, Fee-tail, or for life, these he is to have during both their lives together. And some of them sometimes after

what things are given to the Husband by the marriage, and how, what not.

for his own life, by the courtesie of England. And also all the right and Titles of Entry that she hath into any Lands, are given to the Husband, so that he may enter or claim it as the woman might. Also all her Chattels real she hath in possession, and in her own right, as wardships of Tenants in *Capite*, and Knights service, estates by Statute-merchant, Statute-staple, leases for years, and the like, he shall have the

use and occupation of and power by act executed, to give, grant, or sell, surrender or forfeit it during his life: And if he survive his wife, he shall have them absolutely and not conditionally only as he hath them before. Also all her Chattels personall,

as Horses, Sheep, Near, Corn, Wool, Money, Plate, Jewels, even to her Chamber, Bracelets and Apparell more then needfull, which she hath in her own right, property and possession, are given, with the property thereof unto him by act of Law, by the intermarriage, so that he may sell, keep, or bequeath it if he dye; and if he do not

bequeath them, they shall goe to his Executors, whether he survive his wife or no, and this is to be understood not only, of that she hath at the time of the marriage, but that which shall fall to her also at any time after the marriage during the Coverture.

Also all her Choses and causes of Action for any matter before, or after the marriage are his to take, sue for, or release, when they be due at any time, during both their lives together; but if he do not dispose it, it will come to his wife again after his death: And therefore if a Legacie be given to a woman sole, and she take a Husband, untill her Husband release or receive this, if she die she may devise or dispose it;

and if he dye, it will return to her, and shall not goe to his Executors, except it be received by his appointment, for then the thing in action is become in possession.

Co. super Litt. f. 112. 300. 351. Plow. 191. 419. 21 H. 7. 29 16 Ed. 4. 8. 7 H. 6. 1. 14 H. 4. 24. 39 H. 6. 27. Co. 10. 51. Dolt. & Stu. f. 13. Co. 6. 36. Dyer 177. 251. Plow. 204. 260. 10 H. 6. 11. 11 H. 7. 19. Perk fol. 148. Huntley & Griffith, p. 38 Eliz. B. R. March. 44. pl. 69. see Chattels.

And if she have made Feoffment or condition that the Feoffee, shall pay her 100l. at a day, and before the day she marry, how in this case the Husband shall have this money; or before the day he may release the condition, and this will bind her. All her wardships of Socage Tenure, Heirs, and Tuitions, he shall have during the Coverture only. *Plow. 204. Dyer 251.*

But there is this difference between a property of personall goods, and a bare possession only: For if personall goods be bayled to a Feme sole, or if she find them, or if they come to her hands, as Executrix to a Bayliff, and taketh a Husband, this bare possession is not given to the Husband, although the action of *Detinue* must be brought against the Husband and the wife, *39 Ed. 3. 17. Co super Litt. 351.*

All the Goods and Chattels also the Wife hath in *anwer droit*, as Executrix or Admini.

Administatrix, or as Gardian in Socage, &c. the Husband shall have the disposing powerof, during the Coverture, so that during that time he may sell or give them, *Plow. 194. 192. Dyer 7.* If any Chattels personall were given to the Wife, *dam sola fuit*, and to a Stranger, and after she marry, now the Husband alone, and the Stranger are Tenants in common of this Chattell, and the Husband shall have an absolute property in the one half of them. *Plow. in Bracebridges Case.*

But none of her dignities are given to him; for though the Husband may be enriched; yet he cannot be ennobled by his Wife: and though a man may ennoble a Wife, yet a Wife cannot dignifie a Husband: But she may lose her own dignity by taking a Husband; As in the case of the Lady Anne Powes & Marie 1. *Quando mulier nobilis nupseris ignobili, desinet esse nobilis. Bro. 5 Ed. 499.*

After the death of the wife, the Husband shall have not only all the Chattels personal of his Wife which he shall have, whether he survive her or not; but also all the Chattels reall of his wife, which then he shall have absolutely to himself as his own other Chattels reall: And if they were joyntly possessed of any Chattels reall, as where a wardship or lease for years is made to them two, after her death her Husband shall have the whole. *Co. super Litt. 351. 46. Plow. 191. 192. Fitz. joinder in Actions 20.*

What things
the Husband
shall have after
the death of
his Wife.

Señ. 5.

All Chattels reall being of a mixt nature (*viz*) partly in possession, and partly in action, which happen during the Coverture he shall have, if he survive his Wife, albeit he doth not reduce them into possession during her life-time: As if the Husband be seised of a Rent Service, Charge, or Seck, in the right of his wife, & the Rent become due during the Coverture, and the wife dieth, he shall have the arrearages. So if he have an Advowson in the right of his wife, and the Church become void during the Coverture, if he survive her, he shall have the presentation. *Co. super Litt. 351. F. N. B. 121. 122. 14 H. 4. 12. Co. super Litt. 120.*

All arrearages of Rent incurred and due to the wife before or after Marriage, the Husband shall have, if he survive the wife. As if the Wife be endowed of a Rent, and she take a Husband and dye, he shall have the Rent arrear during the Coverture, and may sue for it by the Statute 32 H. 8. c. 37. If he make a lease of his wives Land, rendring Rent, and she dye, he shall have the Rent due in her life time. *Co. 451. & super Litt. 351. F. N. B. 121. 9 H. 6. 52.*

Also Cases in action recorded by him, or him and his wife in her life time by Judgement, the Husband shall have also, and as Executor or Administrator to her he may have all that she hath. *F. N. B. 121. Co. super Litt. 351.*

If a Legacie be given to a woman sole, and she take a Husband, and after she makes a Letter of Attorney to one to receive this money given by the Legacy, and then she dyeth, in this case the Husband, and if he dye, his Executor or Administrator shall have this money, and may have an action of Accompt for it against him that received it: So if the Husband had made the Letter of Attorney: but before the thing in action be turned into possession, the wife may devise, or give, or dispose it to her Husband or any other, and he cannot have it but by her legacy, or by Administration from her; but now by the receipt of it, the property doth rest in the Husband, and he, his Executor or Administrator shall have it. If the woman have a Bond, and she take a Husband who doth make a letter of Attorney to another to receive the money, and she dye, the Husband shall have it and accompt for it, *pro Popham. Ch. Inst. for the thing in action is become in possession. Huntly & Griffiths Case p. 38. Eliz. B. R.*

What not, but
the Executor
of the wife, or
some other
shall have it.

If a Feme sole be possessed of a Chattel reall, and be thereof dispossessed, and then taketh a Husband, and the wife dyeth, and the Husband surviveth, this right is not given to the Husband, but the Executor or Administrator of the wife shall have it: And so as Executor or Administrator, the Husband may have that that another may have by that meanes. *Co. super Litt. 351.*

So if the Wife have but a possibility and no interest, and dye, the Executor, and not the Husband shall have this. *Idem.*

If she had a wardship by reason of a tenure in Socage, and dye, her Husband shall not have this, but it shall go to some other; and if he dye before her, this shall survive to her, and not go to his Executor, *Plow. 293.* If

If the goods and Chattels she hath in right of another; as Executrix or Administratrix after her death, her Executor or Administrator, not her Husband must have it. *Co. super Litt.* 351. *Plow.* 294. 192.

If a woman sole granteth a term to her own use, and then taketh a Husband and dyeth, the Executor or Administrator of the Wife, not the surviving Husband shall have this trust. *Pasc.* 32 *Eliz Withams Case*, in *Cameld. Co. super Litt.* 351. See a good Case for this, in *March. Rep.* 44. *Plow.* 69.

Chattels reall consisting meerly in action, as a Writ of right of Guard, *avatore maritajij*, or forfeiture of marriage Relief whereunto the wife was enticled before the marriage, the Husband shall not have unlesse he recover it, during the Coverture: So also Chattels Personals that be in action, as debts by obligation or contract, or otherwise, before or after marriage; for he that sues for them after, must sue as Executor or Administrator to the wife, and that the Husband may be if he will, for he may give her leave to make an Executor, and she may make him her Executor, or if she die intestate, he may sue forth an Administration, which in right belongs to him. 32 H. 8. *chap.* 37.

If one give a Feme sole a Legacy to be paid presently or at a day to come, and she marry, and dye before any release or disposall by her Husband, in this case, her Executor or Administrator, not her Husband, shall have it. *per Chief Justice Mich.* 17. *Jacobi. B. R. Eliz Trin.* 38. *Eliz. Jacobi Regis, Huntleys case Accord.*

If I have the inheritance of Land, whereof there is a lease for years; and the Lessee grant his Lease to my wife, and I. S. and after she die, now I shall not have this terme, but I. S. for the terme was not drowned. But by a Feoffment or new Lease, I might in her life time have given away her interest. *Plow.* 418.

If two Femes sole be Join-tenants of a terme, and I marry one of them, and she die, now th'other Join-tenant, and not shall have the whole. But if it had been a personal chattell, *Contra*, for the Join-tenant hath the elder title. *Plow.* 418.

So if a terme be granted to my wife, and a stranger, or were granted to my wife, while she was sole, and a stranger, and she die; In this case I shall not have her moytie, but it doth survive and goe to the stranger. *Plow.* 418.

If one be bound to a Feme sole for money, in an obligation, and the day of payment happen during the Coverture, and the Husband do not release it, or sue for, and recover it, in his wifes life time, as he should, in his owne and his wifes name, or if the day of payment happen after the death of the wife, he shall not have it, but the Executor of his wife, which shee may make him by his agreement, or the Administrator of his wife, which he may be, if he will. *F. N. B.* 121. 7 H. 6. 2. 49. *Ed.* 3. 23. *Co.* 451. 39 H. 6. 27.

The wife shall have again to her selfe after the death of her Husband, all the Chattels reall, that her Husband had by her, and did not by act executed during the Coverture, dispose or alter, (And what shall be an alteration of such chattell, see in the next division) Also all such chattels reall, whereof they were joyntly possessed; As if any wardship or lease for years were granted to them two, now the wife shall have the whole, unlesse the Husband have by act executed, disposed it. *Co. super Litt.* 46: 551. *Co.* 10. 51. *Plow.* 191. *Fitz Joinder in Action.* 20.

If a man be posselt of a terme of Forty years in the right of his wife, and make a lease for twenty years reserving thereupon a Rent, and then dye, though the Executors of the Husband shall have the rent, yet the wife shall have the residue of the terme after her Husbonds death, for a disposition of part is not a disposition of the whole; but if there were a clause of Reentry for not payment, she may not Reenter by this. So if a lease be made to them Two, for years during the Coverture, and he do not dispose it in his life time by act executed, the wife shall have it all. And regularly that which her Executor or Administrator shall have after her death (*For which, see the last division*) shee shall have after her Husbonds death; as all the goods and Chattels shee hath in *Auere Droit*, not disposed by her Husband. All chattels reall consisting meerly in action. All Chattels personall also consisting meerly in action, not recovered by him in his life time: *Co. super Litt.* 46: 351. *Plow.* 294.

Also she shall have all chattels reall, that are of a mixt nature, *viz.* partly in Possession,

session, and partly in action which happen during the Coverture: As if the Husband be seised of a Rent service, Charge, or Seck in the right of his wife, and the Rent become due, during the Coverture: she shall have it and not his Executors. So if he be seised of an Advowson in right of his Wife, and the Church become void, during the Coverture, and he dye, she shall have it. 14. H. 4. 12. Co. super Litt. 33. 12.

If an estray happen within the manor of the Wife, if the Husband dye before seisure, the wife and not the Executors of the Husband, shall have it, for the property was not vested in the wife till seisure 10. H. 6. 11. 43. Ed. 3. 8.

If one be bound in an Obligation, or promise, or Statute, to a Feme sole, who after takes a Husband, or to the Wife or to the Husband and wife during the Coverture, and the Husband dye before he recover or release it; the Wife, not his Executors shall have it. R. N. B. 121. 7 H. 6. 2. 46. Ed. 3. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

If a Rent be granted to a man and woman sole for twenty one years, if the Grantor shall live so long, and after they inter-marry, and then Arrearages incur, and then the Husband dyeth, and then more Rent is behind: now the wife and not the Executor of her Husband, shall have the Arrearages before and after her Husbonds death. *Curia. B. R. Burgens case. Hill. 22. Jac. 33. H. 6. 10. 39. Ed. 3. 19. Hill. 7. Eliz. B. R.*

If a Husband be seised of Rent in the right of his wife, and the Rent incur, and the Husband dyeth, the wife and not the Executors of the Husband shall have the Arrears, *Per 3. Inst. B. R. 22. Jac. Hill, 9. H. 6. 43. 39. Ed. 3. 40.*

If a Lease be made to a Husband and Wife, for terme of their lives, the remainder to the Executors of the Survivor of them, and the Husband dye, the wife and her Executors shall have it; And this the Husband could not grant away from her, because it is but a possibility and no interest. *Hill. 7. Eliz. B. R. Co. super Litt. 46.*

If they two get a Judgement against a man for damages, and he dye, the wife shall have all the damages. 48. Ed. 3. 12.

If an obligation be made to them two, during the Coverture, and he dye, the shall have it, and not his Executors. 3 H. 6. 37.

If a Feme sole sow her Land, and after marry, and he dye before severance, the Wife, and not the Executor of the Husband shall have it. *Bro. Emblements. 26.*

If Husband and wife have a manor to them, and the Heirs of the Husband, and a Tenant by Knights service dyes, his Heire within age, and after the Husband dyes, the wife and not the Executors of the Husband shall have the wardship. So of a presentment to a Church, 1. Mar.

Paraphernalia
what.

This word *Parapherna* is used in our Law: but in the civill Law, the thing is said to be *Paraphernalia*, which by the Civilians is said to be something which the wife hath to her selfe besides her Dowry which her Husband gave her, the which she must have and not the Executors of the Husband. And of which the Wife may make a Will without the assent of her Husband, as being a thing in the free disposition of the wife. And this both by the Civill and the Common Law is all the necessary furniture and apparell of a womans body provided her by her Husband which may extend to many Garments of the same kinde, and is not to be restrained to one garment only, which is, that is sufficient to cover the body, and yet not to be extended to that which is above her degree, and therefore Jewells and Chains of Gold and Silver shall not be esteemed *Parapherna* for a Husband-mans wife: but these may be *Parapherna* for the Wife of a Nobleman. But what shall be allowed for *Parapherna* is to be decided by the Judges, and they do use to give a greater allowance where are no debts of the Husband to pay then otherwise. And *Omnia hac bona mulieris*, are said to be *Privilegiata & de paraphernis non debet maritus intramittere in visa uxoris*, neither is he to devise them at his death. And as touching these, it is out of question; that if the Husband dye, the Wife, and not the Executor nor Administrator of the Husband shall have them. And that with the consent of her Husband she may make a Testament of them and devise them. But not otherwise, as it seems by our Law, because the property and possession is in him: And yet by the Civill Law she may devise them, and make an Executor of them without the Husbonds consent. 18. Ed. 4. 11. 12. H. 7. 23. 33. H. 6. 3. 1. M. 27. 28. *Seaccar and the Lord Treasurer and other*

either five Executors of Vicounts Binden, against Vicountesse Binden, Fitz. Trec. 24. F. Executor. 19. 37. H. 8. 28. Fitz. Administ. 7, Br. Administ. 31. 33. H. 6. 31. Br. Testament 13. 18. E. 4. 11. 12, H. 7. 23. 24.

All the chattells personall the Wife had in her own right; at the time of the taking her Husband, shall not after the death of the husband go to the Wife againe, but shall go to the Executor or Administrator of the Husband, as his other goods and chattells.

Co. super. Litt. 351.

If the Husband and wife be ejected of a terme, which the Husband hath in the right of his wife, and the Husband bring an *Eiectione firme* in his owne name (as he may) and recover it, now by this the Terme is altered, and is become the Husbands own in his own right, and after his death shall go to the Executor of the Husband and not to the wife. *Plow.* 415. 37. *aff. Plow.* 11, *Co. super. Litt.* fo. 46. 6.

If the Husband grant the whole terme upon condition that the Grantee shall pay a sum of money to his Executors and the Husband dye, and the condition is broken and the Executor enter, now this is a disposition of the terme, and the Executor shall have it. *Co. super. Litt.* f. 46.

The Husband during the Coverture is liable and subject to all Suits for any causes or wrongs by the wife before the marriage or after, during the Coverture, as Debts, Covenants, slanders, trespasses, and the like. So as the Husband and the wife be both joynd in the suit, and the suit be begun, and judgement had in it during the Coverture. For if either the wife be sued alone, or they be both sued, and one of them dye, before Judgement obtained, the suit faileth. And therefore it is that upon an Indictment against the wife alone, for a trespass, Ryoe, or the like, if she be to pay fine, forfeiture, or be imprisoned, the Husband shall not be charged with it, unless it be appointed by speciall words in a Statute, but her body must suffer, and the Fine or forfeiture shall be levied of her, if she survive her Husband, for a Husband shall never be charged, for the act or default of his wife, but when he is made party to the action and Judgement is given against him and his wife; but if the suit be by information upon a Penal Law against Husband and wife, there he may be charged, *Co.* 11. 61. *F. N. B.* 83. 151. *Kelw.* 61. *Co.* 8. 148. *old Libred Entries* f. 6. *Co.* 11. 61. 9. 72.

But regularly he shall not be charged with any contract made by his wife during the Coverture, (yet *vide Ascens* exceptions, & *plus infra*.)

If the Husband have a Lease in the right of his wife, Rendering rent, and the Rent behind, during the Coverture, and she dye, in this case, she may be sued for this rent, after her death, also as Executor to his wife, if he suffer her to make a Will, and make him Executor, and he prove it; here he may be charged, where otherwise he would not be. *Kelw.* 61. 10. *H.* 6. 11. *Bro. consultation* 5.

If she (being sole) had held land by wrong, and after marry, and the husband continue the occupation, now for this continuance of the wrong, he may be charged, after her death, and both of them together in her life, might have been charged for her occupation before the marriage. *Plow.* 192. *F. N. B.* 120. *Kelw.* 60.

If the wife hold Land for which by custom a Harriot (i) the best goods of the tenant ought to be paid, and she dye, the best goods of the Husband shall not answer it, without there be a speciall custom for it. *Curia M. S. Car. B. R. Chanores Kings case.*

If the Husband give the wife power to contract for him, and she make a contract and dye, the Husband may be charged for this contract after her death, and without such power, he may be charged for her necessary apperrell, or for the goods shee bought that came to the use of the Husband, and he agreed to it afterwards. *F. N. B.* 100. *G. Fitz.* 41. 160. 163.

But the Husband shall not be sued for any debt she did owe before the marriage after her death; unless judgement were had in her life time, and after marriage she could not contract but by his appointment. *Fitz.* 119. *Rich.* 27. 137.

The Husband alone may make a lease of any of the Lands he hath in the right of his wife, during both their lives, without her consent and agree ment. *Experiencia.*

If an estate in Fee-simple, Fee-tail, or for terme of life, be made to a Husband and wife, or to the husband and wife, the husband alone may disagree to it, and avoid it, for both. *Litt.* 367. 1. *H.* 7. 16. *Co.* 8. 72. *Dick.* 51. 5. *H.* 7. 31.

As a a a

12. What not but the Executor of the Husband shall have them.

Sec. 9. 13. Where the Husband shall be charged for the debt or duty of the wife intrespas, or other thing done by his wife, where not.

During the Coverture. After the death of the wife.

3. 11. 2.

14. Where and in what cases the act or neglect of the husband alone during the coverture shall or shall not bind the wife and others, & the power of the Husband, if alone.

If lands be given to them two, and the heires of their two bodies, the husband alone may levy a Fine and bar their issues, and her also, if she do not make her claime or entry, within five years after the death of her husband. 23 H. 8. 28.

If a woman have an estate for her life; as tenant in Dower or otherwise, and her husband alone, or he and his wife do by Deed, surrender it to him, in reversion, this is good during the Coverture, but if she survive, or there be a divorce, *Causa precontractum*, the wife may enter and defeat the surrender, though he to whom it was made be dead, and his heire be in by descent; But if the husband and wife surrender by fine, this is good and will binde the wife. *Perk. fo. 117.*

And generally all things done by the husband voluntarily, and out of Court, which he and his Wife are compellable to do, shall be deemed both their acts, and good; As if he being seised in his wives, or joynly with his Wife, assign dower to another woman, grant a rent for equality of partition, or make an Attornment, this shall bind her, though it be done by him alone.

If a feme sole make a Feoffment in fee, or condition to pay ten pound to the Wife at Easter next, and before the day she take a husband, the husband may release this condition, and bar her for ever. *Perk. fol. 764.*

A man may make any waste, or spoyl, pull down the houses, or cut down the timber of all those Lands that are his Wives Inheritance that he holdeth in her right, and her heirs have no remedy, for the husband hath the fee-simple of the Land in her right. 32 Ed. 2. 26.

If a Feoffment or other estate be made to a Feme sole on condition, and after she take a husband who doth not perform, or break the condition, and so forfeit the estate, the wife is barred and bound by this: So likewise upon a condition in law, as if the husband doth commit waste in his wives land (See *Infants*) 20 H. 6. 28 Ca 8. qd.

If a feme sole have a Right or Title of Entry into lands, and after the same accrued, she take a husband, and he suffer a dying seysed, this doth bar her of her entry. *Litt. Sess. 404.*

If a man have a right or title of entry into Lands, and after marry a wife, and do not enter during the Spousals, that the husband may have an entry in fait or in Law, now by this neglect of the husband, the wife is barred of her dower. *Perk. Sess. 366. 367. 370. Co. 246. super Litt.*

If a lease be made of two acres for life, the remainder of one acre to a feme sole, and she take a husband, and the tenant for life dye, and the husband doth make election of one acre, now this election shall bar and bind her, and she shall not choose again. *Perk. Sess. 79.*

If they two levy a fine of her Land, and the husband alone declare and limit the uses, this is good, and will bind the wife, if her disagreement thereunto be not proved. *Co. 2. 157.*

Sess. 8.

If a Co-partner be married, and for equality of partition the husband and wife grant a Rent to the others out of the part of the feme Covert, this being equall, shall bind the feme Covert for ever, and neither she nor her heirs shall avoid it. 29. Aff. 23. 17 Ed. 3. 10.

If he be attainted of felony, he doth hereby forfeit the profits of her freehold land during the Coverture, *Co. super Litt. 351.*

If the husband and wife be Joyn-tenants, and he be in debt to the King, the King will have this Land in execution. (See more in *Dower & Discontinuance*) *Plow. 321.*

If he give or grant away any of her Chattels reall, by act executed, this will bind and bar the wife: And therefore if a man be posselt of a term in the right of his wife, if he in the Reversion confirm the State of the husband and his Wife, to have and to hold the land for term of their two lives, by this confirmation her lease for years is gone and drowned. *Co. ut supra Plow. 199. Litt. 526. Co. 9. 129. 10. 47. D. 264.*

If the wife have any future interest, or interest *termini*, the husband alone during the coverture may by Release bar her of it. *Co. 10. 47.*

If she have any goods or chattels as Executrix, and the husband sell and dispose it by act executed; this will bar and bind her: Also he may during the coverture release any debt, confesse any action, or do any thing as Executor may do, and it shall bind her. *Bro. grants 157. Keln. 122. 24. H. 7. 24: Co. 5. 27. Keln. 163.* If

If an Obligation be made to her during the Coverture, the Husband by his disagreement may avoid it. 48 Ed 3. 12. 7 H. 6. 1.

If a Statute or Obligation be made to them two, or to her alone, during the Coverture, and the husband alone make a defeasance, or release it, this will bar the wife. *Plow. 260. b. Co. super Litt. 351.*

If she have cause of action for debt, duty, battery, slander, trespass, or the like, the husband alone may release it during the Coverture, and bar his wife. *Kelw. 92. 20 H. 7. 3.*

If the Husband be outlawed or attainted, hereby the chattells reall of the Wife are forfeited, for this is a gift in law. *Plow. 260. b. Co. super Litt. 351.*

Upon an Execution against the Husband for his debt, the Sheriff may take and sell a term the husband hath in right of his Wife during her life. 26. 27 Eliz. *Amner & Loddington Adjudge en amiales Court. Co. super Litt. f. 351.*

The husband alone may make an Attorney for him and his Wife, or cast a protection, and she cannot disavow or avoid it. 33 H. 6. 43. 35. H. 6. 3.

If the husband do attorn voluntarily in case where by the Law he might have been compelled to it, this will bind the Wife. *Co. 9. 85.*

If a Feme sole, an Executrix take a husband, and he put himself in arbitrement for the debt of the Testator, and an award is made, and he die, now the wife cannot avoid it. 20 H. 7. 29.

If the husband forfeit Issues and dye, those Issues shall be levied of the Land of the Wife. *Dodd. & Sta. 38. 12. H. 7. 2.*

If the husband claim fee in a *Quid juris clamat*, or disclaim an Avowry, so that the Lord recover, the Wife is without remedy. *Per Martin. 9 H. 6. 52.*

If a lease be made to husband and wife for life, and the husband commit waste, and dye, now if she continue the possession, she shall be subject to an action for this; but *contra*, if she wave the possession. 21 H. 6. 24.

If the man that is Copy-holder in the right of his Wife do alien without licence, or otherwise commit a forfeiture, the estate is forfeit. So if the Wife be tenant for life, and her husband make a Feoffment. *Per. Inst. Dodd. Trin. 31. 7. 40.*

The husband alone cannot by Fine, Recovery, or otherwise dispose his wives land for longer time then for their two lives together, unless it be in some speciall cases, as upon the Statute of 32 H. 8. (which see in Leases) or the like.

Where, and in what case not

And if he doe alien or grant it for longer time, she may be relieved by a *Cui in vita* (which see *infra*) or the other heir may enter by the Stat. 32 H. 8. cap. 28. And although the money given for the Land that is sold be paid to her, yet this doth not help the matter at all. 17 Ed. 4. 14. See discontinuance.

If a Joynt estate be made in Fee-simple, or for life to the husband and wife, the husband alone during his wives life, cannot by Judgment surrender, or otherwise sever this joynture, or dispose any part of this Land longer then for their joint lives; but if it had been made before the marriage, *Contra*, 19 H. 6. 45. *Dier. 9.*

If the husband doe commit waste in the freehold of his wife, and die before the writ brought; now neither the wife nor the land shall be hurt by it, but after his death they be discharged. 2 H. 4. 3. 29. *Affs. 47. Dodd. & Sta. f. 29.*

Stat. 9.

If the husband and wife in the right of the wife have any right to enter into lands accrued to them during the Coverture, and the husband suffer a descent, and dying seised, this shall not hurt the wife, but after her husbands death shee may enter. *Litt. 433.*

If the husband levie a Fine, or make a feoffment of the Land he hath in the right of his wife, this will not prejudice her after his death, if she avoid it in time; but if it be by fine, she must enter or claim within five years after his death, or she may be barred. 30 Ed. 3. 19. 19. *Affs. 43. 7. 40. Fines; Co. 8. 72.*

If the husband be seised of a Reversion in the right of his wife, and he grant it away, and the tenant attorn, yet this will not bar the wife. 19 H. 6. 4.

If a Lease be made to husband and wife of land, which are chargeable with damages, or more Rent then it is worth, if she after his death refuse the occupation

of the land, it seems she shall not be charged with damages of Rent. *Dell. & Str. f. 120.*

If the husband and wife levy a fine of the land of the wife, and he declare uses alone, and she disagee to it, and make it appear, by declaring other uses, or the like: now in this case the Declaration of the husband, will not bar nor bind the wife. *Co. 2. 57.*

If the husband discontinue his wives land, and goe beyond Sea, and she discontinue letteth it to the wife for life, and giveth her livery, now hereby she is remitted, and the husband by his disagreement afterward cannot avoid it. *Lit. Sect. 677.*

If he be attainted of felony, this doth not forfeit any freehold estate of his wives, but the profits only during the Coverture, and no longer, for the state remaineth still in the wife. *Co. super Litt. 35.*

If a lease be made to a husband and wife for life, and the husband alien the land in fee, or in taylor, now the lessor may enter for a forfeiture; but if the wife survive, she may recover it by a *Cui in vita*. *11. Aff. p. 11. 43. Aff. p. 11. Bro. Cui in vita. 9. 10.*

If he that is an Accomptant to the King by reason of the receipt of the Kings money purchase Land after to him and his wife in fee, in taylor, or for their lives, and after the Husband die, in this case it seems the wife shall not answer for this debt with this Land. But if he were debtor to the King before the purchase, *Contra. F. N. B. 150. 217. Dir. 225. Crompr. Jur. 10. 2. b. 110. b. 111.*

If a woman have Land by descent or purchase, solely, or with another, and her Husband alien it to a stranger, this bindeth her and her Husband while he lives, and by the Common Law she might not have entered after his death, but must have had her *Cui in vita*. But now by 32 H. 8: It was provided that no fine, or other act of the Husband only, of any land that is the Inheritance or freehold of the wife, shall be any discontinuance or hurt to the wife or her heirs, &c. after her Husbands death, but that she or they may enter notwithstanding, if she will. *Stat. 32 H. 8. 28 Co. 2. 72.*

If the Husband by his last will devise a term he hath in the right of his wife, this will not hurt her, for this devise is void. *Co. super Litt. 35. 1 Plow. 418.*

If the Husband grant a rent out of Land he hath an estate of for years in her right, and after dies, this will not hurt her, for this will not bind the wife. *Dir. 6. Ca. 127. 7 H. 6. f. 2 Plow. 418.*

If a lease be made to Husband and wife for years, the remainder to the survivor of them for one and twenty years, the husband alone cannot dispose of this remainder to his wife. So if a lease were made to them for lives, with such a Remainder for years, the husband cannot grant it away. *Co. 10. 31.*

If an Underpaction be suffered by the Husband in the Advowson that the wife hath by descent, this shall not prejudice the wife but she may after her husbands death have a *Quare Impedit*, or *Wassise*, or *Warrens possession* for the presentment. But if she have it by purchase, *contra*, for there plenary is a bar to her if it be six months; the Husband cannot touch by Essoyn, if the wife by covin of the Plaintiff shall appear. *Co. 6. 30. 26.*

If a woman Lessee for life take a Husband, and being impleaded, they pray in aid of a stranger, and the husband die, now this shall not hurt the wife, for be in reversion cannot enter. *Stat. 4. 24.*

If the husband and wife demise his wives Land by Indenture according to the Statute of 30 H. 8: rendering soul rent, and after the Husband release all his right except 12 d. &c. Or grant that the lessee shall hold it dispossessible of waste, and then die, now she is not bound by them, and though she accept the 12 d. yet she may have the rent, or bring an action of waste. See more, Remitter, Acceptance, warranty, Lease, Fine. *Dir. 104.*

If a man devise that his Executor shall sell his Lands and make a feme Covert his Executor, in this case she may sell this land without her Husband; for she and her Husband may sell it together. So if a man devise land to a woman to dispose thereof at her will and pleasure, and to give it to one of her Children, she alone may make a feoffment to any of her Children during Coverture, for she is sole but as Instrument.

Stat. 10: 35. Where and in what case the act of the wife alone during the coverture, shall bind, where not, and the power of a feme Covert.

Instrument. See *Kelw. fol. 10. Trin. 2 Carol. Upl. & Daniels case, B. R. Maria.*
 If a man made his Wife his Executrix, and devised that she should sell his Lands, and the woman took a second Husband, and then sold the Land to him, and this was resolved to be good: So if a Feoffment be made to a Feme Covert on condition that she shall reinfcoff, and she alone reinfcoff, this is good, and neither the Husband in his life, nor the wife after his death may avoid it. *Plow. 4. 14. 34 Ed. 3. Cui in vita. 19.*

If Lands are given to a woman on condition to sell it, and distribute the money for the Feoffees soule, and she take Husband, and they two sell and do distribute, now this is good, and there is no remedy for the woman after his death in Law nor Conscience. 10 H. 7. 20 *Womans Lawyer, fol. 124.*

If she alone doth levy a Fine of her own Land, it will be good and bar her self and all others; if her Husband do not avoid it in his life time. Co. 10. 43. 32 H. 6. 31: *Crump's case, 100.*

If she be attainted of Felony before any issue had by her Husband, the Lord by Elector may enter presently, and put out the Husband; but after her Husband hath Issue by her, *Contra. 4. Aff. 9. 41. 4 Edw. 3. Fitz. Aff. 166 Co. super Litt. 669.*

If she be an Executrix or Administratrix, she alone may receive Debts due to, or pay Debts or Legacies due from the Testator, so it be done duly, and not in prejudice of her husband; and the residue she may give for Gods sake, maugre the death of her husband; but if she deliver any goods before Debts payd, her husband may have an action of Trespass against the taker. But Quere for Legacies, for *M. 19 Jac. Ca. 2. Inter Wills & Goldborow*, It was held that a Feme Covert cannot deliver or assent to a Legacy without her husband. Co. 5. 27. 2. H. 7. 15. 18. H. 6. *Park. f. 3.*

A Feme Covert may by the Licence precedent, or agreement subsequent of her husband make a will, and make him Executor also, if she will, And by this means the debt due to her, and damages for goods taken away, or other wrongs done, *Dans filia suis*, may be recovered by him: Also she may make either a stranger, or her husband, her Executor, as to all such duties as were due to her before marriage, which were due to her in Action and not in possession; As if when she were sole, she had made a Lease for her life rendring Rent, and the Rent is in arreare, and she marieth, or she being Executrix and had many debts owing her or otherwife. And if she make a will without his leave, and make J. S. her Executor, and her husband do by word agree to it afterwards, or after J. S. have proved the will, do deliver him the goods, she devised, this makes it a good will, *Bro. Testament 10. 13. H. 7. 32. Womans Lawyer f. 134. Park. fol. 97.*

A wife alone may contract for her own necessary wearing Apparell, and the husband must performe it, unless it be in case where he have before forbidden the seller to deal with her, or let her have any: Also if the wife buy unnecessary Apparell, and the husband do after agree to it, this will bind him. 11 H. 6. 38. *Dyer 134. Trin. 14. Jac. Banes & William Child case.*

If she alone buy any thing that comes to the use of the husband, though she had no special authority for it before, if the Husband after he do heare of it, do agree to it, this will bind him. And so it seems of any thing else, for she may give, sell or charge any other husbands goods or chattels by his consent; and if she have done it without, yet if he do afterwards agree to it, this makes the contract good, whether it be to his advantage or not; but his consent will not make a Feoffment made by her of her own Land good. *Olden B. 62. Dyer. 234. Fitz. Deb. 130. 163. 11 H. 6. f. 38. 17 M. 8. 24.*

If the wife doe use to sell the husbands goods, and he doth allow of it, and affirm it, her sale will be good, especially if it be such things as are fit for her to sell, as Butter, Cheese, Eggs or Calves, &c. she in such case may give licence to the buyer to fetch the Calf out of the lease, and this licence may be good, *God. Aff. 1854.* A Feme Covert may be a Dissenser without assent of her husband, and she shall be charged with damages in an Affise. Some hold that she alone may sue in the spirituall Court with defamation, and that the husband cannot release it, nor that any prohibition lyeth against her. *Sarah Edwards case. 7. Jac. B. R.*

Contracte

A Feme Covert may take an *Assumption* from any man, for her husband, she may take an *Obligation* or *Feesiment* in her own name, and it will be good, until he disagree to it: If the husband and the wife wage their law, &c. and have day given, and the wife do not appear at the day, he shall be condemned.

A Feme Covert alone can do nothing during the Coverture, with any her lands, goods or chattels, she hath in her own right without her husband, for that she is *Sub potestate viri et omnia quae sunt uxoris, sunt ipsius viri, & res licet sit propria uxoris, vir tamen ejus custodit eam, sit caput mulieris, & non habet Uxor potestatem sui, sed viri*; Therefore all *Feesiments*, *Deed*, *Gifts*, and *Grants*, by her alone, are void, although she say in the *Deed* she is sole, and not married, and although they be executed by livery of seisin, or attornment, And although the Husband know of it. *Benet lib. 2. cap. 13. Co. super Litt. 112. 14 H. 4. 29. per chap. 41.*

A *Devise* by her of her Land by Will is void. If a *Feesiment* be made to her, she shall take nothing until he agree to it, and a bare *Verball* agreement of the Husband will avoid it. And if the husband be vagrant, have not been in the Country a great while, and she know not whether he be dead or alive, and she Rectoring that she is sole, grant a rent charge out of her Land, yet this is void, and if the Grant enter and distrain for the Rent, the Husband may have an action of *Trespas* against him, *Dyer 354 & 34. H. 8. cap. 5. 1 H. 7. 16. Perk. fo. 2.*

She cannot give or sell his goods or chattels by contract or bargain without his authority generall or speciall precedent. And if she do, it is void, neither can she give them by Will, without his agreement: precedent or subsequent. *Dyer 234.*

If she enter into any Bond, Statute, or Recognizance alone without her husband, they are void and will not binde him, she alone cannot release any debt due to her, as Executor or otherwise. *Co. 10. 43. Kelw. 10. 16. H. 7. 5. 1 H. 3. 12. 1 H. 7. 13. Co. 3. 27. Kelw. 12. 21.*

If she buy or make any contract for goods, and to pay money, without his authority, this will not binde him, albeit the things bought do come to the use of his house, unless he doe afterwards agree to it. *Dyer 234. 21 H. 7. 40. 11 H. 6. 38. F. N. B. 62.*

If the contract for apparrel, more then is needfull, and that is superfluous, the husband shall not be charged with it, nor bound by it. *11 H. 6. 38.*

If money be paid to me upon Bill, or Bond, or Rent on a lease, and it be paid to my wife, and she accept it, this will not prejudice me if I after disagree to it. But if I once agree, the payment is good. And until I do disagree, the Law doth conclude, I do agree and allow of it, and although it be a Rent that was hers before the marriage, yet it is all one. *Adjudge Sir Paul Tracy's case in 19. Jaco. B. R.*

She cannot sue, nor be sued, without him, nor plead any other Plea then he doth in a suit; unless it be in some speciall case where he is dead in Law. *33. H. 6. 31. 2 H. 7. 13. Eni in vita. 3. 1. H. 4.*

She cannot be Executor without her husbands agreement, nor being so made, do any Act that might be a *disavow* of the goods without him. *Co. 3. 27. 33 H. 6. 43.*

She shall never be received to disavow the suit of the husband and her self. *39. Aff. See Infant, Abilitie.*

The husband and wife may joyn together, and by Fine or common Recovery (where she is excluded) make a good assurance of any Land she hath any free-hold Estate in, and barr her of her Title and right of Dower or Jointure into her present husbands Land, and so by a recovery suffered by husband and wife, in Lands, she may pass her Land. But they cannot do it by *Deed* indented (no although after it be enrolled) *Feesiment*, nor the like, unless it be by speciall custome. And where she doth joyn with him to levie a fine or suffer a recovery; she is to be examined by him that taketh the Comfiance of the fine or the Recovery, *Stat. 18. Ed. 1.* But if they be both within age at the time of the levying of the Fine, they may at their full age avoid it by Writ of Error. *Worseys Case, B. R. 19. Eliz. Deff. & su. fo. 175. Co. 10. 43. Kelw. Br. 101. Plow. 515. Stat. 34. H. 8. cap. 22. Crumps. sur. 100. b.* If a partition or exchange be made by *Deed* of her Land, between the Husband and wife, and another, and she agree to it after her husbands death, this is good and will bind her. *20. H. 7. 8. Co. super Litt. fo. 171.*

The

Self. 12.
Where and
what acts they
both may do
during this
Coverture, and
the power of
the husband
and wife to-
gether, and
where not.

The husband and wife together, may make a Lease of the wifes Land, rendering a rent and if she after his death accept the Rent, by this the Lease is affirmed; and the wife cannot avoid it (See Acceptances)

They may by themselves or by Attorney make a Lease of her Land to try a title, and such a Lease is good without question. *per Just. Jones Summer Assizes at Glam. 9 Cap.*

If they two be seised of any estate of Inheritance in Fee-simple or Fee-taile, Jointly before the Coverture or after, or if the Husband be seised of any such estate in the right of his wife, they two may make Leases for three lives or twenty one yeares to binde their issues, or heirs by the 32 H. 8 cap. 8. and this may be without Fine or recovery by a Deed in the Country (See Leases) Co. 506. 6. 37. *Co super. Litt. f. 44.* If the Husband have a Coppy-hold estate in fee, or for life within a manor in the right of his Wife, they two may make a good surrender of it, and so sell it. But it seems in the case the wife must be Excluded in the Court there before her surrender be taken. Co. 4. 23. 6 *Dier. 344 Reynolds case M. 7. Jac. B. R.*

She may with his consent devise her goods, by his authority, make contracts, *vide supra Dier. 334 Co. 632. 20 H. 6. 23. 21 H. 7. 40.*

Whatsoever act she being sole might have avoided by her Infancy, she and her Husband both may avoid by entrie or action after marriage, if they take the time. *Litt. Sect.*

But though her husband joyn with her, they cannot grant that which is not grantable. As if the wife have the wardship of an Infant and of his Lands, by reason of a Tenure in Socage, and she and her husband grant it, this is void. *Plow. 293.*

And though her husband joyn with her, or give his consent, yet she cannot devise her land by will. *Dyer 344.*

If the husband and wife both joyn in a Statute Recognizance, this will not bind the Wife nor her Land. *Kelw. 10.*

All acts done by a *Feme sole*, that be countermandable, done to the disadvantage of her husband, if they be not executed before the marriage, are countermanded by the marriage, whereof see *Countermand. See Fines Numb. 6: 8. Grant Numb. 2. 3.*

But such acts as are done by, or to her, that are or may be for her advantage, are not countermanded by the marriage: So also such acts as are not countermandable: As if the Conusance of a Fine be by her whiles she is sole, and she marry before the recording and finishing of it, yet the Fine may go on: So if a *Feme sole* deliver a Deed as in Ekrow to take effect as her Deed, after certain conditions performed, and before they be performed she marry, yet the conditions may be performed, and the Deed take effect according to the intent and agreement. *Dyer 246.*

If a *Feme sole* and another have a lease for yeares in Joynttenancy, and she take a husband, yet the Joynttenancy doth continue and is not determined.

If a lease at will be made to a *Feme sole*, and she take a husband, this lease is not determined. *Plow 418: Kelw. 61. See Countermand*

In some cases, & for some causes the husband and wife must joyn in the Suit: As if any wrong be done to the person, name, or lands of the Wife, before, or during the Coverture, or if the Suit be upon any Covenant on a lease made by the husband and Wife of the Wives Lands, where the Covenant is made to them both: or if the Suit be for any Inheritance, as Lands, Commons, Advowsons, or the like, that do belong to the Wife. 9. *Ed. 4. 52. Dyer 805. 40 Ed. 3. 3. 21 H. 6. 30. Co. 5. 16. 97. 39.*

If an action of Debt upon arrearages of accompt (where one was receiver to her whiles she was sole) they must both joyn, and that though the Auditors were assigned during the Coverture in a writ of *Detinuit* of Charters of the inheritance of the Wife, they must joyn.

If one have a term in the right of his Wife (and be outed of it) it seems they both must joyn in an *Ejectione Firme*. But *quare*, 47 *Ed. 3. 12. Plow. 418. 16 Ed. 4. 18.*

If husband and wife make a lease for yeares of the Wives Land, they must joyn in an action of Wast, else it is not good. 7 *H. 4. 15. 3 H. 6. 33.*

In trespass, if the Plaintiff recover against the husband and wife by false verdict, they must both joyn in the attainr. But in some cases the husband must sue alone, and

17 Where and what acts make a countermand by the intermarriage, and where and what not.

Sect. 19.
18 Where and what actions shall be sued and maintained by husband and wife jointly, and what the husband shall have alone or jointly with his wife at his election, where, and what not.

not joyn his wife with him : As if goods be delivered by them both, the husband alone must bring the *Devinne* : Or if an *Assumpsit* were made to the wife to pay to the husband money, the husband alone must sue for it : If he sell any of his Wives land for money, he alone must sue for the money, or for any goods or chattels that were hers, he alone must bring the *Replevin*. But if the goods were his Wives as Executrix to another, there he may joyn her with him in the Suit : So likewise if the goods were taken from her, *dum sola fuit*. 46 Ed. 3. 20. 27 H. 8. 24. 8 Ed. 4. 48 Ed. 3. 18. *Fitz. Reception* 37. *Ass.* 11.

If he have execution of a Statute made to his Wife, or she had execution before the Marriage, and he is afterwards ousted, he alone may sue for it. 37 *Ass.* p. 11.

If he sue for money promised him in marriage, he alone may sue for it : But he must be advised whether at the Common-law, or in the Spirituall Court : for which, see *Action sur le Case and Prohibition*, and these cases. 23. *Ass. Pl.* 70. 45 Ed. 3. 44. 14 Ed. 4. 32. 17 Ed. 4. 5. 19 Ed. 4. 10. *English Lawyer* 197.

If a lease for years be made, or wardship granted to a husband and wife, and they be disturbed, the husband, as it seems, may sue alone, or he may joyn his wife with him, *Fitz. Joinder in Action* 20. If the wife have a turn to present to a Church and the husband is let, he alone may sue for this, 50 Ed. 3. 13.

In trespass upon the Statute, 5 *Rich.* 2. the husband alone may sue, and so likewise for taking away Charters that do concern the inheritance : So if he alone deliver such Charters.

And in some cases the husband may sue alone, or may joyn his wife with him at his election : As where an obligation is made to them two during the Coverture : So if an accompt were made to her as her receiver when she was sole : So if they two make a lease of their Land, and the Lessee make Waste : So in all actions of the nature of Trespass for wrong done before or after the Coverture on the wives Land wherein Damages only are to be recovered, and he alone may release it : As where a Reversion is granted to a husband and wife, and the Lessee break her Covenant : So if she have a Rent charge arrear before the Marriage : So if he have a Lease for life in her right, and he make a lease for years, and the Lessee do Waste, and the husband have cause to bring an action of the Case : So if an Assize have passed against him and his wife, yet he alone may have the writ of *Champerty* : So if a man bring a writ of Ravishment of Goods upon a possession *jure uxoris*, he may bring it in his own name : If the husband be lord in the right of his wife, of a Mannor, and they have cause to bring a writ of *Rescous*, he alone, or both of them may sue : And alwaies where the action may survive the Wife, she may joyn in the Writ : And generally where the husbands release is good, and will barr the Wife, or that which is in demand, or to be recovered, cometh meerly and only to the husband, there he may sue in his own name if he will, as where he sueth one for chasing in a free Chase, which he holds in the right of his Wife, or for Strays taken of Lands holden in the right of his wife, or for breaking of a house, and carrying away the timber of a house, or eating the Grass, &c. which is his wives inheritance : So in such like cases where damages is only to be recovered. H. 6. 37. 16 Ed. 4. 83. H. 6. 53. 43 Ed. 3. 3. 8. 26. 21 H. 6. 30. 7 H. 7. 2. 46 Ed. 3. 3. 8 H. 4. 21. *March.* 47. pl. 75. 212. 249.

Sec. 14.
19 Where and what actions ought to be sued jointly against the husband and wife, for a thing done by them during, or before the coverture.

In some cases where there is cause of action that doth concern a *Feme Covert*, the Suit must be brought against the husband and the Wife, for in no case can the Wife be sued in any action without the husband, and in some cases the husband cannot be sued without the Wife, as where the suit is for the recovery of any Land whereof the Wife hath any estate of freehold : So if one deliver goods to a *Feme sole* who doth after marry, the husband and Wife must be both sued. If the husband do commit Waste in the Land he hath in the right of his Wife, the suit must be against them both : So if a man have cause to have an action of the Case against a man that hath land in the right of his Wife, for not reparations, whereby his Land was drowned it must be against them both : So if a Lease be made to a husband and Wife for years, rendring Rent, *Devinne* for the Rent, or *Wast* must be brought against them both. 39 Ed. 5. 17. Co. 5. 11. 62. 5. 52. 1 H. 4. 31. 3 H. 4. 1.

If a Feme-covert finde goods, and convert them to her own use, it seems the action must be brought against them, and not against the husband onely, if she slander another, or beat him, or do any Trespas, or otherwise, to him or his, the Action must be conceived against them both. *Dyer* 355. 9 *Ed.* 4. 2. 4. *M.* 31. 32 *Eliz.* Co. 11. 61. b.

But in some cases the husband must be sued alone, as if they two make an Obligation, during the Coverture, he alone must be sued upon it. *Co. super Littl.*

If one be Guarden in Chivalry, in the right of his wife, and a woman have cause to demand Dower out of the Land, he must sue the husband onely; so if the Wardship were granted to the husband and wife; so if a Rent be granted out of the Land a man holds in the right of his wife, to another for his life, and it be arrear, and he dies; here the Action of Debt shall be brought against the husband alone. So if a wife be Guarden in Socage of the Lands of an Infant, and take a husband, for the time before the Marriage, they must be joyned, but for the time after the Marriage, will lie against him alone. *Fitz. Debt.* 180. *Briss. Aff.* 561. *Briss.* 847. 930.

But an Action of Trover and Conversion of the Trover of the wife, it seems may be brought against the husband and wife, or the husband alone, *Drapers case, Mich. 1 Jac. B. R.*

If one have a Ward in the right of his wife, and a woman have cause to bring her Writ of Dower, she must have it against the husband onely; but if a Writ of Wardship be brought to recover a Ward, it shall be brought against them both, because of Voucher. 46 *Ed.* 3. 20.

And where the Action is brought against the husband and wife, she must be named Wife in the Writ: But in no case may the wife be sued alone, while the husband is living, and known to be so, unless it be in some rare case, whereof the husband for some offence is banished, &c. 42 *Ed.* 3. 23.

It is a Writ lying where Lands are given by a woman to a man, on condition he shall take the woman to wife by a day, and before that day he doth disable himself, or at the day he doth not take her accordingly, then the Dower may have this Writ to recover the Land again. But this is now out of use. 1 *H.* 4. 2 *H.* 4. 7. 18 *Ed.* 4. 4. *F. N. B.* 105. *Co.* 2. 15.

It is a Writ that lieth where a man is seised of Lands in Fee-simple, Fee-tail, or for term of his life in the right of his wife, and doth alien the same, and dieth: Then the wife shall have this Writ to recover the Land so aliened. And if she die before it be recovered, her heir may have a *sur cui in vita*. *Exp. Terms of the Law* p. 85.

A Feme-covert may commit a Felony, and be principal or accessory, as another may, as if she kill a man, or steal goods, or receive stolen goods without her husbands privity; and if she do so, she must answer it her self, for her husband shall suffer no Corporal punishment for her: But if a Feme-covert steal any thing by the commandment of her husband, or together with her husband she shall be quit, for it is no Felony in her. *Contr.* if she hold a man while her husband kill him, and if she receive Goods of her husbands stealing, though she know it, she is not accessary, for she is not bound to discover her husband. 15 *Ed.* 4. 1. 29 *Aff.* pl. 40. *Stamf.* 1. 1. 101.

Any act that is high Treason in an other, shall be so in her; and for this offence she is to be burned: So also for Petri. Treason for the killing of her husband, *Dym* 332.

If a woman do commit any misdemeanor, as Ryot, Battery, &c. for which she may be indited, and Judgment thereupon must be against her alone, therein she must answer without her husband, and the Fine put upon her, shall not be levied upon her husbands goods in those cases, but her body must answer it, and the King must stay for his Fine until she be sole: But in cases where for any misdemeanor made by any Statute, it is otherwise provided. *Capit.* 61. b.

It is the separation of two married persons before coupled together, by sentence of a Judge, for it is impossible that after persons are lawfully married, they may by any agreement between themselves divide and separate themselves again. *Nov. Titul. of Law, Womens Lawyer* f. 64.

And this is sometimes, *A vinculo matrimonii* (i. e.) which doth dissolve and make nullity of the marriage from the beginning, and this is when the Divorce is by reason of some essential Impediment as *Causa precontractus, causa metus, causa frigidiarum*

20. What nor, but against the Husband alone, and what the one way or the other at the Election of the party who sueth them.

21. Where one of them shall answer without the other, *Sur* 44 *Ed.* 3. 1. 34 *H.* 6. 19. 36 *H.* 6. 1. 43 *Ed.* 3. 18. 41 *Ed.* 3. 24. 16 *Aff.* pl. 1. 3 *H.* 6. 9. 9 *Ed.* 4. 23. 9 *H.* 6. 8. 8 *H.* 4. 6. 21 *H.* 4. 1. *Causa Matrimonii* prolocuti.

Cul in vita.

22. How Criminal Matters done by them jointly or severally, shall be construed, and how they shall be punished for them.

St. H. 15.

23. Divorce

vel impotentia, causa affinitatis vel consanguinitatis, and this Divorce that is of this kinde, which is perpetual, makes such a nullity of the Marriage *ab initio*, that he may take any other wife, or she another husband, that all the children had between them, during this marriage, are reputed Bastards, the wife shall have no Dower, the husband shall not be Tenant by the Courtesie, they may sue one another. 31 H.8. 11.

38. Co. 7. 43. 9. 141. Dyer 147. Rrw. 164. Co. super Littl. 235.

The other kinde of Divorce is *a mensa & toro*; and this is when the Divorce is *Causa adulterii*, or *Causa professionis*, which is onely till reconciliation be had, and doth not dissolve the Marriage, nor produce any of the effects aforesaid, so in this case the wife may be endowed, and the children inherit, notwithstanding.

Causæ thereof.

The causes of Divorce, do sometimes precede, and sometimes succeed the Marriage; precede, as in all the causes before, where there is any such impediment; as if it be so that two be married, *Infra annos nubiles*, for this at their full age, they may be divorced: So if either of the said parties be, *improbus mentis*, at the time of, and always after the marriage. 47 Ed. 3. in suis: 39 Ed. 3. 32. 19 Aff. pl. 2.

Causa consanguinitatis & affinitatis.

If two be married that be within the degrees of Consanguinity or Affinity forbidden, this is cause of Divorce: As if a Woman do marry, her Grand-father, Father, Sons son, or Brother of the whole, or of the half Blood, her Father or her Mothers Brother, her Brother or Sisters Son, Brother or Sisters Children, or a Man married the Widow of his Grand-father, Father, Son, Sons Sons the Widow of his Brother or Brothers Son, or his Brothers Sons Son, nor with the Grand-mother, Mother, Daughter, Niece, Great Aunt, or Sister of his deceased Wife. *English Lawyer*, f. 71. 25 H. 8. 32. *Womans Lawyer*.

Causa professionis.

If one be a professed Infidel, and the other a professed Christian, it seems this is cause of Divorce.

Causa frigiditatis.

If either of the parties at the time of marriage be *imabilis*, unable and unfit for procreation, for this cause the parties may be divorced, and their after-marriage to others, good; but it seems it must be such as was at the time of the marriage, for if it happen after marriage, it is no cause. Co. 5. 98. Dyer 179. *English Lawyer*. Co. 6. 66.

Causa precontractus.

If one have Contracted marriage before with another, now this is sufficient cause of Divorce of a latter marriage, with another after this Precontract. See 32 H. 8. 38. 2, 3 Ed. 6. 3.

Causa metus.

So also if a marriage be made through fear, or upon any such corrupt terms as before, this is cause of Divorce.

Causa adulterii.

Some causes also do succeed the marriage, as when it is for Adultery or Fornication, which by the Canon, is Carnal and Spiritual, for they dissolve Matrimony, when one of the parties is converted to Christian Faith, and the other being an Infidel, will not live with him, out of the *Cor. 7.*

14. The effect and fruit thereof.

That which a Divorce doth work, and bring forth, may be seen by that which was said before, and by these cases following.

14. The effect and fruit thereof.

If a man marry with a Woman Precontracted, and hath issue by her, this issue in Law and Truth beareth the surname of his Father: But if after they be divorced for the Precontract, there the issue hath lost his surname, and becomes a Bastard. Co. 6. 66.

15. The effect.

If a Lease be made to a man and his wife, during the Coverture between them; now if a Divorce be made between them, for any cause that doth dissolve the Marriage; in this case the Lease is determined: But if the Divorce be *Causa adulterii*, this doth not determine the Lease. Co. super Littl. 235.

15. Where and what things the Wife shall have again after Divorce, and what acts of the Husband shall bind the Wife after the Divorce, and where and what not.

If Land be given to a man and his Wife, and to the heirs of their two bodies, and after they are divorced, *Causa precontractus*, hereby their Estate of Inheritance is turned into a Joint Estate for life. Co. super Littl. 235.

If the Husband, during the Coverture, make any Discontinuance of his wifes Land, or any ways charge it by granting of Rents, Commons, &c. out of it, or entering into any Statute, or the like, and after, they be divorced, in this case she shall avoid all these Discontinuances and Charges: And to avoid the Alienations, the Writ of *Cul. ante Divorcium* is given her, it is to recover the Lands he held in her right.

right alone, or joyntly with him, which he aliened during the Coverture; or she may enter by the Statute of 32 H. 8. But such things as are executed, as Gifts and Sales of her Goods, Waste, Seisage of Wards, Receipts of Rents, and Presentments to Benefices, and the like, that were done during the Coverture, shall stand, and cannot be avoided. *Broo. Arraignment* 18. *Co. 8.* 75.

If Lands be given to her Husband, and her in Frank-marriage; with her marriage, and after they be divorced, now the wife shall have all the Land; and if the Husband keep it from her, she may sue him. So if Goods were given unto her, with the marriage of her Husband, and after they are divorced, she shall have all the Goods that are left, and not (*bona fide*) sold or spent, to her self, and may have a Detinue for to recover them, or she may sue in the Spiritual Court for them. 19 *Aff. pl. 2.* *Dyer* 13. *Old N. B.* 139. 6 H. 8. 7.

If the Husband during the Coverture, release a Legacy due to his Wife, and after they are divorced, it is said the Release is not good to binde the wife; but *quere* of this case, for I think the contrary to be Law. *Torty and Stephens, B. R.* 44 *Eliz.*

If one that is bound to a Woman by Obligation marry her, and after they be divorced, it seems her action that was suspended, is now revived. See 11 H. 7. 4. *Dyer* 140.

If Lands be given to the Husband and Wife, so as now they have no Moyeties, yet if they be after divorced, there shall be Moyeties again between them: And if they be Donees in Tail, and after divorced; now they have but Frank-tenant. *Bro. Tail* 9. *Park, Jett* 238. See more in *Women, Widows, Acceptance, and Agreement.*

It is a double marriage, which by the Common Law was an impediment to a man to demand his Clergy in Felony, or to be called to holy Orders, which is now out of use, and altered. 1 *Ed. 6.* 12. 1 *Eliz.* 7. 18 *Ed. 3.* 2. *Expre Terms of the Law,* 38.

CHAP. CX.

Of Marque, Masons, Malt, Malsters, and Marshes.



Arque, and Letters of-Marque, are authority given by the Supreme Magistrate to some persons, to right themselves upon strangers without the Limits, and reach of our Laws, by the taking of their Goods, to make amends for some wrong done by them to some of ours; for which they are destitute of Remedy in another Country. And it is so called, because the griefs whereupon these Letters are sought and granted, are commonly given about the Bounds and Limits of every Country, or because the Remedy there is most likely to be had by some sudden inrode, and hapning of such Recompence of the Injury received, as may most conveniently be lighted upon. 15 H. 6. 8. 4 H. 5. 7. *Aff.* 25 June, 1649.

17 April, 1649.

For Masons. 3 H. 6. 1.

For Marshes and Fens. 4 Jac. 8. 13: 7 Jac. 10.

Masons,
Marshes and
Fens.

Of Malt and Malsters.

For Malt and Malsters, these things are to be known:

1. It must be made of good Grain, and well, and orderly prepared.
2. It must not be sold till it be well cleansed.
3. Officers may search for bad Malt, and if they finde any, sell it away. 2 *Ed. 6.* 10.
4. Justices of the Peace, in Sessions, may restrain the superfluous number of Malsters, and-of Buyers of Barley to make Malt.

B b b b b a

3. Such

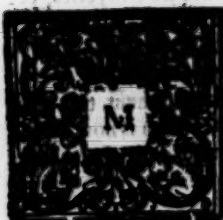
5. Such as have Barley of their own, may make this into Malt, 39 Eliz. 16.
 6. The Malt made in the Counties of *Huntingdon, Cambridge, Northampton, and Bedford*, and brought to *London*, must be very well cleansed from dust and filth. And Officers of the places where it is sold, must search and see to it, and punish defaults, 17 R. 2. 4.
 7. When Malt is at sixteen shillings the Quarter, Beer may be transported to our Allies in Casks. See *Transportation*, and § 40. 11.
 The old Statutes for this are, 17 R. 2. 4. 2 Ed. 6. 10. 39 Eliz. 16. 3 Jac. 11. See my *Justice of Peace*.

CHAP. CXI.

Of Master and Servant, Meason or Dwelling-house.

Señ. 1.
 1. Master and Servant.

2. The kinds of Servant.



Retainer.

What Acts of the Servant shall binde the Master, or not, in matter of Contract.

After and Servant are Relatives; and a Servant in the Intendment of our Law, seems to be such a one, as by Agreement and Retainer, oweth duty and service to another; which therefore is called his Master. And amongst Servants some are ordinary, menial, and familiar, (i.) Such, as always and constantly in House, or attending on their Masters business: And these are called Menial and Familiar Servants; and these are either for a less time, As such as are hired by the year, or half a quarter of the year, or such as are for a longer time: As Apprentices which are for seven or eight, or more years. And others are extraordinary, and upon occasion onely, as Retainers, who are not dwelling with him, but bear the Masters name and Livery, Laborers, and the like; also some Servants are Universal and General. (i.) Such as are to look to all their Masters business, and to serve him in all his lawful commands, and others are special and particular. (i.) Such as are to look to some things onely, and to serve him in some special matters onely, as Bailiffs, Parkers, Stewards, Butlers, Receivers, and the like; and in all these cases the general Rule of Law is: That, according as the Agreement and Retainer is, so the Servant must do his work, and so the Master must pay his wages; and if either of them fail, they may have Reciprocal Remedy one against another. See *Statutes of Laborers and Debt*. 3 Eliz. 4. 26 R. 2. 4.

The Contract of the Servant in buying, will binde the Master, and make him chargeable to an Action of Debt, for the thing bought, in either of these cases.

1. Where the Servant is a known and common Bailiff to his Master, and is used to buy for him, and he doth mention his Master in the bargain, and doth buy for him, though the Master never have the thing bought.

2. Where the Master did give him a precedent authority so to do, and he do mention his Masters name in the bargain, and do buy for him, though the Master never have the thing bought, nor notice of the bargain; and any friend may be a Servant in these cases.

3. Where the thing bought, doth come to his Masters use, and he doth assent to it.

4. When he doth afterwards assent to it, though the thing bought do not come to his use; for a subsequent assent is equivalent to a precedent authority. And in these cases the Seller may have an Action of Debt against the Master: And if the Servant himself do make any special promise to pay the money, the Buyer may upon this have his Action of the Case against the Servant also. And it is held by the better opinion, That these Contracts are good, although the Servant in his Contract, do never mention the name of his Master. But generally in all other Cases, the Contract of the Servant as to the Master, is void, and will not binde him. *Fitz. 302. 27 Aff. p. 15. 11 H. 6. 20. Plow. 11. F.N.B. 62. D. & Sh. 37. Dyer 234. 2 R. 2. 65. 21 H. 7. 40.*

So in selling the Masters Goods or Chattels, the Contract of the Servant will binde the Master, and alter the property of the thing sold; in either of these cases,

1. When the Servant hath any precedent authority, general or special to sell it; and there it will binde the Master, though the money be not paid to the Master, or come not to his use; and though he have no notice thereof.

2. So if he have no such express charge and authority, if he be a common and known Bailly, and use to sell for his Master.

Or 3. If the Master agree to the sale and bargain after it is made, and in this case the Master may have an Action of Debt in his own name against the Buyer. *Broo. Debt. Contract. 24.*

If the Servant that is such a known Bailly, or hath such an Authority, Pledge, or Exchange any of his Masters Cattle for Corn, or the like, and the Corn come to his Masters use, the Master is bound by this. As a Contract made to a Wife, is good when the Husband doth agree to it, so it is of a Contract to a Servant, and it shall be said to be made to the Husband, and Master himself. In all the cases of buying by a Servant, if he promise to pay the money by a day, the Seller may have an Action upon the case, upon that promise, as well as an Action of Debt against his Master upon the Contract. See *Contract.*

If I be a Merchant, and have a Factor that doth use to buy one kind of Stuff for me, as Tissue, or the like, and no other; if he buy Sapp, or other Commodities for me, and assume to pay it, I may be sued upon this Contract of my Factor. *Goldb. 139. pl. 46.*

If one bid another deliver his Servant what he doth call for, and he will pay him, here the Master shall be chargeable for how much soever the Servant doth fetch, *Co. 8. 146.*

If one send his Servant to Market or Fair to buy Cattle, or other things for him, and doth not tell him of whom he shall buy it, now of whomsoever he shall buy it, the Master shall be chargeable: But perhaps, if he had bid him buy of one man, and the Servant buy of another, the Master should not have been chargeable. *Doff. & St. 137.*

If such a Servant as is used to buy and sell, sell his Masters Horse, or exchange his Ox for Wheat that cometh to his Masters use; this is good, and the Master may not have an Action of Trespas for it; and he shall be charged for the Corn, and the other need not shew that he had authority from his Master, *Noy 110.*

If one make a man his general Receiver, and he receiveth money of a Debtor of his Masters, and maketh him an Acquittance, and payeth not the money to his Master, yet this payment shall binde the Master, and discharge the Debtor; but if he make an Acquittance to him, and he pay not the money, this will not binde the Master. And yet if a man make another his general Receiver by writing, and give him power also thereby to make Acquittances, and he make an Acquittance to one of whom he receives not money; this will binde the Master, and discharge the Debtor. *Doff. & St. 138. Noy 111.* If one ow me money, and I send my Servant for it, and he pay it to him; this will bar me to demand it again, and discharge him of it, *D. & St. 138.*

If a Lord of whom Land is held, be desirous of a Seignior, and the Bailiff pay the Rent to the Heir of the Lord, without any special Commandment; this doth give the Heir Seisin of the service. *Doff. & Stud. 138.*

If my Servant that is no common Bailiff, will buy other mens Goods for me, or sell my Goods from me, without any authority from me so to do; this will not binde nor charge me, so as he may bring an Action against me for the Goods that are bought, or that I may not take again my Goods that are sold. *Doff. & Stud. 137.*

If such a Servant buy any thing for me, especially if it be things unnecessary, and these things come to the use of my House, yet I shall not be bound by, nor charged for this, unless I agree to the bargain after that it is made, and had notice of it, *11 H. 6. 20. D. & St. 137.*

If a Servant that hath authority to sell his Masters Goods, do sell and warrant the Goods sold; this Warranty will not binde the Master, though the sale will. *11 Ed. 4. 7.*

If a Taverners or Mercers Servant, or a Pashen, Bailiff, or Shepherd, that have the custody and power of their Masters Goods, and perhaps authority for to sell them, do give

In matter of Receipt, Gift, or Discharge.

In point of Consent.

What Acts of the Servant will not binde the Master. In matter of Contract.

In matter of Receipt or Discharge.

give away any of them, it seems this gift is void, and doth not binde the Master, but that he may bring an Action of Trespas against him, that shall meddle with them, under colour of such a gift. *Noy 110. 21 Ed. 4. 31 Bro. Domer 36.*

If one make one his general Receiver, and he by agreement betwixt the Debtor and him, take and accept a Horse, or other thing, in recompence of his Debt; this will not binde the Master, nor discharge the Debtor; and yet if in this case, the Receiver had authority from his Master, to make such a Comutation, or the Master do afterwards assent to it, by this the Master may be bound. *Doll. & Stud. 138.*

If my Servant go to a man that doth owe me money, and tell him, or shew him a counterfeit Letter, that I sent him to receive it, and my Debtor pay him the money, this will not bar me of my money, nor discharge him of the debt; but if the money come to my use after, and I assent unto it, *contra Doll. & Stud. 138.*

If there be Lord Mesn, and Tenant, and the Tenant holdeth of the Mesn, as of his Manor, and the Mesn maketh a Bailiff, and after the Tenant maketh a Feoffment, and the Feoffee tendereth notice to the Bailiff, and he accepteth and receiveth the Rent with the arrearages; this notice and acceptance will not binde the Lord, nor compell him to sue his Avowry. *Doll. & Stud. 138.*

In matter of
Consent.

If one make a Bailiff of his Manor, and the Lord of another Manor, of whom the Manor is held, grant the Seignory to another, and the Bailiff doth after pay the Rent to the Grantee; this shall not binde the Lord, nor amount to an Attornment for the Grantee. *Doll. & Stud. 138.*

If the Bailiff pay more Rent then he should, and the Lord inroach by this means; this shall not binde the Master, unless the Master did give commandment to pay more Rent then was due. *Doll. & Stud. 130.*

Sec. 3.
Where the
Master shall be
charged for
the Act or Of-
fence of his
Servant or De-
puty, or not;
and how.

If the Servant keep his Masters fire so negligently, that the Masters house, and his Neighbors also is burnt thereby, the Master shall be charged, and answer for this negligence of his Servant; but if this negligence were abroad, out of his Masters house, *contra Doll. & Stud. 137. H. 4. 19. F.N.B. 34 22 H. 6. 24.*

If a common Hostlers servante rob a guest that lodgeth in the house, the Master shall be chargeable, and answer for this Felony in an Action of the Case. But if another man, no common Inn-keeper or Hostler do so, it is otherwise. See *Action of the Case.*

If a Servant of a Gaoler that hath a prisoner in execution for debt, suffer him to escape; the Master shall be chargeable in an Action of Debt. And if he have a Felon in his custody, and the Servant suffer a voluntary escape of him, the Master shall be fined for this, but it shall not be Felony in him, as it shall be in the Servant. *Doll. & Stud. 137. Co. 9. 98.*

Officers, Deput-
ties.

If any Officers do make and appoint any Deputies in their Offices, they shall answer, and be charged for the offence of their Deputies; and their acts will be as penal to them, as if they were done by themselves: As High-Sheriffs must answer for their Under-Sheriffs, Under-Sheriffs for their Bailiffs, Gaolers for their Deputies, and so all others. *Broo. Forfeiture 27. Co. 9. 98. 48. Dyer 238. Co. 4. 33. 5. 89. Br. Off. 24.* But if one have an Office grantable over to an Assignee, and he assign it; in this case the Assignor shall not be charged, or prejudiced by any thing the Assignee doth. *Dyer 261. 10 H. 7. 23. 18 H. 8. 5.*

If a Servant, or one of a mans Family do lay or cast any thing into the High-way, that is a Nuisance, it seems the Master may be punished for it. *Noy 110.* So if a mans Cattle do against his will, hurt another, he must answer for them, for he must govern them. *Idem.* But if a Servant borrow or receive money in his Masters name, and for him, without any authority from his Master, the Master shall not answer this, nor be charged for it, though it come to his use, unless he do after agree unto it. *Doll. & Stud. 137. Noy 109.*

If one send his Servant with deceitful Wares to a Market or Fair, and command his Servant to sell them, but doth not say to whom; it seems no Action of the Case will lie against the Master for this; but if he bid him sell them to one man in particular, and he do so; therefor the Goods sold, the Master shall be charged in an Action of the Case, *11 Ed. 4. 6.*

If my Servant drive my Cattle into another mans ground against my will, and they do Trespass there; it seems I shall not answer for this Trespass: So if my Servant set on my Dog, against my will, and kill another mans Cattle; or if he do any other Trespass by beating a man entry into his Land, taking away his Goods, or otherwise, or commit any Felony, I shall not be charged, nor answer for it, unless I be accessory thereunto. *Doff & St. 137. 11 Ed. 4. 7. 9 H. 6. 53. 6 H. 6. 39. 13 H. 7. 19.*

If the Servant ride his Masters horse into a Town where they have power to attach Goods upon a Plaint of Debt; and the Goods are attached as the Goods of the Servant, and forfeit for his default of Appearance, the Master shall not be prejudiced by this; but he may take his horse again, or bring an Action of Trespass for him. So if the Master send his Servant for to distrain another mans Cattle, and the Servant after he hath distrained doth kill, or otherwise abuse the Distress, the Master shall not answer, nor be charged for this. *21 H. 7. 27. D. & St. 138. No. 111.*

For the Murder, Felony, Battery, or Trespass of his Servant, the Master shall not be charged. *No. 109.* But if I command my Servant to do a Trespass, or agree to it, I am a Trespasser also.

No act or default of the Master, to which the Servant is no way accessory or privy, shall binde or be prejudicial to the Servant, unless the Servant be accessory or assenting thereunto: as the Felonies of the Master, and the like. So if the Servant distrain Cattle, at his Masters commandment, and after the Master doth kill, or abuse the Distress; or a Bailiff of a Sheriff arrest a man by the Sheriffs Warrant, and after the Sheriff do not return the Writ. *20 H. 7. 13, 22, 23.*

For Apprentices, these things are to be known.

1. That in some cases men may not take Apprentices, or but such a number, and such kinde of Apprentices. 2. A man may not exercise some Trades, till he have served seven years as an Apprentice in the Trade. 3. The differences between Masters and their Apprentices, are to be ended by the Justices of the Peace. 4. A Master cannot send his Apprentice beyond Sea, unless his Calling, to which he is Apprentice, require it. 5. In some cases Men and Women may be bound Apprentices against their will. 6. Apprentices cannot be turned over from one to another, but by Custom, as in London. But for all these, and some other things concerning them. See 5 Eliz. 4. 43 Eliz. 2. 1 Jac. 25. Co. 11. 54. *March. Rep. f. 1.* And the First part of my Justice of Peace, in the Chapter of Masters, &c.

See.

Apprentice.

For Artificers, Laborers, and Servants, these things are further to be known.

1. In some cases, and in some works, Laborers, and them that are fit to labor, may be compelled to work. 2. None may beidle that have able bodies, and nothing to live by but their work. 3. In some cases men may not take Journeymen, or not so many, or not such men. 4. Servants and Laborers must take the wages assailed by the Justices, and may not take more. 5. Masters must give to their Apprentices, Laborers, and Servants, what is meet for Diet, Cloths, and Wages, and may not abuse them. And Apprentices, Laborers, and Servants, must do their duty to their Masters. 6. If any miscarriage be of either side, the Justices of the Peace may punish it. But see for all this, and other things. *23 Ed. 3. 1, 2, 3, 4, 8. 13 R. 2. 8. 7 H. 4. 14. 3 H. 6. 11. 28 H. 8. 3. 2, 3 Ed. 6. 19. 21 H. 8. 7. 5 Eliz. 4. 8 Eliz. 11. 3 Jac. 25. 1 Jac. 6. 16 & 7. 4, 5 Phil. & Ma. 5. Co. 11. 54.* And in my Justice of Peace first part, the Chapter of Laborers, Masters, and Servants.

Laborers, Artificers and Servants.

Wages.

This was an old Writ that did lie against such, as having not whereon to live, did refuse to serve, or for him that refused to serve in the Winter where he served in the Summer. *Regist. Orig. 189. b.*

Laborarius, what.

A Journeyman is he that covenanteth with another, to serve with him in his occupation for a year, or less time for money, or other reward. *3 Jac. 9.* See the Statutes of 5 Eliz. 4. and the rest.

Journeyman, what.

The Dwelling-house hath many privileges granted to it by Law: As first, Peace in a Writ, if it be demanded amongst other things. Secondly, It cannot be broken to make an Arrest at the Sure of a common person, but at the Sure of the King, as to arrest the owner, or another man in it, for Felony, or on a *Capias* writ. Thirdly, Protection against the Kings Prerogative, for

Mason or House-dwelling.

Felony.

Salt.

Salt-Peter:

Salt-Peter-men cannot dig in a mans Dwelling-House, without the owners consent. 4. If one kill a man that is about his House, to rob or spoil him in his own House, he may kill him, and justifie it, when he hath done it. 5. If one be threatened to be beaten in his House, he may assemble his Friends, and stand on his guard there, and it is no Riot. 6. If two Joyntenants be of a House, one of them may compel his Companion to help to repair the House. Co. 11. in *Lewis Bowls* case.

Ryot.

CHAP. CXII.

Of Money, Meal, Mills, Millards, Mines, Monopoly, Milderneux and Powldavy.

Meal.



Any sell Meal any where but in the open Market, or there mixt, and not pure, or do use Bolting; he forfeits double the value of it, and must be imprisoned two moneths without Bail. 23 *Octob.* 1650.

Mills and Millards.

For Gig-Mills. See 3 *Ed. 6.* 2. 5 *Ed. 6.* 22.

For Iron-Mills. 27 *Eliz.* 9.

How Millards are to be punished for changing the Grift, or taking excessive Toll. See *Leet*, and other Titles, and in my *Justice of Peace Book*:

Milderneux and Powldavy.

For Milderneux and Powldavy, and how, and where it may be used, and by whom, See 1 *Jac.* 22.

Mines.

For Mines, these things are to be known. First, That all Mines in any mans ground of Gold and Silver Oar, or where the Major part is Gold and Silver, are the Lord Protectors, and not the owners of the Soyl, whether they be new Mines or old. Secondly, All the Mines and Quarries of Cole, Stone, Brick, Iron, Gravel, Lime, Clay, and the like, when a Tenant for life or years, comes first to the Land are his, and he may dig on. But such a Lessee for life or years, cannot open and dig new Mines or Quarries, without special words in his Lease to warrant it. See more of these things in *Waste, Trespass, Estate for years*.

Monopoly, what.

A Monopoly is where the power of selling any thing, is in some one man alone; or where one doth ingross or get into his hands, such a Merchandise as none can sell them, or gain by them, but himself. And to this there are three inseparable Incidents against the publick good: First, The price of the Commodity is raised. Secondly, The Commodity is made worse. Thirdly, It tendeth to impoverish many poor Artificers and Tradesmen. And therefore the Law doth utterly distaste it. See for this 21 *Jac.* 3. Co. 1. 86, 87. and Co. 3 *part. Instr.* chap. 85.

Monopolists, Propounders, and Projectors.

All such as get such Allowance from the King, by Grant, or otherwise for the sole buying, working, or making, or using of any thing, whereby any person or body Corporate or Politick, are sought to be restrained of any Freedom or Liberty they had before, and hindered in their lawful Trade are called Monopolists, &c.

Money.

For the Statutes concerning Money. See them in *Wingates Abridgment, Money*.

CHAP. CXIII.

Of a Mortgage, Mortmain, and Mortuary.

Mortgage or Pledge, what.



The kinds.
The nature of
Mortgaged
Land and
Goods.

Mortgage doth signifie in our Law, a pawn of Lands or Tenements, Goods, or Cattles, laid, or bound for Money borrowed, peremptorily to be to the Creditors for ever, if the money be not paid at the day agreed upon. Of Lands thus: As if one make a Feoffment in Fee, Gift in Tail, Lease for life, or years to another (for money borrowed) on Condition, That if he repay him his money by such a day, that then he shall have his Land again. And this bindes the Land so, till that time, that neither of them can do any thing with the Land.

Land: But both of them together, may sell or charge it; and after the day past, and money not paid, the Mortgagee cannot well sell it, for the Land (especially if it be of much more value than the money) will be recovered in *Chancery*, upon payment of the money, Interest, and Damage: For which see my *First part of the Marrow of the Law*, f. 628. But for this see *Condition* at large in my *Book of Common Assurances*, chap. 6.

A Pledg of Goods is, where one doth deliver Goods to another man in assurance of another thing had from him at the same time: And this is either in Deed, where one doth actually deliver Jewel, Plate, or other Goods, to one for twenty pounds lent him; and if he do not pay the money at a day agreed upon, That he to whom they are delivered, shall have them; and if he do pay the money, that then he shall have the things pledged again. In this case if the Deliverer do pay his money at the day, he shall have his Goods again, or an Action of Detinue for them, if he refuse to deliver them: And if he do not pay the money at the day, the other may keep the Goods pledged, for ever; and yet the Quality and Condition of the Interests of these Parties doth stand thus. The Party that doth pledg them, till the time they be forfeit to the Party that hath them in pawn, according to their Agreement, hath a general Property in the things pledged: So as if they be casually lost, he must abide the loss of them; and they cannot be forfeit by the Party that hath them in pawn, nor can they be taken in Execution, or attached for his Debt: And yet the party that hath the Pledg, hath such a Special Property in it, That if the thing pawned be a Horse, Ox, or the like, he may work it, if a Cow milk it: And if it be any other thing, as Apparel, or the like, that will not grow much worse by usage, he may use it as the first owner thereof might have done: But if he shall abuse it, the party pawning it, may have an Action against him for this Abuse. And he that hath this Pledg, may assign over his Interest to another; and this Assignee shall hold it upon the same Terms the party to whom it was pledged, held it. And if the Goods be taken away from him that hath them in pawn, he may have an Action of Trespass against the Taker, and say, *Quare bona sua & cepit*. And if the party to whom it is pawned, die before the day of payment of the money, the Goods shall go to his Executor. And when the day is past, and the Pledg is forfeit, yet doubtless if it be much more worth than the money, the party pawning it, will have it again by a Sute in *Chancery*, upon payment of the Money, Use, and Damage, if he sue before it be quite sold: There is also a Pledg in Law, where the Law without any Special Agreement made, doth enable a man to keep Goods in the nature of a Distress. And so a Tailor may keep, but must not use, nor sell a Garment he hath made, till he be paid for the making of it: And so an Inn-keeper may keep, but not use his Guests Horse, till he pay him for his Meat, and if he leave him there so long, till he have eaten as much as he is worth, he may sell him, and pay himself; and so was it agreed, in *Trin. 3 Jac. B. R.* This word Pledg is taken also for one that is Surety for another. See for all this, 5 H. 7. 1. 22 Ed. 4. 11. *Kelw. 81. Littl. 332, 333. Co. upon Littl. 205. Co. 7. 14. DoH. & Stud. 150. Broo. Attachment 20.*

Property.

Executor.

Of Mortmain.

It is where one doth give Lands to, or to the use of any Religious House, or other Corporation, then it is said to be in a Mortmain, because the Services are gone, and the Corporation can yield no Services to the Lord; and therefore if any Alien to any such persons, or in any such manner without the Kings Licence, the Lord of whom the Land is held, may enter at any time, within a year after, for a Forfeiture; and if he do not, the next immediate Lord may, and so every Mesn-Lord shall have half a year; and if none enter, it shall come to the King; and of such Inheritances, wherein no Tenure can be as Villains, Rents, and the like: For these the King should have had them presently; but such Alienations may be good with the Kings Licence. *Broo. 19. Dyer 25. 7 Ed. 1. 25 H. 8. 10. 13 Ed. 3. 3. 16 R. 2. 79. Broo. 79.*

It is a Writ that is used to go forth, when the King was about to grant any Liberties, as Marker, Fair, or the like, to enquire what prejudice will come thereby: So also

Mortmain, what.

Forfeiture.

Ad quod damnum, what.

Cccc

it

it seems where one would alien in Mortmain, before the King granted his Licence, he used to grant this to the Elcheator to enquire what harm it may be to him, or to his Country. See 27 Ed. 1. *Ordinatio de libertatibus*. F. N. B. 221.

*Quale Jus,
what.*

It was a Writ that did lie where an Abbot, or such like person had a Judgment to recover against one by Default, then before Judgment given, or Execution awarded, this Writ did go to the Elcheator, to inquire what right he had to recover; and if it had been found he had no right, then the Lord which should have had the Land, if it had been aliened in Mortmain, shall have had it. *Terms Ley*. See the old *Statutes*, *Mag. Chart.* 36. *Westm.* 2. 32. 15 R. 2. 5. 23 H. 8. 10. *Wingates Abridgement*

Of Mortuary or Corse present.

*Mortuary or
Corse present,
what.
Executor.*

Mortuary is a Gift left by a man at his death to his Parish Church, for the Remembrance of his Personal Tithes and Offerings, not duly paid in his life time: And this by the Executor was used to be paid next to the Herriot, and before the Debts: For anciently, if a man had three Beasts, the Lord had the first Beast, the Parson the next, in the right of his Church. But now the rate, and order of this is altered, and set down in Certain, by the Statutes of *Circumspecte agatis*, 13 Edw. 1. 21 H. 8. 6. Co. upon *Lutl.* 185. *Doll. & Stud.* 175. See *Tithes*.

CHAP. CXIV.

Of Navy and Navigation, Marriners and Shipping, News and Night-walkers.

*Sec. 1.
Navy, &c.*



Or the Navy and Navigation, Marriners, Ships and Shipping, and that which doth concern these things, see 6 R. 2. 8. 1 EL. 13. 5 ELiz. 5. 13 ELiz. 25. 18 H. 6. 19. 1 Jac. 25. 39 EL. 17. 1, 2 Phil. & Ma. 5. 18 ELiz. 8. 43 ELiz. 3. 1, 1 Phil. & Ma. 16. 8 ELiz. 23. *Asst.* 9 Octob. 1651. 16 Jan. 1648. For increase of Shipping, see *Merchants, Transportation*.

of News.

News.

The Penalty of telling false News of the great Men of the Realm, see 3 Ed. 1. 34. 2 R. 2. 5. 12 R. 2. 11. 1, 2 Phil. & Ma. 3. See *Scandalum Magnatum* in my *First part of the Marrow of the Law*.

of Night-walkers.

Night-walkers.

Night-walkers are suspicious persons, such as sleep by day, and walk by night; these especially, if they haunt leud Houses, or keep leud Company, or be otherwise suspicious, may be arrested by a Justice of Peace Warrant, and bound to the Good-Behavior for this, without any more matter, see 13 H. 7. 10.

CHAP. CXV.

Of N^om or Name.

Omnes quasi rei notamen, Names were invented onely to put a difference between person and person, thing and thing, and these are considerable in Law, with relation to Deeds or Writs. For by mistakes of names, sometimes Deeds may be avoided, sometimes Writs may be abated, or suits may become erroneous. And for this we are to know that our Law doth call Persons or Bodies, Natural, or Politick.

See. 1.
1. N^om or Name, what.

There are many kindes of Names, Names of Persons, or Bodies, and places, of Persons, Natural and Politick; the Politick is sole or aggregate of many: There are Names of Baptism, as *John William*, and Surnames, as *White, Dyer, &c.* Names of Mystery, or Occupation, as *Baker, Mercer, Carpenter*; Names of Office, as *Justice of Peace, Attorney*, and the like; Names of Honor, Degree, or Dignity, as *Duke, Earl, Knight, Gentleman*; Names of Corporation, as *Major and Commonalty*, and the like: And Politick Bodies, as *Bishops, Deans, &c.* There are names of places, as *Towns, Villages, Parishes, Hamlets*, and the like.

The kindes of Names, of Baptism, Surname.

A Body Politick, is a Body in Fiction of Law, that endureth in perpetual succession. And these are either sole of one person, such were a *Bishop, Dean, Prebend, Archdeacon, Parson, Abbot, Prior*, and the like. And these had a double capacity, to give, or take, sue, or be sued, or else they are aggregate of many, and then are called a Corporation.

2. Body Politick, what. The kindes of it.

A Corporation is an Assembly, and joyning together of many into one Fellowship, Brotherhood, and minde, whereof one is as the Head, and the rest is as the Body.

3. Corporation, what.

And these kindes of Corporations were said to be heretofore, either by the Common Law. So the *Parliament* onely was a Corporation. And so *Church wardens* also are to some purposes a Corporation, or by the *Kings Authority*, or mixt. Some of these again were said to be *Spiritual*, and some *Temporal*. The *Spiritual* were also, either of dead persons in Law, as *Abbots, Convents*, and the like, or they are of able persons in Law, as *Dean and Chapter, Master and Fellows* of Colledges, and the like. Some of them also were said to be Regular, and some Secular Corporations. Temporal are such as is a *Major and Commonalty*.

The kindes of it.

For Corporations, these things are to be known.

4. Corporations. Ordinances.

1. They may not make or execute any Ordinance in Diminution of the *Prerogative*, or of other, or against common profit, except approved by the *Chancellor, Treasurer, Chief Justices*, or three of them, or the *Justices of Assise*, under pain of forty pound. 19 H. 7. 7. 2. They may make no Ordinance to restrain Sutes in the *Kings Court*, under pain of forty pound, 19 H. 7. 7. *Brownl. 2 part, 284.* 3. They must take but two shillings and six pence for the first Entry of an Apprentice, and three shillings and four pence for his Entry of Freedom, under pain of forty pound. 22 H. 8. 4. 4. They may not by Bond or Oath, restrain any Apprentice or Journeyman from keeping shop, or take more money of them for their Freedom, then the Fee of Entry. 28 H. 8. 5. 5. Acts done by the Major part, these shall binde the rest, and no Oath taken to the contrary, shall be binding. 33 H. 3. 27.

14 H. 8. 3.

But for this matter of Corporations, see Co. on Littl. 250. 34. 11. 20. 14 H. 8. 3. And in divers other places in my Book of *Common Assurances*, chap. 12.

Addition is a Title given to a Man over and above his proper and *Christian* name and surname, shewing his Estate or Degree, Occupation, Mystery, Place, and Dwelling.

5. Addition and alias Distum, what.

1 H. 3. 5. *Alias Distum* is the manner of Description of a Defendant in a Writ, when he is sued upon an Especialty, where after a short Description of his Names and Additions, the Writ goeth farther, *Alias Distum*; and then doth after describe and set him down again by the very Names and Additions, whereby he is named and bound in the Writing. Dyer 50.

6. Indemnitate
nominis, what.

This is a Writ that lieth where an Action of Debt, Covenant, or Accompt, is brought against one man, or one man hath entered into a Recognizance, or the like, and another man of the same surname is taken, and vexed in his Body, Goods, or Lands thereby; in this case, the party grieved, or his Executors, after his death, if the Goods be taken, shall be relieved by this Writ. See for it *F.N.B.* 167. *Kilm.* 39. *Dyer* 5. *Fineux* *Law* 474. 37 *Ed.* 3. 3. 9 *H.* 6. 4. *Broml. Rep.* 2 part. 270.

7. Misnomer,
what.

Misnomer is the mistake of the right name of a person, or thing: And this is sometimes in the Christian, sometimes in the surname, and sometimes it is in some other of the Additions; and where this will mar a Deed, or not? See my Book of *Common Assurances*, chap. 12. *C. 6. 63.* on *List* 3. *Broml. Rep.* 2 part. 244. 249. 48, 1 part 52. And where a Writ will abate, or not by such mistake, see *C. 6. 63.* And what shall be said a good name so purchase by, or not, see at large in my Book of *Common Assurances*, chap. 12. 11 *H.* 7. 28. 9 *Ed.* 4. 2.

8. Dignities
and Nobility,
and Title of
Honor.

As for names of Dignity, and Titles of Honor, these things are to be known.

1. There have been, and are, where the Law doth take notice, divers Titles and Degrees of Honor and Dignities, one beneath another, As the King as Supreme (in whose room the Lord Protector now is,) the Queen, Princes, Dukes, &c. Marquesses, Earls, Viccounts, Barons, Knights, Knights of the Bath, of the Garter, &c. (which are all one with Knights Bannerets, the Templars of the Rhodes, of the Order of St. John of Jerusalem, Esquires, Gentleman, who are said to be those, whom their Blood, and Race, doth make Noble, and known; and under this are comprised all above Tammens; for all Noblemen are Gentlemen, but all Gentlemen are not Noblemen-Gentlemen. Also persons were divided thus, as by the Noble, and in respect of Nobility of the Lords house of Parliament, and of the Barony of England, or one of the Commons, and in respect thereof of the Commons-house in Parliament. And there are divers Degrees of Nobility, As Dukes, Marquesses, Earls, Viccounts, and Barons, which last word did sometimes include all the rest; so of the Commons there be degrees, As Knights, Esquires, Gentleman, Citizens, Tammens, and Burghers of several degrees, but Nobility, with us is said to be from the Knight upward, and is lesser; that is, all from Barons downward, or greater from the Burghers upward.

2. Some of these Degrees, Orders, and Titles, are gone, as King, Queen, and Prince, Regent, the Order of Knights-Marshal, Templars of the Rhodes, and others. Some of them continue to this day, as Marquess, and the rest. Some of all which remain still amongst us.

Heralds.

3. These have either Arms, Ensigns, and Cognisances allowed them, and for the examination, and safe keeping of these, there are Officers called Heralds, who are of purpose to look to it, and to finde them out, and to give them to such as desire it.

4. The Kings have had in all times, the dispose of most of these Inferior Honors at their first Creation, as the Dignities of Dukes, Earls, and most of the other great Dignities: All which they did sometimes confer in Fee, sometimes in Tail, or as they pleased. Some of these are made by Patent of the King, and some by other ways and means, some of them are incident to Offices, and some not.

Degradation.

6. Some of these Creations were done with much Ceremony and Solemnity, and some with no Ceremony at all.

7. These Honors had, they that had them, might have lost and forfeited them, and they might have been degraded of them; the which also in some cases was done with much Ceremony. *Cambden*, *Henric* *Anraby*, *Sir Thomas Smith de Republica*.

8. None may assume to themselves, nor give to others any Names, or Titles of Honor, or Dignities conferred on, or given to them by the last King, since 4 *Jan.* 1641. *Att.* 4 *Feb.* 1651.

9. The differences about these things were wont to be decided by the Constable of England, and Earl-Marshal, by the Law of Chivalry, or Title of Honor in the Court of Chivalry. But these Officers, and this Court is now gone. 21 *H.* 7. 33. 37 *H.* 6. 16. See Title Lord, *C. 2* part. *Justit.* For Bishops and Bishopricks, see 1 *Ed.* 3. *Stat.* 2. cap. 1. 14 *Ed.* 3. *Stat.* 3. *pro clero* cap. 6. 25 *Ed.* 3. *Stat.* 3. *pro clero*, cap. 6. 26 *H.* 3. 14. 3 *Ed.* 6. 2. 3 *Ed.* 6. 1. 1, 2 *Ph.* 4. *M. 2.* 2 *Ed.* 1. 9, 10 *Ed.* 6. 2. 39 *Ed.* 8. 1 *Jan.* 3. For Addition, see 1 *H.* 5. 3.

CHAP. CXVI.

Of Notice.



Notice is the making something known, that a man was or might be ignorant of before; and this in divers cases produceth divers effects. As first, in respect of the party that doth give it, that by this means he shall have some benefit; but otherwise he should not have had; or hereby he may be freed of some charge, that otherwise he should have borne. Secondly, In respect of the party to whom the notice is to be given; in that, by these means he is made subject to some Action or charge, that otherwise he should not have been subject unto; and his estate is subject to a

Señ. 1.
Notice, what.

Forfeiture, which otherwise it had not been in danger of. Thirdly, In respect of both, in that hereby an act may be brought, that otherwise had been good, or an act may be good, that otherwise had been naught. Co upon Litt. 309.

If a Patron had resigned his Church unto the Ordinary, the Ordinary or his Successor, if he die, must give notice thereof to the Patron, else he shall never take advantage of the Lapse. If the Patron do not protest within six months. *Rel. 49.*

If the Ordinary had refused to institute a Clerk presented, because he was illiterate (as in that case he might) there he must have given notice thereof to the Patron, especially if the Patron had been a Lay-man, (for if he had been a Clergiman, it is some otherwise) or if he had refused him for any private cause confessed upon his examination, and not publicly, and notoriously known. In these cases he must have given notice to the Patron, or else he had taken no advantage of the Lapse. *See Dyer 292. Mol. 30. 6. Br. cap. 304. 1 Hy. 9. Doct. & Stud. 13. Rel. 49. 30. Dyer 293. 246.*

If the Parson be deposed, the Ordinary must have given notice hereof to the Patron, or else he had taken no advantage of the Lapse. *Dyer 346.*

If one that had a Benefice with Cure of eight pound, and is not qualified, had been instituted, but not inducted into another, contrary to the Statute of 2. 1 H. 8. The Ordinary must have given notice hereof to the Patron, else he had taken no advantage of the Lapse. *Co. 4. 79.*

If a Church had been void by Simony, the Patron must have had notice. 13 *Edw. 6. See more in 31 E. 6. 6.*

If a Manne be conveyed or transferred from one to another, as when an Estate that one hath in a Manor, doth cease by limitation of use, and it be limited to another, then he that is the present Lord must give notice hereof to the Copiholder, or else if the Copiholder deny his Rent upon demand to the Lord, this is no Forfeiture. So also is it, though the Manor were passed by a Deed of Bargain and Sale inrolled. *Co. 8. 92. 3. 13.*

If the Lessor make a Feoffment of his Land in Lease for life or years, that is, upon condition to forfeit for non-payment of Rent, and the Lessor give Livery and Seisin to the Grantee of the Reversion, so that the Lessee hath not notice of it; in this case the Grantee must give him notice of it, else he cannot enter after demand for non-payment of the Rent upon the Condition, as the Lessor might have done; and so is it, though the Grant of the Reversion had been by Deed and Bargain and Sale inrolled. *Co. 9. 113. 8. 42.*

If one make an Indenture to Use, provided, That if one at any time, during his life, pay to J. S. twenty pound, or tender it, at such a place, then the Use to cease, or the Estate of any raised by the said Use, shall cease; in this case, if he will pay the money according to the Condition, he must give notice thereof to J. S. else the tender at the place, is not sufficient. *Co. 8. 92. Dyer 31. Co. 5. 113.*

Where Notice is requisite and ought to be given. And what shall be said a sufficient Notice, or not. To the Patron by the Ordinary.

To the Tenant of the Grant of the Reversion. Forfeiture by a Copiholder.

To one upon a Condition to avoid or affirm an Estate.

If a Feoffment be made to divers Uses on Condition, That if one that hath an Estate by the same Feoffment shall do, or not do something, that then his Estate shall be void; now he must have notice of this Condition, or else the doing, or not doing of that act, is no Forfeiture of his Estate. *Dyer 354. Co. 9. Francis case.*

If a Lease be made on Condition to do some collateral thing, as build a House, or the like, and the Lessor sell the Reversion by bargain and sale or Feoffment; in this case the Vendee must have notice hereof for otherwise if he after the Condition broken, accept the Rent; this is no Dispensation of the Condition, or Assurance of the Estate. *Co. 3. 64. 8. 91.*

If one grant a Reversion, notice hereof must be given to the Tenant by the Grantee; for otherwise, if he Attorn, and have no notice of the Grant, his Attornment is void, (see *Attornment*.) But Notice by Law may be without Notice in Fact. *Co. upon Litt. 308.*

If one have any Estate, or any Lands in trust for, and in the use of another, and one is about to purchase this; in this case, it behoves him to whose use, to give notice of the use to the Purchasers, for otherwise the use may be gone: For if in that case, the party trusted, do for a good consideration sell the Land to one that hath notice of the use, then the Purchaser shall stand seised of that Land to the first use. *Plow. 351.*

If one bring an Action against an Executor or Administrator, and lay his Action in another County, then that wherein the Executor or Administrator doth dwell, he must give notice hereof unto him; for the Executor or Administrator, is not bound to take notice of it, unless it be in the same County, and therefore if he after that do pay away the Assets he hath to another, that hath not begun any Suite, the party hath no Remedy. See *Executors. Plow. 279. Broo. Notice 16.*

If a mans Dog do kill Cattle, he shall not be charged in an Action of the case, unless he had notice of the quality of the Dog therein. See *Action of the Case*.

If the Lord distrain the Tenant for such Services as he holdeth of the Mefn; in this case, he may have a Writ of Mefn, without giving any notice thereof to the Mefn; but if he distrain for other Services then he holdeth, there he cannot have this Writ before he have given notice to the Mefn. *Broo. Notice 21.*

If one make a Lease for years to one, and after make a Lease to another, to begin after the Surrender, End, or Forfeiture of the first Lease, with clause of Re-entry for not payment of Rent. After the Lessor took a secret Surrender of the first Lessee, and after that Surrender a Rent day incurred, and the Rent not paid by the second Lessee; it was adjudged, that his Estate was not void, for the other ought to have given him notice of the Surrender. *Guldb. 140. pl. 49.*

If a Condition be to pay money at any time, during ones life, he must give notice when he will pay it. *Co. upon Litt. f. 211.* So if A. be bound to B. with Condition that C. shall infeoff D. on such a day; in this case C. must give notice to D. thereof, and request him to be on the Land at the day to receive the Feoffment, and he must seek D. and give him notice. *Co. upon Litt. 211.*

If the Master imprison a man wrongfully, and the servant keep the Key of the Room where he is in prison, he must have notice of the cause that it is wrongful, or else he is no Trespasser. *Broo. Faux Imprisonment.*

If I hire the servant of another man, hired in a foreign County, and have not notice thereof; in this case, I am no Trespasser; as it seems it should be, if he were the servant of another man, hired in the same County. *Broo. Notice 20. 4. 8.*

If a man be bound by the Condition of an Obligation; or otherwise upon a penalty, upon a contingent precedent; this is to be done by the Obligee, and it lieth wholly and properly in his Conusans, and not in the knowledge of the Obligor; in this case it seems, that the Obligee must give notice of the thing done to the Obligor, or otherwise he is not to be charged to do that thing; as if he be to pay money within a week after the Obligee is married; in this case he must give him notice when he is married. But if he be bound to do such a thing by a single Obligation, Covenant, or an Assumpsit only; in that case he must take notice of it at his peril. So also where

Sett. 2.
By a Lord to
the Feoffee or
Purchaser to
change the A-
view.
To a Purcha-
sor of a Use or
Trust.

To others, in
other cases.

Sett. 3.

where the thing doth lie, as much in the knowledge of the Obligor, as of the Obligee, as in the cases below. *Wheeler's case. Mich. 7 Jac. B. R. Hil. 9 Jac.*

B. R. 1000 If *A.* be bound to *B.* to pay him one hundred pound when he doth come to London, he must give notice to *A.* when he doth come to London, as was resolved. *Mitch.*

3 Jac. in C. B. If *A.* be bound to *B.* in an Obligation with Condition, that *B.* coming from beyond Sea before the 12. of April, then that *A.* shall pay *B.* twenty pound before the 27. of April after; in this case it seems *B.* is not bound to give notice of his Return, *Goldsb. 138. pl. 49.*

When one is bound to do such an act after the death, or marriage of a stranger, or to stand to the Award of another. *Co. 7. 29.*

Where the promise is to the party, to do a thing at the time of the marriage of a stranger, there it seems notice is requisite, but when it is to be done at the time of the marriage of the party himself, *contra.* By three Justices, in *B. R. Trin. 14 Jac.* but *quere. Co. 7. 29. 9 Ed. 4.*

If I binde any self to save another harmless from a Bond, he is bound in for me; as soon as I am sued, his Obligation is forfeit, without giving notice of it. *Foxes case, M. 4 Eliz. upon an Arbitrement. See Arbitrement and March. f. 408; pl. 186.*

If the Ordinary had refused a Clerk presented, because he was *merc laicus*, or for any other notorious crime, as because he was a Bastard, perjured person, common whore-master, drunkard, or the like; or if a Parsonage had become void by Cession, and the Creation of a Parson, a Bishop; in these cases the Ordinary was not bound to give notice to the Patron, but he must have taken notice of it at his peril, and presented again, or else the Ordinary may present by the Lapse, *Kelw. 49: Dyer 293.*

Broo. Notice 241.

If one that had a Benefice with Cure of eight pound, and being not qualified for another, had been instituted and inducted to another against the Statute of 21 H. 8. In this case the Ordinary was not bound to give notice, *Co. 4. 19.*

If there be Lord and Tenant, and the Tenant make a Feoffment in Fee, and die, then the Lord, though no notice be given to him, yet must change his Avowry, and take his Service of the Feoffee, *Broo. cap. 108.*

So if a Recovery be had against the Tenant, or if the Tenant be disseised, and the Disseisor die seised, and so the Heir is in by Discent, and the Entry of the Disseisor is gone; here the Lord must charge his Avowry without notice, *Perk. f. 131.*

If one be bound to pay money, or do any other thing at the death, or marriage of a stranger that is not party to the Deed, here the Obligee is not bound to give notice of this contingent to the Obligor, but he must enquire and take notice of it at his peril. *Wheeler's case, M. 7 Jac. B. R.*

So if one be bound to stand to the Arbitrement of *J. S.* and *J. S.* do make an Arbitrement, the Obligor must take notice, and perform it at his peril.

So if one binde himself to account before Auditors, and to pay the Arrearages, he must take notice of the Account, and pay the Arrearages at his peril, without any notice given. *1 H. 7. 5. Co. 8. 92.*

If one have Land in trust, or to anothers use, and have the same without any consideration; in this case the Donee shall stand seised to the first use, though he had no notice of it. *Plow 35 11*

If one distrain anothers Cattle, he is not bound to give notice to the owner in what Pound he doth put them, though the owner desire to know, but he must enquire after, and look to them at his peril. *Broo. Notice 27.*

If a Tenant for life, Lease for years and die, the Lessee for years must take notice thereof, and avoid at his peril, and he in Reversion is not bound to give him notice thereof. *Broo. Notice 15.*

If general Acts of Parliament that do concern the whole Nation, the Judges in giving of their Judgments, are bound to take notice; though the same be never pleaded before them: And every other man is bound to take notice presently at his own peril. But of special Acts of Parliament that concern some particular places or persons

3. In what case the party is bound to take notice, without giving notice:

StB. 4.

persons, onely the Law doth allow some reasonable time, and means for notice; *Broo. Notice 9.*

The Sheriff in the summoning of men, and taking, and seising mens Goods, and Lands, is at his peril, to see that he do not mistake, though no notice be given him; and therefore if a Sheriff do make Execution of another mans Goods, or seise, or distrain, or make Replevin of another mans Cattle, or give Seisin of another mans Land, instead of his, that he ought to take and seise, though notice be given him by the Plaintiff, or some other, that they are the proper Goods and Lands of him, whose Goods or Lands he intended to take; yet in this case the Sheriff is a Trespassor.

Doff. & Stud. lib. sect. 44. Broo. Notice 43.

4. How Notice is to be given.

If the Ordinary had been to give notice of the Avoidance of a Church, or Refusal of a Clerk to a Patron, he ought and must have done it by himself, or by some other by his appointment, by a writing or Certificate under his hand, certainly and plainly setting down the Matter to the Patron, and that to the Person of the Patron, if he might have been found; and if he would not be found in the County, then at the Church-door, whereof the Presentation was to have been. And if another man of his own head had given notice of this to the Patron, this had not been sufficient. *Dyer 327. Co. 6. 40. Doff. & Stud. l. 2. c. 41.*

Notice by a Tenant to change the Avowry, must be made upon the Land aliened with a tender of all the Arrearages behinde; for if the Lord accept the Services of the Alienee, before the Arrearages paid, he doth lose his Arrearages for ever. *Kels. 113. Co. 3. 66.*

If one be bound to Infeoff such a one as the Obligee shall name; now he must name them to the Obligor himself, for if he do it to a stranger, and not to the Obligor, it is not sufficient. *Broo. Notice 150.*

If an Executor be sued in another County, and he pay away his Assets before notice be given him, and have no Assets to answer the Sute; yet this is good, and the other hath no remedy. See before.

CHAP. CXVII.

Of a Nuisance.

1. Nuisans, what.



Nuisans signifieth a thing done, whereby another man is annoyed in his Free-Lands, or Tenements, or otherwise: As when a House is built, or Wall set up, or Water stopt to the grievance of a Neighbor, by which his Frank-tenement is impaired. And this is either Common, when every man is or may be equally annoyed by it; or Special, where some one or more are, or may be more hurt by it then others, *F. N. B. 193. O. N. B. 108, 109.*

Sometimes also this word signifieth a Writ, which is given for Relief in these cases. See for this, *6 Rich. 2. 9. Crompt. Jur. 222. Westminster 2. 25.*

2. What shall be said a Nuisans, or not.

A Nuisans may be unto a man by stopping, or annoying his Ways, Waters, Light, or Air, and that by Building, Diverting, Stopping, Digging, or the like: As if one set up or build a Wall against the Windows, and light of another mans House; or build a House, so that it over-hang his Neighbors, or make a Pig-stie, or a Chimney, or lay Dung or Carrion so near his Neighbors House, that he is annoyed by it; these, and the like Acts are Nuisances, *Cujus est solum, ejus est usque ad calum. Co. 9. 54. 5. 101.*

The erecting of Lime-kills, and Dye-houses, may be a Nuisans to the Neighborhood.

If there be a High-way thorow a Copice, and the owner make Gates at both sides to save the young Sprigs, and a stranger travelling did unhang them, and cut them in peeces; and the owner brought Trespass, and it was adjudged justifiable, and judgment against the Defendants: *James and Hayward, B. R. Quarto Chr.* But it is no Nufans to a man that hath a Mill upon a Water, that another Mill is builded upon the same Water by him, unless thereby his Water be stoppt or turned, though he get away part of his Custome by that means. *Broo. cap. 36.*

It is no Nufans to build a new Pigeon-house, though the Neighborhood be annoyed by it.

It is no Nufans to a Neighborhood, when a Butcher, or Chandler, or Brewer, doth set up his Trade, or Houses for it, amongst them. But a Nufans may be by them, by laying of stinking heaps at the doors. *Pasche, 5 Jac. B. R.* But the building of a Brew-house, the keeping of a Chandler, or Butchers-shop in an inconvenient place to the offence of the Houses or Gardens of Neighbors, may be a Nufans. *Trin. 13 Car. B. R.*

It is no Nufans to plant Coneys, whether a man hath any Warren or not; neither is this punishable any way, but he may kill them. Adjudged *Hil. 39 Eliz. C. B. Rowlethons case.*

For Common Nufances that are, or may be grievous to one as well as another, as in High-ways, and the like, the most proper and apt means of Remedy, and place of Redress, are the Sessions, the Sheriffs Turns, and the Leets; for which the Cause is

If any cast any Garbage, Dung, Intrails, or any other annoyance into the Streets, Rivers, Waters, or other places within, or near any City, Burrough, or Town, the Suburbs thereof, in pain to be called by Writ before the Lord Chancellor, and to be punished at his discretion. *12 Rich. 2. 13.*

But for such Nufances as are more special to one mans Freehold, more than others, the party grieved must be thus relieved; if the Way, Water-course, or Conduit, be wholly stoppt; and he whose Way, Water-course, or Conduit it is, be he a Freeholder of that thing, to which the Way, Water-course, or Conduit doth belong, he may either abate the Nufans himself, or he may have an Assise of Nufans, or a *Quod Permittat* against the party that doth the Nufans. And if the party to whom the Nufans is done, have onely a Lease for years of that to which the Way, Water, or Conduit doth belong, and the Way be wholly, or in part stoppt, or if he have the Freehold, and the Way or Water be stoppt in part onely; in this case the party wronged cannot have an Assise, but he must have an Action of the Case. *Co. 5. 73. 33 Hen. 6. 26. Co. 9. 113. 5. 101. F. N. B. 18. 4. 42 Aff. pl. 1. 14 Hen. 8. p. ult.*

And if he that doth the thing, Alien the House or thing by which the Nufance is bred to another, the party grieved shall have a *Questus est nobis* for his Relief.

For every special Nufans, a man hath a double Remedy, either by Action, wherein he shall recover damages, and Judgment shall be that the Nufans shall be removed, and thrown down, &c. as the cause doth require, or the party to whom it is done, or his Feoffee, or Alienee, if he sell away his Land, to which the Nufans is made, may demolish it, whether the Lands be in the hands of such Alienee, or no, and that before any prejudice to them. But if he demolish it before this Action brought, he cannot after bring an Action; and if he do hanging the Action, the other may plead it in Bar of the Action; if after pleading, it seems, he should have an *Audita querela*. *Co. 9. 54. 5. 101. F. N. B. 185.*

If the Nufans be to a Frank-tenement, the party wronged, or his Heir, or Feoffee, may have a *Quod permittat* against the Actor, without any notice or request before, to reform it; and against his Heir or Feoffee, after Request made to him, to reform it. *F. N. B. 124. Co. 5. 101. 9. 54. Dyer 313.*

If a man have a House near my House, and he suffer it so ruinous, that it is like to fall on my House; I may have a Writ *De domo reparanda*, and compel him to repair it by these means. *Co. lib. Inst. 1 part, fol. 56.*

It seems generally it is where any thing is done to the Nufans of the Kings Tenants, 6. *Perpetuare*, or more particularly where any one doth inroach to himself, that he ought not in what.

D d d d

any

any Jurisdiction, Land, or Franchise. Generally it is as often as any thing is done to the hurt of the Kings Tenement, the Kings Way, or of Common Waters, or of a City, &c. And most properly it is where there is a House builded or inclosed, made of any part of the Kings Demesns, or if a High-way, or a Publick Water, or Common Street, or such like Publick things be taken in to private use. So that a *Perpetrator* is where one inchoate, or makes that several to himself, which ought to be Common to many. *Co. 1 part of Inst. fol. 277. 2 part, fol. 38.*

CHAP. CXVIII.

Of an Oath, Oat-Meal, Ordinary, Ordinances, Oyl, Oppression, Obligation and Defeasance.

See 1.
1. Oath.

2. Perjury and
subornation
of Perjury.

3. Swearing
and Cursing.

4. Oath Ex
Officio.



S to an Oath and Swearing, these things are to be known.

1. That by Oaths of Witnesses, is one way of Tryal, and Proof of Matters of Fact in Civil and Criminal Matters. And for this see *Tryal*.

2. Perjury is a great offence by our Law, and to be severely punished: If it be by a Jury, in a Verdict, in a Civil Cause, it is punishable in an Attaint; for which see *Attaint. Co. 11. 98.*

3. For wilful Perjury, a man is to forfeit twenty pound, to suffer six moneths Imprisonment without Bail, and be ever after disabled to give evidence in any Court of Record, until the Judgment given against him for that offence, be Reversed by Attaint, or otherwise. And if he be not able to pay the Fine, he is to be set upon the Pillory in some Market-place, and to have both his Ears nailed. *5 Eliz. 9.*

4. He that shall suborn a Witness, to give Testimony in any Court of Record, concerning any Lands, Goods, Debt, or Damage, shall forfeit forty pounds, and be for ever after disabled to give evidence (as in the case before.) And if he be not able to pay the Fine, he must suffer six moneths Imprisonment without Bail, and stand upon the Pillory a whole hour, in the next or same Market-Town, where the offence was committed. *5 Eliz. 9: See also in Maintenance. Co. 11. 98. Crompt. Jar. 51. 75. Co. 3 part. Inst. c. 74.*

5. For Common Swearing and Cursing, the Forfeiture is for the first offence, The Lord, and all above him in degree, thirty shillings; the Baronet or Knight, twenty shillings; the Esquire, ten shillings; the Gentleman, six shillings eight pence; every other Man and Woman, single and married, three shillings four pence; and for every offence afterwards twice as much; and for the tenth offence, to be bound with Sureties to the Good-behavior for three years: And for lack of payment, or not giving Security to pay it, and no Distress being to levy it, if the offender be above twelve years old, he is to be put in Stocks three hours for the first offence, and for every offence after six hours; if he be under twelve years old, he is to be whipped by the Constable, or by the Parent or Master in his presence. *Att. 22 June, 1650. See my Justice of Peace. 29 Eliz. 5. 32 H. 8. 9. 23 H. 8. 3. 11 H. 7. 21. and in other Titles.*

6. The Oath of Freemen of Cities, see *Att. 10 Febr. 1648.* The Oath of Majors, Justices, and other Officers, *Att. 5 Sept. 1649.*

7. He that Swears, may do it, by laying hand on the Book, or by lifting up hands which he will. *Att. 5 Sept. 1649.*

8. No man shall be forced under pain of Fine, Imprisonment, or the like punishment, to take any Oath to accuse himself of any crime whereby he may be liable to any pain or punishment, under pain of treble damages to the party grieved: One hundred pound to him that shall first prosecute him for it, and to be disabled to execute, to have any employment in any Court of Justice, and to exercise any Jurisdiction by force of any Letters Patents from the King. *1637 Car. 11.*

9. Com-

9. Commissioners to examine Witnesses by Commission out of *Chancery*, are to be sworn by the new *Ordinance*, 22 *Aug.* 1654.

10. The Oath of Allegiance and *Ex Officio*, is taken away upon 1 *Eliz.* 3 *fac.* See *Allegiance* and *Supremacy*.

For the Oath upon Wager of Law, see *Law*. And for Oaths in General, see my *Justice of Peace*.

of Ordinaries.

For Ordinaries, and the Statutes concerning them, whiles they were here, see *Ordinary*.
13 *Ed.* 1. 19. 25 *Ed.* 3. 9. 31 *H.* 8. 13. 32 *H.* 8. 7. 27 *H.* 8. 20. 5 *Ed.* 6. 4. 2 *Ed.* 6. 20. 1 *H.* 7. 4. 13 *Eliz.* 12. 2 *H.* 5. 1. 21 *H.* 8. 5. 25 *Ed.* 3. 7. 23 *Eliz.* 1. 1 *fac.*
4 34 *H.* 8. 14. 9 *H.* 6. 11. 13 *Eliz.* 12.

of Oat-Meal.

The punishment of him which selleth corrupt Oat-Meal, the first, second, and *Oat-meal* third time, see 5 1 *Ed.* 1.

of Oyl.

Who may search for Oyl brought into *London*, and elsewhere; and how the *Oyl* offenders shall be punished, see 3 *H.* 8. 14.

of Ordinances.

As to Ordinances, these things are to be known.

1. That no Parish or Corporation may make Ordinances against the Publick *Ordinances*; Prerogative, or good.

2. Nor to binde, but where they are allowed by the Chancellor, Treasurer, Chief Justices, or three of them, or Justices of the Assise: See *Corporation*, 19 *H.* 7. 7. And therefore an Ordinance to forbid the *Londoners* to carry their Wares to Fairs, was made void, 3 *H.* 7. 9. *Brownl.* 2 part. 284. See *By-Laws*:

of an Obligation and Defeasance.

An Obligation is a Deed in writing, whereby one man doth binde himself to another to pay a sum of money, or do some other thing; and he that makes this Deed, is called the Obligor, and he to whom it is made, is called the Obligee. *Finches Ley* 49.

And it is sometimes Simple or Single, which is when it is to pay a sum of money, or do some other thing; and when it is without any Defeasance or Condition in, or annexed to it, which also is sometimes with a penalty called a Penal Bill, and sometimes without a penalty: And this is that which is most properly called an Obligation, and sometimes also it is called a Single Bill, or Single Bond; and sometimes it is double or conditional, which is when it is attended upon, and accompanied with a Condition; and then it is said to be a Bond containing a penalty with Condition to pay money, or do or suffer some act or thing, &c. And this Condition is sometimes called a Defeasance, and then especially when it is (as sometimes it is) in another Deed or Instrument; for most commonly it is inserted into the same Deed, wherein the Obligation being the other part of it, is contained: And then also it is either subscribed under the Obligation, or included within the body of it, or indorsed upon the back of it. And *quacunqve via* if the Condition be performed, the penalty is saved; if not, the penalty is forfeit. *Co. super Littl.* 172.

An Obligation may be made upon Parchment or Paper, and in loose Parchment or Paper; or in a peece of Paper or Parchment sowed in a Book, and either way it is good. But if it be made on a Tally, peece of Wood, or any other thing but Paper or Parchment, albeit it be sealed and delivered, yet it is void. *Broo. Oblig.* 67. 30. *Trin.* 49 *Eliz.* B.R. And it may be made in the first, or in the third person (notwithstanding the Statute of 38 *Ed.* 3. 4. which doth intend onely Obligations made beyond the

1. Obligation, what. Obligor, Obligee.

2. The kinds.

3. What shall be said a good Obligation in his Original Creation, or not.

First, for the manner and form of it; and what words are sufficient to make an Obligation.

Sea.) And therefore an Obligation so made, as *Memorandum quod A. de B. debet C. de D. 10l. In cuius, &c.* is good. *Co. super Littl. 229. Fitz Obligat. 9.*

Albeit the best manner and form of an Obligation, is that which is most usual; yet any words in a writing, sealed and delivered, whereby a man doth prove and declare himself to have another mans money, or to be indebted to him, will make a good Obligation; and therefore if a man by Deed say but this, *Memorandum that J. A. of B. do ow to C. of D. 20l. to be paid at Easter next: Or memorandum, that J. A. of B. have had of C. of D. 20l. of which there is 10l. behinde, [or of which I ow him 10l.] Or memorandum, that J. A. of B. have receiyed of C. of D. 20l. to be repaid him again. Or memorandum, that J. A. of B. do grant to ow [or to pay] C. of D. 20l. Or memorandum, that J. A. of B. do promise to pay C. of D. 20l. Or memorandum, that J. A. of B. will pay to C. of D. 20l. Or memorandum, that J. A. of B. have had twenty pound of the money of C. of D. Or memorandum, that J. A. of B. have borrowed of C. of D. 20l. Or memorandum, that J. A. of B. do binde my self to C. of D. that he shall receive of me twenty pound: All these, and such like, are good Obligations. *Dyer 21, 22, 23. Co. 9. 53. 37 H. 6. 9. 22 Ed. 4. 22. Kelm. 34. 21 Ed. 4. 39. 11 H. 7. 6.* So if one say, *memorandum, that J. A. of B. binde my self to C. of D. that he shall receive twenty pound by the hands of J. S. when K. doth come to his house, and at Michaelmas then next following five pound; this is a good Obligation, and the words [by the hands of J. D.] are void, Broo. Oblig. 56.* So if one binde himself thus, *Memorandum, that J. A. of B. ow to C. of D. twenty pound; for payment of which, I binde my self and my goods; this is a good Obligation, and will binde the person, but not his goods, Broo. Oblig. 16.* So if one by Deed, Covenant or Promise to do a thing, and then useth these words, *Ad quam quidem promissionem perimplendam obligo me in 20l.* this is a good Obligation for twenty pound, *Broo. Oblig. 52. Dyer 6.* So if one binde himself thus, *Memorandum, that J. A. of B. am bound to C. of D. to deliver him twenty quarters of Corn by a day, Ad quod performandum obligo me,* without more words; this is a good Obligation, *Broo. Oblig. 40. 79.* So if one binde himself thus, *Memorandum, that J. A. of B. binde my self to pay C. of D. ten pound at Easter, and if I fail to pay it then, I do grant to pay him twenty pound; this is a good Obligation for the twenty pound, if he fail to pay the ten pound: And some say he may recover both the twenty pound, and the ten pound, Foxalls case, 9 Jac. B. R.* So if one binde himself thus, *Memorandum, that in consideration of a Bill of fifty pound, wherein J. S. is bound for me to I. D. for payment of twenty pound: I do binde my self in twenty pound to the said J. S. to save him harmless from all Actions of the same; this is a good Obligation, and if I. D. sue J. S. the Bill is forfeit. Or if one binde himself thus, Be it known, &c. that I A. of B. do ow unto C. of D. the sum of fourteen pound, to be paid at the Feast of, &c. together with six pounds, which I ow him upon Bills and Recognisances, subscribed with my hand; this is a good Bill, but it is good for no more but the fourteen pound, and not for the six pound; for the words do onely import the time of payment of the six pounds. See Brownl. 1 part, fol. 72. 103. 2 part, f. 98, 99. Fox versus Wright, Trin 40 Eliz. B. R. Adjudged Parret and Woolwards case, M. 38, 39 Eliz. in the Exchequer Chamber.**

If one make a writing in the form of a Statute, which the Party doth Seal, and afterwards legally deliver; but it is not sealed by the Kings and the Majors Seal, according to the Statute, albeit this be not a good Statute, yet it may be a good Obligation, *Trin. 37 Eliz. B. R. Fitz Accompt 79.*

If one binde himself to pay money, or do any other thing, and afterward doth adde this clause in the Deed, *Et ad maiorem huius rei securitatem inveni A de B, & C de D fide jussores, quorum unusquisque obligat se in toto & in solida.* And these two do also seal and deliver the Deed; it seems this is a good Obligation to binde them; albeit there be no other words in the Deed, *Perk. sect. 158. Fitz Oblig. 1.*

If an Obligation be made to J. D. to the use of I. S. this is a good Obligation for I. S. in Equity, and some have said he may Release it; but this is much to be doubted; for it is certain I. S. cannot sue the Obligor in his own name, but when he hath cause of Sute he may compel I. D. in Chancery to sue the Obligor, *Br. Obl. 72. Cromp. 7. 63.*

If A. of B. binde himself to C. of D. to pay twenty pound, and say not when; yet the Obligation is good, and the money is due presently. So if the Obligation be *Solvendum nunquam*, or *solvendum* at Doomsday, the Obligations are good; and the *solvendum* void, and the money is due presently. So if A. of B. binde himself to C. of D. in twenty pound, *solvendum A de B* [where it should be *solvendum C de D*,] the Obligation is good, and the *solvendum* void. Broo. Oblig. 14 H. 8. 18. 21 Ed. 3. 46. 4 Ed. 4. 29. If the Obligation be made thus, [*Obliga me, &c.*] leaving out these words following [*heredes, Executores & Administratores*]; this is a good Obligation, and the Executors and Administrators, but not the Heir, are bound by it. And if it be made thus, [*Solvendum to the Oblige & Successoribus suis*] and not *Executoribus, &c.* this is a good Obligation, and the Executors and Administrators, and not the Successors, except it be in case of a Corporation, shall take advantage of it. Dyer 13. Broo. Oblig. 15. 68. An Obligation may be good, albeit it contain false or incongruous Latin or English, or Latin be put for English, or *contra*, if the intent of the parties may sufficiently appear: And therefore if one be bound by the name of *Johannes* for *Johannem*, or one binde himself in *octoginta*, for *octoginta libris*, or in *septuaginta* for *septuaginta libris*, in *viginti* for *viginti libris*, in *seventeen* for *seventeen pounds*, in *quingentus* for *quingentus libris*, in *septuaginta* for *septuaginta libris*, in *sexingentis* for *sexcentis libris*, in *quingagesimus*, or *quinque decies* for *quingaginta libris*, in *octoginta* for *octoginta libris*, or in *viginti* for *viginti libris*, in *viginti nobilibus* for *twenty nobles*, or in *octoginta libris* for *octoginta libris*, or *quingenta libris* for *quingaginta libris*, or the like; these misprisions will not hurt the Obligations, for they are good notwithstanding. But if one by the Obligation binde himself in *quingaginta libris*, or in *quingaginta libris*, or in *quingentis libris*, or in *secentis libris*; these Obligations are void, for in these cases the meaning is so uncertain, that it cannot be discerned; and no Averment will serve to supply it in this case. So if an Obligation be dated *23 die Aprilis*, instead of *Aprilis*, this is a good Obligation, and this mistake will not hurt. See Bruni. Rep. 1 part, 62. 64. 63. 122. 2 part, 208. Co. 10. 133. Fitz. Oblig. 12. 1 H. 4. 14. Adjudged Vernons case, M. 13 Jac. Co. B. Grants case, 5 Jac. B. R. M. 10 Car. B. R. Adjudged Fitz. Hugh versus Bridges, 3, 4 Ed. Co. B. Paris case, M. 4 Jac. B. R. Trin. 21 Jac. Novels case. And if an Obligation have not date, or a false and impossible date, or have but half the date, as the year of our Lord onely; or if it want these words, *In ejus rei, &c.* or the like, if it be sealed and delivered, it is a good Obligation, Co. 2. 5. See Fair, Numb. 5.

A Single Obligation may be to pay money, or to do any other thing that is lawful and possible, and such Obligations are good. But if the Obligation be to binde a man to do a thing unlawful or impossible, it is void; and therefore if one binde himself in an Obligation to kill a man, burn a house, maintain a Sute, or the like, it is void. So if the Obligation be made for maintenance, or to that end, or if it be made pursuant to, and in execution of an usurious contract, or the like, it is void. So if an Obligation be made against the Statute of 23 H. 6. it is void. So if one binde himself in an Obligation, and the matter thereof is altogether uncertain, or insensible, it is void; but if there be any reasonable certainty in it, it is good enough. So if one binde himself to go to Rome in three days, under pain of twenty pound, this is void, Co. 10. 110. See Fair or Deed, Numb. 51. See more *Infra*.

The Condition of an Obligation may be either in the same, or in another Deed, and it may be indorsed of the back of the Obligation, subscribed under it, or contained within it; but the best way to make it, is the usual way, *viz.* The Condition of this Obligation is such, &c. and yet if it be otherwise, it may be good; for if an Obligation be made from A. to B. and on the back of the same, these words are indorsed [*That whereas the within bounden A. is bound to B. in 20li yet B. willeth and granteth, that if A. pay to B. 10l. at Easter, that then the Obligation shall be void.*] it seems this is a good Condition. So if in the close of an Obligation of 20l. these words be added, [*That if A. (the Obligor) pay 10l. to B. (the Oblige) at Easter, that the Obligation shall be void,*] this is a good Condition. So if an Obligation be made from A. to B. of 20l. and these words are subscribed, [*Now therefore if the Obligor pay*

Secondly, For the Matter and Substance of it:

4. What shall be said a good Condition of an Obligation, or not. First, For the Manner and Frame of it.

pay five pound quarterly for four years, then it is agreed that the Obligation shall be void,] this is a good Condition. So if a single Obligation be made from A. to B. of twenty pound, and after the Obligation is made, B. doth by another Deed grant, that if A. pay him ten pound at Easter, the Obligation shall be void; this is a good Condition or Defeasance: But if A. do binde himself in an Obligation to B. of twenty pound, and after B. doth binde himself in another Obligation to A. to perform the Covenants of an Indenture; and in this second Obligation, there is a Proviso that B. shall not sue upon the first Obligation till such a time; this is not a good Condition, *Plow. 141. 21 H. 6. 51. Fitz. Bar 157. Broo. Obl. 89. Fitz. Bar 265. Pasche, 8 Jac. B. Simpsons case, 21 H. 6. 51. 26 H. 8. 9.* A Bill was made thus, [Memorandum, That A. doth binde himself to B. twenty pound; for payment whereof I binde myself, &c. In witness, &c.] And after this, is subscribed these words, [Memorandum, That the said A. doth not compelled to pay the said twenty pound, until he recover thirty pound upon an Obligation against C. &c.] This is a good Defeasance. *Brownl. 3 part, f. 98.* If A. be bound to B. in twenty pound, with Condition, that if B. do not bring A. a horse before Easter, that the Obligation shall be void; this is a good Condition. And if the Obligor will have advantage of it, he must perform the thing, *Et sic de similibus, 26 H. 8. 8.* So if A. be bound in an Obligation to B. in twenty pound, with Condition, that if B. shall bring twenty load of Wood to the house of A. that A. shall pay him the twenty pound; or that A. shall pay him twenty pound when B. shall bring him twenty load of Wood to his house; these are good Conditions, and the thing must be done before the money is to be paid, *Broo. Count. 69.* If the Condition of an Obligation be, That if A. (the Obligor) do not pay to B. (the Obligee) ten pound, that the Obligation shall be void, this is a good Condition: But it shall be taken according to the words; and therefore the Obligor it not to pay it: And if he be sued, he may plead performance of the Condition in the not paying of it, *Broo. Oblig. 42.* If these words be omitted in the close of the Condition [That then the Obligation to be void;] the Condition is void, but it doth not hurt the Obligation, for that remains single: But if the next words, *viz.* [Or else shall stand in force] be omitted, the Condition is never the worse; for as the addition of them doth nothing adde to, so the omission of them doth nothing detract from the strength of the Obligation, *Curia B. R. Pa. 9 Jac. Truman & Parson case.*

Secondly, For matter and substance of it;

Against Law.

The Condition of an Obligation, may be to do any lawful or possible thing, as to pay money, deliver Goods or Cattle, acknowledge a Statute, enter into an Obligation, make a Release, make an Estate, surrender an Estate, make Reparations for quiet enjoying, to save harmless, to defend a Title, to perform Covenants, to abide an Award, to perform a Will, to give so much Land or Money in Legacy, to purchase Lands, to appear in a Court, to marry another, not to sue, not to meddle with an Executorship, not to revoke a Letter of Attorney, not to be Surety, not to play at Cards or Dice, or any such like thing, and such a Condition is good. So also it seems a Condition, that a man shall not sell his Goods, is good: But when the matter or thing to be done by the Condition, is unlawful or impossible, or the Condition it self is repugnant, insensible, or uncertain, the Condition is void, and in some cases the Obligation also. See *West. Symb. Pasche, 8 Jac. Co. B.* And herein, these differences are to be observed. 1. When the thing enjoined, or restrained to be, or not to be done by the Condition, is such a thing in his own nature, as the Commission or Omission thereof, is *malum in se*, there not onely the Condition, but the whole Obligation also is void *ab initio*: And therefore if one be bound in an Obligation with Condition that he shall kill a Man, burn a House, do any other Felony, commit any Trespass, maintain any Sute unlawfully; or (being an Officer) that he shall take Fees by Extortion, or that he (being a Sheriff, &c.) shall let a Prisoner escape, or that he shall save the Obligee harmless against an unlawful Deed, or that he shall not save his Land, or that he (being a Tradesman) shall not use his Trade, (and yet it seems a Condition, that a man shall not use his Trade in one place, or at one time, or if he do that, he shall pay so much by the year unto another, is not a Condition against Law,) or that a man (being an Officer and an Officer *pro bono publico*) shall not exercise his office, or the like; this Condition is void, and makes the Obligation, and so the whole Deed void. But when the thing to be, or not to be done by the Condition, is such a thing as the Omission or Commission

tion thereof in its nature is not *malum in se*; but onely against some maxim of Law, as that a man shall make a Feoffment to his own wife, or is but *malum prohibitum* onely, as that a man shall erect a Cottage contrary to the Statute of 31 *Eliz.* or is repugnant to the state, as that a Feoffee of Land shall not alien it, or take the profits of it, or that a Tenant in Tail shall not suffer a Recovery of his Land, or the like; in these cases the Conditions onely are void, and the Obligations remain single and without a Condition. And yet perhaps, if the Obligors be sued upon these Obligations, they may have relief in Equity. See *Brownl.* 1 part, 63, 64, 65, 70, 71. 2 part, 281. *Equity.* Co. 10. 101. 11. 53. *super Littl.* 206. *Dyer* 304. *Plow.* 64. *Fitz Oblig.* 13. See *Condition and Covenant.* March 191. pl. 238. See *Covenant, Numb.* 4. 2. When the matter or thing to be done by the Condition, is such a thing as in its nature is impossible to be done at the time of the making of the Obligation, there the Obligation is good, and the Condition onely is void. And therefore if I be bound in an Obligation with Condition, that I shall stand to the Award of certain persons, &c. Provided, That the Award be made before the tenth day of *May* next; and provided, that I have warning fifteen days before the tenth of *May*, and this Obligation is made the ninth of *May*; this is a void Condition. And so if I be bound in an Obligation with Condition, that I will go to *Rome* within three days, or that I will make an Estate of *White-acre* in *Dale* worth ten pound *per annum*, when *reverà* it is worth but five pound *per annum*, or that I will be non-sure in such an Action, or assure such a peece of ground, when in truth there is no such Action, or peece of ground; this Condition is void, and the Obligation remains single and good. *Perk. sett.* 735. *Co. super Littl.* 107. *Fitz Oblig.* 17. 27 *H.8.* 29. 21 *Ed.* 4. 54. 42 *Ed.* 3. 6. So if the Condition be, That whereas *A.* had a Judgment against *B.* the Obligor for twenty pound, and the Obligee hath acknowledged satisfaction, if therefore the Obligor shall before such a day get a Warrant from *A.* whereby the Obligee may be saved harmless for the same acknowledgment; That then &c. this Condition is void, and as it seems, the Obligation also, for that it is not onely impossible, but against Law also. But when the thing to be done by the Condition, is a thing possible at the time of the making of the Obligation, and after by matter *ex post facto*, by the Act of God, the Act of the Law, or the Act of the Obligee, it is become impossible; in this case the Obligation and the Condition both are become void: And therefore if a man be bound with a Condition, that he shall appear the next Term in such a Court, and before the day the Obligor dieth; hereby the Obligation is saved. So if *A.* be bound to *B.* that *J. S.* shall marry *Jane G.* by such a day, and before the day, *B.* himself marry with *Jane G.* hereby the Obligation is discharged, and *B.* shall never take advantage of it. *Hilary,* 17 *ac. B.R.* 21 *Ed.* 4. 53. 3. When the Condition of an Obligation is so insensible and uncertain, that the meaning cannot be known, there the Condition onely is void, and the Obligation good: As if an Obligation be made by *A.* to *B.* with condition, that *A.* shall keep *B.* without damage against *J. S.* for ten pound, in which the Obligee is bound to the Obligor; this Condition is void, and the Obligation single. So if the Condition be, That *A.* shall pay his part of the sums of money, that shall be levied for the trying of the Customs of *M.* unless the word [*levied*] be used for taxed in that Countrey, the Condition is insensible and void. So if *A.* be bound to *B.* with Condition to save him harmless, and say not for what, or against whom; this Condition is void, and the Obligation single: But if any sense or certainty may be made of it, the Obligation and Condition shall be both good. *Pasche,* 9 *ac. B.R.* 4. When the Condition of an Obligation in the matter of it, is Repugnant to the Obligation it self, there the Condition is void, and the Obligation good: And therefore if the Condition of an Obligation be, That the Obligee shall not have benefit by the Obligation, or that he shall not sue for the money in the Obligation, or the like; this Condition is void, and the Obligation single: And yet this by a Defence made after the Obligation may be done. 7 *Hen.* 6. 44. 21 *H.* 7. 24. 30. See *Defiance.* 5. When the thing to be done, by the Condition is to be done beyond the Sea, it hath been held that the Condition is void, and the Obligation single, because the thing was not triable here. See the Statutes of 10 *Hen.* 6. 14. Not triable, 21 *Ed.* 4. 10.

But

But it seems the Law is otherwise now, and that the matter is triable here, and the Condition good, *Trin. 7 Jac. B. R.* And in all other cases where a Deed in general is void for Misnomer, Disability, or otherwise, there an Obligation is void, *Fitz. Oblig. 2. 11.*

All Bonds with Conditions for the enjoying of Spiritual Livings, contrary to the Statute of 13 *Eliz. 10.* are void by the Statute of 14 *Eliz. 11.*

If any Ladies or Gentlewomen be drawn by flattery, or threatening to enter into any Obligation, Simple or Conditional, to pay any money, not truly due, they may be relieved by a course in the Chancery, for which see 31 *H. 6. 39.*

5. When an Obligation shall be void, for that it is made to another, and not to the Sheriff, or to the Sheriff in another manner then is appointed by the Statute of 23 *H. 6. 10.*

No Sheriff or his Officers shall take any Obligation, by colour of their Office of any person in their Ward, but onely to themselves, and in the name of their Office, with Condition, with Sureties sufficient, that the prisoner shall appear at the day in the Writ; and all others taken in any other form shall be void. And persons that are in his Ward, by Execution, Condemnation, *Capias Velagatum*, Excommunication, Surety of the Peace, or some other special case, being sent for by a Justice for Felony, or the like, may not be bailed; and others that are arrested on a *Capias* for Debt, or an Indictment, or otherwise by Writ, Bill, or Warrant that are Mainpernable, must be bailed. 23 *H. 6. 10.*

For the better understanding of which Statute, these things must be observed. That such Obligations as differ and vary from the form of this Statute in words and circumstances onely are good, notwithstanding this Statute. And therefore if a Prisoner make an Obligation with a Condition to appear and answer in a Plea of Debt, and say no more, nor do set down the cause of the Debt; this is a good Obligation. *Villars case, 34. 9 Jac. B. R.* And if the Sheriff take an Obligation with one Surety onely, or with two Sureties that are insufficient, or with two Sureties of another County; this is a good Obligation. *Co. 10. 101.* So if the Debt for which the party is arrested, be three hundred pound, and the Sheriff take an Obligation of one hundred pound for his appearance; this is a good Obligation, for in these cases it is left to his discretion, and it doth concern him onely. So if the Condition of the Obligation be for appearance *Mense pasche*, omitting *proxime futuro*, yet it is a good Obligation. *Villars case.* So if the party be arrested by an Attachment out of the *Star Chamber* upon a contempt, and the Condition of the Obligation is, That if the Obligee shall appear, and then, and there shall answer a contempt by him committed against the King and his Council, this is a good Obligation. *Dyer 364.* And if the party that doth make the Obligation be not in the Sheriff's custody, albeit the Obligation be made in any other manner, essentially differing from the form prescribed in the Statute, if it be not against the Common Law, it is a good Obligation. And therefore, if when a *Capias Velagatum* be delivered to the Sheriff against a man, the Sheriff take Bond of him for his Fees, and his Travel; this Bond if it be not within this Statute, yet it is against the Common Law, and therefore void, because it is by colour of Extortion. *Antlers case, Hil. 7 Jac. Co. B.* But where the Obligation, whether it be single, or double, made by a prisoner, doth essentially differ by addition, alteration, or diminution from the form prescribed in the Statute, there the Condition and Obligation both are void. *Co. 10. 101.* And therefore if such a prisoner make an Obligation to any other besides the Sheriff, albeit he to whom it be made be called Sheriff, or if he make an Obligation to the Sheriff himself, and not by the name of his Office; or if he make an Obligation to him by the name of his Office, and doth not rightly name him, (*Nowels case, Trin. 21 Jac. Curia*) as if he make it to *J. S. Viccomiti in Comitatu predicto*, whereas it should be *De Comitatu predicto*: All these Obligations are void by this Statute. And if the Sheriff take an Obligation of a Prisoner for his Appearance, in case where he is not bailable by the Statute, and so let him go free; or if he take an Obligation of a Prisoner that is bailable for his Appearance, and doth insert other things into the Condition, as to pay money for Meat, Drink, or Fees, or the like; or if he deliver a man in Execution, and take Bond of him to save him harmless; or to be a true prisoner: All these and such like Obligations as these, are void by this Statute.

If a man be a prisoner in Ludgate upon a *Capias utlagatum*, and the Gaoler take an obligation of him with two sureties, with condition to save him harmlesse, and to discharge his fees, and to yield his body at all times upon Summons &c. this is a void obligation, as well against the sureties, as against the principall. If the under-Marshall of the Kings Bench take an obligation of one in execution and a stranger with condition to save him harmlesse of all escapes, and so suffer the prisoner to goe at large, this is a voyd obligation. If the Sheriff of Bedford having a prisoner by force of an Execution, let him goe at large, and take an obligation of him, with condition that he shall keep the Sheriff without damage against the King and the plaintiffe, and be at all times at the commandement of the Sheriff as a true Prisoner, and appear before the Iustices of the King at *Westminster* &c. this is a void obligation. *Dier.* 118, 119. *Dier.* 324. *Plow.* 61. 62.

If a man be a Prisoner to the Sheriff for suspicion of Felony, and after a writ comes to him to have all his prisoners at a certain day before the Iustices of Goale delivery of the same County, and thereupon the Prisoner doth make a single obligation to the Sheriff to appear before the Iustices the day of the writ, this is a void obligation, because it is single and not with condition. And if the Sheriff baile not one bailable by a single obligation, it seems this is a void obligation. *Fitz. Oblig.*

6 How a single Obligation shall be taken.

Joint and severall.

A single obligation is alwayes taken most in advantage of the obligee and against the obligor, but it is otherwise of the condition of an obligation. For this is alwayes taken most in advantage of the obligor, and against the obligee: 10 H. 7. 1. 16:
If two, three, or more bind themselves in an obligation thus, *Obligamus nos*, and say no more, the Obligation is and shall be taken to be joint only and not severall; but if it be thus, *Obligamus nos & utrumque nostrum*; or *obligamus nos & unumquemque nostrum*; or *obligamus nos & quolibet nostrum*; or *obligamus nos & alterum nostrum*; in all these cases the Obligation is both joint, and severall, so as in these cases the obligee may sue al the obligors together, or all of them apart at his pleasure, but it seems he may not sue some of them and spare the rest, but he must sue them al together, or all apart by severall *Precipes*, and in this case he may have severall Judgements and severall executions against the obligors, and take all their bodies in execution, but he shall have satisfaction but once, or from one of them only, for after he hath been satisfied by one, the rest shall be discharged. But in the first case where the obligation is joynt and not severall, the obligee must sue all the obligors together, for he cannot sue one alone with effect without the rest, unless it be in some speciall cases, as where one of the obligors alone doth seale the deed, or where all of them do seale, but one of them is an Infant, a woman covert, a monk, or the like, or where one of them is dead, for in these cases one or some of them may be charged without the rest. But otherwise the Plaintiff cannot proceed in his suit against one, or some of them without the rest, except the defendant give him advantage, for howsoever the suit be well begun, for when one or some of them alone is, or are sued, it shall not be intended that the rest are living, untill it be shewed by the other party, yet the defendant is not bound to answer, unless the rest be sued also; and therefore in this case he or they that is or are sued alone, are thus to take advantage of it. *viz.* to shew the matter to the Court, and to plead in abatement of the writ; for if he appear and shew it not, but plead *non est factum*, or the like, to the obligation, the Iury must find against him, and he will be charged with the whole debt. And so also if one appear, and the other make default and is outlawed, it seems he that doth appear must answer all. See *Brownl.* 1. part. 208. If an obligation be, we bind us or either of us, this is joint & severall at the Election of the obligee. *Brownl.* 1. part. 121. *Dier.* 19. 310. *Co.* 5. 119. 9. 53: *old N.* B. 62. *Broo.* Joynancy 4. 16. *Dec.* 69. *Hil.* 39. *Eli. R. R.* adjudged.

Executors and Administrators shall be bound by the obligation of the obligor, albeit they be not named: but the heire of the obligor shall not be bound by the obligation, unless he be named in the obligation, *viz.* *obligo me, heredes &c.* *Dier.* 14. 27. 1. 1. si non.

Executors, Heire.

If an obligation be made to one and his heires, or to one and his successors; the Executors and administrators, not the heire, or successor, shall take advantage of it. See before.

If one binde himf: If in an obligation of 100l. to *A.* and *B. solvent*: 100l. to *A.* and 100. to *B.* and *A.* die, it seems the executors of *A.* shall not have 100l. but that *B.* shall have the whole 200l. *sed quere. Dier* 350.

For the time
of payment.

If one binde himself by obligation to *I. S.* to pay him an 100l. when *K.* doth come to his house, and at Michaelmas then next following 100l. more; Michaelmas then next following shall be taken for next following the making of the obligation, and not next following the coming of *K.* to his house. *Broo. Oblis* 59.

If one bind himself to pay mony upon a single obligation, and doth not say when; in this case it must be paid presently.

If one bind himself by obligation to pay money at Michaelmas, and doth not say which Michaelmas, this shall be taken for Michaelmas next after the date of the obligation. And so also it shall be taken in the condition of an obligation. If one bind himself to pay at severall day. See *Brownlows rep.* 1 part. 64. 2 part. 98, 99. *Dier.* 128. By three Justices, *Trin.* 22 Jac. Co. B. Curia in the Marches of Wales, *Trin.* 8 Car.

If one bind himself to pay 20l. in the yeare of our Lord which shall be 1599 in and upon the thirteenth of October next ensuing the date of the obligation; this shall be taken to be due the 13 of October 1599. and not next after the obligation. See more *infra: Agree M.* 9 Jac. B: R.

7. How an Obligation with a condition, or the Condition of an Obligation shall bee taken. And how it must & ought to be performed.

The condition of an obligation when it is doubtfull, is alwaies taken most favourably for the obligor, in whose advantage it is made, and most against the obligee, yet so as an equall and reasonable construction be made according to the minds of the parties, albeit the words sound to a contrary understanding: *Hill: 37 Eli: B: R: Sharpus versus Hanchington: Dier: 14: 51:*

First in respect of the persons that are to doe the thing.

If something be by a condition to be done, and it is set down indefinitely, and not set down who shall do it, if the obligee hath more skill to do the thing then the obligor, it shall be done by him; otherwise it shall be done by the obligor: as if a tailor be bound to me in an obligation with condition, that if I bring him three yards of Cloth which shall be measured and shaped, and if he make me a Cloak of it &c: and it is not said by whom it shall be shaped, this must be done by the Tailor: See more in *Brownlows rep.* 1: part 76: and in *Acts: Perk Self: 785:*

Secondly in respect of the time when the thing is to be done.

If the condition of an obligation be to pay mony, or doe any other transitory act to the obligee himself, and no time is set for the doing thereof, but a place only; this regularly must be done in convenient time, and that without request: So also in case where the thing to be done is in its nature locall, but yet such a thing as may be done in the absence of the obligee, and without his concurrence, as to acknowledge satisfaction on a Judgement, make a lease for years or the like, it must be done in convenient time and that without request. So also in case where the thing to be done is locall, and the concurrence of both parties necessary thereunto, yet when it is to be done to a stranger and not to the obligee, as if the condition be that the obligor shall make a Feoffment to *I. S.* it must be done in convenient time without request.

But where the thing to be done is locall, and the concurrence of both parties necessary thereunto, and the act is to be done by the obligor himself, or by a stranger to the obligee himself, as where the condition is that the obligor, or a stranger, shall enfeoff the obligee; in this case the obligor, or the stranger shall have time to do it during his life, unless the obligee do hasten it by request, and if he request it sooner, then it must be done in convenient time after request made. And yet if the thing to be done, be to be done wholly by the obligor, or a stranger, and doth nothing concern the obligee, as where the condition is that the obligor shall goe to *Rome*, or that *I. S.* shall preach at *Pauls Cross*, or the like; in the first case it may be done at any time during the life of the obligor, and in the last case it may be done at any time during the life of *I. S.* and request in this case shall not hasten it. See *Brownl. 1. part. 73. 74.*

If one be bound to pay 10l. or to enfeoff one upon the return of *I. S.* from *Rome*, in this case if *I. S.* die before he return from *Rome*, there the obligation is saved though the 10l. be not paid. But if it be to pay 10l. or to enfeoff before Michaelmas, if the obligor dye before Michaelmas, his executors must pay the 10l. By *Popham Justices, Goldb. 192:*

If an obligation be with condition to grant a rent, or an annuity to the obligee during his life, to be paid at Easter, and no time is set for the doing of it; this rent must be granted before Easter next after the obligation, or else the obligation will be forfeit. And if the condition be to grant an Advowson, and no time is set for the doing thereof; It must be done before the Church become voyd, or otherwise the obligation shall be forfeit. *Co. 2. 80. Super Litem. 208.*

If the condition be to do a thing upon a day in the yeare, and there be two daies of that name in the yeare; in this case it seems it must be done that day that is furthest off from the time of the making of the obligation, especially if that day be the more notorious of the two daies. *Dier. 77.*

If the condition be to pay 10l. the eleventh of May next following, and the obligation is dated the 5 of May; in this case the money must be paid the 11 day of the same Month of May, and not of the next Month of May. *Adjung. M. 20. Jac. B. R. Prescotts Case.*

If one be bound upon the Feast day of St. Michael to pay money upon the Feast day of St. Michael next coming; this shall be understood the 12. month after, and not that very day so if one be bound in Lent to pay money in the 4 week of Lent next to come; this shall be paid that Lent come 12 Month. *Goldsb. 137. Pl. 40.*

If the condition be to permit the obligor to thresh and carry away the Corn in the Barne of the obligee from time to time and at all times convenient, in this case the obligee shall have time for any time of continuance more then two or three years &c. but otherwise perhaps if the words be [within time convenient] but he cannot take it a way on the Sabbath day or in the night, but he shall break his Bond. *Goldsb. 77. pl. 81.*

If the Condition be to stand to the award of I. S. and I. S. award money to be paid, but set no time for the payment of it; this must be paid in convenient time; else the obligation shall be forfeit. *22 Ed. 4. 25.*

If one be bound to me in an obligation with condition, that if I enfeoffe him of White acre, he will pay me 10l; but doth not say when; this must be done as soon as I make him the Feoffment. So if one be bound to me that if the goods, I have delivered to B. shall be lost, that C. shall satisfy me for them, and doth not say when; this shall be presently after the losing. *Parks. 508. 797. 799.*

If the condition be to pay I. S. money when he shall come to the age of 21 years; in this case it must be paid the very day I. S. doth come to his full age, and payment after is not a sufficient performance of the condition. *N. 2 Jac. B. R. Granddenes Marfess Case.*

If the condition be to come at a day to such a place to do a thing, and the thing cannot be done without the concurrence of the other parties; in this case the obligor must stay for the very last instant of the day for his coming; and it seems also he must stay at the place all the day long. *39 El. B. R. Fitz. Barre 91.*

If the condition be to pay a rent at Michaelmas or within 20 daies after, the obligation is not forfeit before the 20 daies be past. *Adjung. 736. 39 Ell.*

If one be to do a thing on a day certaine, he may doe it any part of the day whiles the light doth last. And if the Condition be to doe a thing by, or before a day, it may be done the last instant of the day before, and it is sufficient. *Broo. Condition. 145.*

Dier. 17. Ed. 4. 3.

If the condition of an obligation be to pay money, or doe any like transitory act to the obligee on a day certaine, but no place is set down where it shall be done; in this case it must be done to the person of the obligee wheresoever he be; and for this purpose, the obligor must at his perill seek out the obligee, if he be *intra quatuor mania*, otherwise the obligation is forfeit; but if the obligee be not within the Kingdom at the time when the thing is to be done, he is not bound to seek him, so neither is the obligation forfeit for not doing of the thing. So if one grant an Annuity to another, and doth not set down where it shall be paid, and gives a Bond with condition for the payment thereof; in this case it must be done to the person of the obligee where ever he be. And the like law is as it seems, where the thing to be done by the condition, is to be done by or to a stranger.

But when the thing the party is bound by the condition to do is Locall,

3. In respect of the place where the thing is to be done.

he is not bound to goe any further, or to any other place, but to the place itselfe: And therefore if the condition be to make a Feoffment of a piece of Land, the party that is bound to doe it, is not bound to goe to any other place, but to the piece of land to doe it. And if a man make a Feoffment in Fee, or lease for life or years of land, rendering rent generally, and gives an obligation with condition for the payment of the rent, the Feoffee, or Lessee, is not bound to goe to any place from the Land to seek the Feoffor or Lessor to pay him this rent. *Perk. Sess. 780, 781. 7 Ed. 4. 23 Ed. 4. 25. Litt. Sess. 340. 341.*

If the condition be, to deliver 20 quarters of Corn such a day to the obligee, and no place is set down where it shall be delivered; in this case it is sufficient, if the obligor when the Corn is ready, doe give notice thereof to the obligee, and to wish him to appoint a place whereunto the obligor may bring it, and if he refuse to appoint a place, it is at his own perill; or the obligor may bring the corn to the house of the obligee (and this is the safest way) and if the obligee refuse it, the condition is performed, and the obligation is discharged. *Perk. Sess. 785.*

4. In respect of the thing it self to be done To perform Covenants.

If the condition be to perform all the Covenants in an Indenture; this shall be taken as well for the covenants in Law as for the covenants in Deed. *Co. 4. 80. Dier. 257.*

If a lease be made of a Manor excepting a Close, and the Lessee make an obligation to the Lessor with condition, that the Lessee shall perform *omnia & singula in scriptis prædictis contenta*; by this the Close shall be taken to be within the condition, so that if the Lessee disturb the Lessor in the Close excepted, this shall be a breach of the Condition. *Plow. 67.*

To make a Feoffment, Lease &c.

If the condition be, to make a feoffment to the Obligee of Land; in this case the Feoffment may be made with, or without writing, and if it be made by writing, it may be made without any warranty or covenants, and this will be a sufficient performance of the condition: See covenant. *Numb. 6.*

To make a Release, or other assurance.

If the condition be, that the obligor shall make a Lease to the obligee for 20 years and it is not set down when the Lease shall begin, it shall begin presently. See more in *Brownl. 1. part. 84: 94. 91: 92. Co. 6. 33.*

If the condition be, that the obligor shall doe any act upon request that the Counsel of the obligee shall think reasonable, as for example, shall doe any act &c. for the releasing of an obligation, wherein the obligee is bound to the obligor, and the obligee by advice of Counsel deviseth and requesteth a release of all demands to the obligee, and to *J. S.* in this case the obligor may refuse to seale it, albeit it be devised by the Counsel of the obligee, because it is unreasonable, for it must be a reasonable act that the obligor by this condition is bound to doe. *Dier. 218.*

To pay money or acnt.

If the condition be to pay 10l. at Michaelmas next, and 10l. yearly after, until *J. S.* be made Knight; in this case albeit *J. S.* be made Knight before Michaelmas, yet the first 10l. at Michaelmas must be paid. See more in *Brownlows. Rep. 1. part. 104: 103. 113. Adind. Hil 39 Eli. Co. B.*

If the condition be thus: That if the obligor shall for ever pay yearly to the obligee &c. 10l. at the two usuall Feasts by equall portions; or if his heires shall at any time hereafter pay 100l. at one payment to the obligee, that then the obligation to be void; in this case albeit the obligor hath election, which of these two things to doe; yet because the intent is apparant that one of these things should be done; if therefore the 100l. be not paid before the first feast, the 10l. must be paid yearly. *Ad. judge. M. 18. Jac. B. R. Herbert versus Rockey.*

To warrant land and for quiet enjoying.

If the Condition of an obligation from *A.* to *B.* be thus; that whereas *A.* hath sold to *B.* a certain Meadow in Dale, that the said *A.* shall warrant the same against Lord and King and all others, if the said *B.* shall peaceably enjoy it to him, and his heires of the Lord of the Mannor of *M.* by the services due after the custom &c. in this case the substance of this being for quiet enjoying, it shall be extended that way; and albeit it be not said what he shall warrant; yet it shall be taken the Land in question, and the warranty shall be construed to last only for the life of *B.* and not to extend to any new titles after the Covenant, especially such as are by the act and default of the obligee himself, as if he commit a forfeiture and the Lord enter, or the like. *Dier. 41: 43.*

If the condition be, That the Obligor shall sufficiently prove such a thing; this shall be taken for proof by enquest, and accordingly it must be done: But if the condition be that it shall be done by such a time, or before such persons as when or where such proof cannot be had, then it is otherwise. Where the word [proof] is put generally, it shall be understood of proof by Justice; but when the parties agree upon another form of proof, that shall prevail against that which is but instruction of Law. See more in *Brownlows* 1. pa. 33. 63. 2 part. 38. *Park*, *Sess.* 791. 10. *Ed.* 4.

11. *Golds case in Harberts Rep.* 127.

If one be bound in an obligation with condition to suffer his wife to give to her kinsfolks children or others portions of his goods to the value of 100l. and that he will perform it, and she give part to one and not to another; in this case the husband must perform it accordingly: But if the condition be to suffer her to give to A and B. 100l. and that he will perform it, and she give 100l. to A, he is not bound to perform this. *Curia Triarum* 7. *Jac.* Co. B.

If the condition be, That he shall perform his wives Will, so it do not exceed 20l. and she make a Will and devise 100l. in this case he is not bound to perform the Will for the 20l. See more in *Brownlows* 1 part 54. 112. 113. *Adjdg.* *Hil.* 7. *Jac.* B. R.

If the condition of an Obligation be, That the Obligor shall infeoffe the Obligee and such others, as he shall name by a day; in this case the Obligee must doe the first act, viz. name the others; otherwise the Obligor doth not forfeit his Obligation by the not doing of it: But if the condition be to infeoffe me, or such others as I shall name before such a day; in this case if I do not name others, it seems he must infeoffe me before the day at his perill.

If the condition be, that the Obligor shall make such an estate of Land as I. S. shall advise, I S. must first advise, and this must be made known unto the Obligor ere he is bound to doe any thing, and if he never advise, he is never bound to doe any thing; for it is in this case, as if one be bound to stand to the award of I S. and I S. never make any, or make a void award which is all one. *Co.* 5. 25. 7. *Ed.* 4. 13. *Park*, *Sess.* 775.

If the condition be, to make such a discharge in such a court as the Obligee or his counsel shall advise; in this case the Obligee must first act, viz. advise and give notice of the advise to the Obligor before he is bound to doe the thing: But if the condition be to make such a discharge in such a Court such a day, as the Judge of that Court shall advise, in this case the Obligor must at his perill procure the Judge to advise a discharge, and it must be done that very day, or the obligation will be forfeit, *Co.* 5. 23.

If the condition be, to pay 10l. to the Obligee when he doth come to London; in this case, the Obligee must doe the first act, viz. make known to the Obligor when he doth first come to London; for otherwise, it seems the Obligor is not bound to pay the money. *Per Just.* *Nichols* *Id.* 13. *La. Ca.* B. 10. *per* *Just.* *Id.* 13.

If the condition be, that the Obligor shall levie a fine to the Obligee before such a day, the Obligee must doe the first act, viz. sue out the Writ of Covenant. See more in *Brownlows* 1 part. 70. *Co.* 5. 127. *Dyer* 371.

If the condition be, that the Obligor shall deliver 20 Clothes to the Obligee such a day, the Obligee paying for every cloth immediately after the delivery 10l. in this case the clothes must be delivered, altho the Obligor refuse to pay the money; but if [immediately after] he left out, it seems the Obligor is not bound to deliver the cloth unless the Obligee first pay the money. *21 Ed.* 4. 13. *per* *Just.* *Id.* 13.

If the condition be, that the Obligor and his Heirs shall at any time upon request made, doe any act, &c. that the Obligee shall require, &c. and the Obligee tender a Release or other Deed to seale; in this case, if the Obligor or his heir that is to seale the Deed, be an illiterate man, he may refuse to seale it until he can get some body to read it unto him; but he may not refuse or delay to seale it until he can have a Lawyers advise upon it; but he will forfeit his Obligation; *CA.* 12. *per* *Just.* *Dyer* 337.

To prove a thing.

To suffer his wife to make a Will.

5 In respect of the manner and order of doing the thing and other matters.

If the condition be, to doe any thing upon request, the Obligor untill request made is not bound to doe any thing towards it, neither can he forfeit his obligation till then.

And yet if in this case, the Obligor disable himself to doe the thing he hath undertaken to doe upon request before the request made the obligation may be forfeit without any request made. *Park. Sect. 77. Co. 5. 21.*

If the condition be, that the Obligor shall within a certain time surrender such land of his for an Annuity, of so much as they shall agree upon; and they agree upon 10 l. *per annum*; in this case the Obligor is not bound to make the surrender untill the Annuity be made and tendered unto him. *14. H. 8.*

If the condition be, to deliver to the Obligee an obligation wherein the Obligee is bound &c. or to seale and deliver to the Obligee such a release of it as shall be devised by the counsell of the Obligee before Michaelmas, and the counsell doe not advise any Release before Michaelmas; in this case the Obligor is discharged of the obligation, for the Obligee is to doe the first act. *Hil. 37. Eliz. Co. B. Greetingham; case adjudg.*

If *A* be bound to *B*, in an obligation with condition that *A* and his wife shall levie a fine of Land to *C* and *D* and their Heirs, and at their costs and charges; this shall be construed to be at the costs of the Obligor, and not at the costs of the Confees; but if the word [and] be omitted, perhaps it may be otherwise. *Trin. 4. Jac. B. R.*

If the condition be thus; That if the wife die before Michaelmas without issue of her body then living, that the obligation shall bee void; in this case [then living] shall relate *ad proximum antecedens*, and not to the death of the wife, [and therefore] if she hath issue and die, and after before Michaelmas the issue dyeth also, the obligation is void. *Dier. 17.*

If the condition be, that if the Obligor shall waste the goods of the Obligee (his master) and this waste within three Moneths after due proof of it, either by confession or otherwise be notified to the Obligor, that the Obligor shall satisfy the Obligee for it, and the Obligor doe confess the waste under his hand and seale; in this case, it seems this proof though it be *extrajudicialis* is sufficient. *Gold case M. 13. 12.*

Conditions
Impossible.

When the condition of an obligation is to doe two things by a day, and at the time of Making of the obligation both of them are possible, but after and before the time when the time is to be done, one of the things is become impossible by the act of God, or by the sole act and factes of the Obligee himself; in this case the Obligor is not bound to doe the other thing that is possible, but is discharged of the whole obligation. But if at the time of the making of the obligation one of the things is, and the other of the things is not possible to be done, he must perform that which is possible. And if in the first case one of the things become impossible afterwards by the act of the Obligor, or a stranger, the Obligor must see that he doe the other thing as he can. And when the condition of an obligation is to doe one single thing which afterwards before the time when it is to be done doth become impossible to be done in all or in part, the obligation is wholly discharged; and yet if it be possible to be done in any part, it shall be performed as near to the condition as may be. *Co. 5. 26. super Lit. 20. Dyce 162. 15. H. 7. 2. 4. H. 7. 4.*

If the condition be to doe one of two things, as to make a Feoffment to me, or pay me 10 l. in this case, if the Obligor doe either of them, it is sufficient. But if the condition be in the copulative, as to enfeoff me and pay me 10 l. in this case, the doing of one of them will not suffice, but he must doe both. *21. Ed. 3. 29.*

If the condition be to pay, to *A* and *B* 10 l. a piece within a week after they come to 18 years of age; within 40 dayes after their dayes of marriage after notice given thereof, which shall first happen; in this case, this notice must goe to both the parties, so that notice must be given when they are 18 years of age; otherwise, and untill notice given, it seems the Obligor is not bound to pay the money. See more in Condition Numb. 8. and Covenant Numb. 6. See more in Brownlows rep. 1 part. 77. and in Covenant before. Brownlows Rep. 1 part. 99. *Per Iustice Dodridge.*

M. 2. Car. B. R.

The

The matter of a condition of an obligation is sometimes affirmative and compulsory and doth consist of something to be done, and sometimes it is negative and restrictive and doth consist of something not to be done; the not doing in the first case, and doing in the latter case causeth the obligation to be forfeit, and the doing in the first case, and not doing in the latter, saveth the obligation.

If one be bound in an obligation to me, with condition to enfeof me of Land, and the obligor doe first make a Lease to me of it, and afterwards he doth make a Release of it to me and my heirs this is a good performance of the condition. See more in *Brownlow's Rep.* 1 part 62. *Co. super Lis.* 207. *plow.* 6. 7. 17 *Ed.* 4. 3.

If the condition be to make me a Feoffment of Land and he tender me a Feoffment, and I refuse it; by this the condition is performed. So if the condition be, to make a Feoffment to my use, and when it is made I refuse it; this is a good performance of the condition. But if a man bind himself in an obligation to me, with condition to make Feoffment to a stranger, and he tender the Feoffment to the stranger and he doth refuse it; this is no good performance of the condition, but the obligation is forfeit. If the condition be, to enfeof me and my wife, and he tender it to me, and I refuse it; it seemes; this is a good performance. *Perk. Sess.* 784. *Fixe. Barre* 82. *Perk. Sess.* 758. 15 *Ed.* 4. 5.

If one bind himself in an obligation to me, with condition to make me a Feoffment of the Mannor of Dale by a day, and he before the day, grant a rent-charge out of the same mannor to a stranger, and afterwards and before the day also, he doth make me a Feoffment of the land; this is a good performance of the condition, and the grant of the rent no breach thereof. But if the Obligor sell away part of the Mannor before, or make a Feoffment to me but of a moiety or a third part of the Mannor; this is no good performance of the condition. And if in this case, the Obligor before the day take a wife, and before the day make his Feoffment according to the condition, but the marriage doth continue untill after the day; in this case, it seems the condition is broken. 3 *H.* 7. 4. 4 *H.* 7. 4. *Perk. Sess.* 757.

If the condition be; that the Obligor shall enfeof me of the Mannor of Dale, and he make a Feoffment of the Mannor of Sale, and I accept thereof; it seems this is no performance of the condition, and that my acceptance in this case will not help. So if the condition be to make me a Feoffment of Land, and he give me money, a horse or the like in recompence of this, and I accept thereof; this is no good performance of the condition: And the like Law is in all cases where the condition is to doe any collaterall thing, as to account, build a house, enter into a Recognition, or the like, and the Obligor doth give, and the Obligee accept some other thing in lieu thereof: And so also it is where the condition is to make a Feoffment to a stranger, and the Obligor give, and the stranger take another thing in lieu thereof.

But if the condition be to enfeof me of land such a day, and he make, and I take the Feoffment before the day; this is a good performance of the condition. *Perk. Sess.* 749. 759. *Dyer* 1. *Perk. Sess.* 751. 9 *H.* 7. 17. 3 *H.* 7. 4. 27. *H.* 8. 10. 14. *H.* 8. 15. 10 *H.* 7. 14.

If the condition be to enfeof me or my Heirs in the disjunctive, and the Obligor enfeof me and my Heirs; this is a good performance of the condition; for it is impossible to enfeof my Heirs while I live, and when two things are to be done by a condition, whereof the one is possible at the time of making the obligation, and the other is not; in this case it is sufficient if he doe the thing which is possible. 14 *H.* 8. 15. *Co.* 5. 112.

If the condition be, to make me a Feoffment, or pay me 20l. if the Obligor doe either of them, it is sufficient.

But if the condition be to enfeof me, and pay me 20l. in this case the Obligor must doe both, or the condition will not be performed. *Ex. de assibus.* 21 *Ed.* 3. 39.

If the condition be, That the Obligor shall make me a sufficient estate of land by the advise of W. and S. and they advise an insufficient estate, and the Obligor doe make the estate according to that advise; this is a good performance

8 When the Condition of an Obligation shall be said to be performed and the Obligation saved, or not. To make a Feoffment.

Tender and Refusal.

Acceptance.

To make an Estate.

of

of the condition: But if the condition be that the Obligor shall make a good and sure estate, and he by advise of counsell make an estate that is not good and sure; this is no good performance of the Condition. *Perk. Sess. 776. Kely. 95.*

If the condition be, that the Obligor shall make me an estate of Land, and make the estate to another by my appointment; it seems this is no performance of the condition. *Fitz. Barre. 55.*

If the condition be, that the Obligor or his Feoffees in trust shall make an estate to the Obligee such a day, and the Feoffees doe it without the consent of the Obligor; this is no performance of the condition. *See more in Brown. 1 part. 69: 75. Trin. 17. Ia. Br.*

To make further assurance.

If the condition be, to make further assurance, and the Obligor make further assurance upon condition, without the agreement of the other party; this is no good performance of the condition. *Pasche 8. Ia. Co. B.*

To save harms.

If the condition be, to save me harmless from an Annuity wherewith my land is charged, and the Obligor doth pay the same yearly, and get me an Acquittance for the same from the party; this is a good performance of the condition. But if the condition be to discharge me of such an Annuity; in this case, payment and procuring me a Release, is no good performance of the condition. *37. H. 6. 18. Perk. Sess. 792.*

To grant a rent, or to procure a rent to be granted.

If the condition be, that the Feoffees or Lessees of the Obligor of such Land which they have in trust shall grant me a rent-charge or release their right to me before such a day, and there be three Feoffees, or Lessees, and two of them only doe grant this rent, or make this Release; this is no good performance of the condition. *Perk. Sess. 790. Fitz. Barre 72*

If the condition be, that the Obligor shall purchase and procure to me and my heirs a rent of 5 l. *per annum*, and a stranger hath such a rent out of my Land, and he doth get him to release this to me; this is a good performance of the condition; And if one be bound with condition to grant me the rent and farm of such a Mill before Michaelmas, to be had and perceived untill I be paid 10 l. and before that time he lease the Mill to me at a rent, and then suffer me to detain so much of the rent; it seems this is a good performance of the condition. *See more in Brownlow 1 part 75.*

To deliver a horse.

If the condition be to deliver me a horse, and the Obligor tender the horse unto me, and I refuse him; hereby the condition is performed; and so in all such like cases where the Obligor is to doe any collateral thing, as stand to an award, or the like; if the Obligor offer to doe it, and the Obligee refuse, the condition is performed, and the Obligation discharged for ever. *Co. super Litt. 207.*

Tender and Refusal.

To pay money

If the condition be, to pay money at a day certain, and the Obligor pay a link before night, time enough for the receiver to see to number his money by day light; this is a good performance of the condition. And if the condition be to pay money by, or before a day; payment the last instant of the day before is a sufficient performance of the condition. *Dyer 17. super Litt. 202. Broo. Condition 145.*

If it be to pay money to a man and his wife, payment to the man is a good performance. *Goldsb. 73. pl. 16.*

Acceptance.

If the condition be, to pay me a sum of money at a day certaine, and the Obligor pay me less money before the day, or all the money before or at the day, or give me something else before, or at the day of payment in lieu thereof, or pay me all the money or a lesser sum at the day appointed, but in another place, and not the place mentioned in the condition, & I accept thereof; in all these cases the condition is well performed. But if a stranger to the condition doe so, and I accept thereof; this is no good performance of the condition as hath been adjudged. And if the Obligor pay less then the whole money at the day of payment, and the Obligee accept thereof; this is no good performance of the condition. And if the thing to be done be a collateral thing, as to account, or the like, and the Obligor give unto the Obligee money, or a horse in lieu thereof, and the Obligee accept it; this is no good performance of the condition. *Perk. Sess. 248. 34 H. 6. 17. 21 Ed. 3. 33: Co. 5. 117. 9. 79. Broo. Oblig. 64. Trin. 36 Eliz. Adjudge 27 Eliz.*

And if the obligor pay the money to the obligee after the day of payment, this is no performance of the condition, but the obligation is forfeit, and the money paid shall goe in part towards the forfeiture. And yet in this case the Defendant at this day being sued upon this obligation, doth usually adventure to plead conditions performed, and give this speciall matter in evidence to the Jury, who for the most part doth find against the obligee. And yet if the condition be, to pay me money at a day certaine, or to pay another money at a day certaine, and the obligor pay me or the stranger at severall times before the day, and I, or the stranger accept thereof, this is a good performance of the condition. But if the obligee doe only promise to accept of a horse for his money at the time of payment, and when the time of payment comes, and tender of the horse is made to him, he doth refuse him; this tender is not a sufficient performance of the condition. *Perk. Sect. 548. 34 H. 6. 17. 21 Ed. 3. 13. Co. 5. 117. 9. 79. Broo. Oblig. 64. Trin. 36 Eliz. Admudge. 27 Eli. Dier. 18. 18. Ed. 4.*

Tender and
Refusall.

If the condition be, to pay money at a day and place certaine, and the obligor tender it at the time and place, and the obligee is not ready to receive it; or being ready, doth refuse to receive it; this is a good performance of the condition to save the forfeiture of the obligation. And yet if the obligor be afterwards sued for this money, he must say in his pleading, that he is still ready to pay it, and he must tender it in court. But if one be bound by a single obligation to pay money, and after at the same or some other time, he hath a defeasance from the obligee, that upon payment of a lesser summe the obligation shall be void; and the obligee refuse the money when the same is tendered at the time when by the Defeasance it is to be paid; in this case the obligor is not bound to tender the money in Court, neither hath the obligee any remedy for it. *Co. super Litt. 208, 209. 27 H. 8. 10. Perk. Sect. 784.*

If the condition be, to pay me money at a day and place certaine, and the obligor doth tender it to me the same day in another place, this is no performance of the condition, and therefore in that case I may refuse it. *41 Ed. 3. 25.*

If the condition be, to pay money between two daies; payment of the money upon either of those daies is not a good performance of the condition, but the payment must bee between the two daies. *Dier. 17.*

If the condition be, to pay me money at a day certaine, and I bid the obligor pay the money to one that I doe owe so much more unto, or I bid him lay out the money for mee, or I bid him keep it for such a debt I owe unto him, and he doe so, and I accept hereof, it seems this is a good performance of the condition. *Perk. Sect. 748. 27 H. 6. 6. Fitz. Bar. 43.*

If the condition be, to pay me money, and I appoint another to receive it, and the obligor pay it unto him; this is a good performance of the condition.

If the condition be, that a stranger shall pay to the obligee 10l. and the obligee accept a horse for it, this is a good performance of the condition. But if the condition be that one stranger shall pay to another stranger 10l. and the one doth give, and the other take a horse in lieu of this; this is no good performance of the condition. See more of this in acceptance, *Sect. 3. Co. super. Litt. 208, 209, Dier. 56.*

Acceptance.

If the condition be, to pay me 20l. of lawfull English money, and the obligor pay me in Spanish or in any other money currant in this Realm, this is a good performance of the condition. But payment in farthings is no good payment. If the condition be, to pay me 20l. and the obligor pay me some of the 20l. in counterfeit pieces, which I not perceiving at the time, doe put up and accept, but after upon a review I doe perceive some of them to be naught, and thereupon I doe send it back to him again, in this case it seems the condition is well performed, and therefore the sending back of the money againe will not cause a breach afterwards. *New Terms of the Law. tit. Coins. Per. Just. Bridgman and Curia in the Marches of Wales. 8. Terms of the Law. Idem.*

If the condition be, that I shall stand to the award of J. S. and he doth award mee to pay 20l. to W. S. by a day, and at the day I doe tender him the 20l. but he doth refuse it; in this case I have sufficiently performed the condition, and the obligation is saved. See more in *Brownlow's 3 part 48. 23 Ed. 4. 2.*

If

FFFF

If the condition be, that I shall stand to the award of J. S. and he saith that I shall enter a Retraite in a suit depending between me and the other party, and I do not so, but am Nonsumit, or do discontinue my Suit; this is no good performance of the condition. 21 Ed. 4. 25.

To shew a Release.

If the condition be that the obligor shall come such a day to such a place and shew me a Release, and he doth come to the place the latter part of the day, and doth stay there until the light of the day be gone, ready to shew his Release, but I come not thither: this is a good performance of the condition. 21 Ed. 4. 42.

For quiet enjoyment.

If one make a lease of land to me, and bind himself in an obligation with condition to suffer me quietly to enjoy the land without the let of him or any other: in this case if he himself, nor any other by his inticement doe disturb me, the condition is performed; and if a stranger that hath title, doe enter without his procurement or occasion, this is no breach of the condition. *Dier.* 255. 17 Ed. 4. 3.

To appeare.

If the condition be, to appear in the Kings Bench such a day, to answer J. S. and at the day the obligor doth appeare, but the Plaintiff is essoined so that the defendant cannot answer him, or the suit is discontinued by the demise of the King before the day of appearance; in these cases the condition is performed and the obligation lived. But if the obligor in this case when he doth appeare, doth not cause his appearance to be entred of Record, the obligation is forfeit. *Park. Sess.* 760. 758. 2 Ed. 4. 3.

If the condition be to appear *coram domino Rege*, and the obligor appeare before the Kings Person; this is no performance of the condition. And if the condition be, to appear *coram Justiciariis Domini Regis*, and the obligor appeare before them out of Court; this is no performance of the condition. 8 H. 4. 6.

To make a Bond.

If the condition be, that a stranger shall make an obligation to the Obligee, and the stranger tender it, and the obligee refuse it; this is a good performance of the condition. But if the condition be, that the obligor shall make an obligation to a stranger, and the obligor tender it, and the stranger refuse it; this is no performance of the condition. *Co. super Litt.* 268. 269. 10 H. 6. 16. 27. H. 8. 1.

To marry a woman.

If the condition be, that the obligor shall marry the daughter of the obligee by a day, and he doth tender himself, and she doth refuse; in this case the obligation is forfeit, notwithstanding this tender and refusal. *Park. Sess.* 758. 4 H. 7. 3.

To leave a Possession.

If the condition be, to deliver the key of a house, and the quiet possession to J. S. to the use of the obligee, and the obligor the house being rid, and every one out of the house, and the doot locked, doth deliver the key to J. S. it seems this is a good performance of the condition, but that J. S. or the obligee, or his deputy ought to come and receive the possession. See more in Condition at *Numb.* 9. and *Coram.* 8.

9 When a single Obligation shall be said to be broken and forfeit, or not.

If an obligation that is single, be not performed, as when it is to pay money at a day, and the money is not paid, the obligation is broken. But if a man be bound by an obligation to pay money at severall daies, the obligation is not forfeit, nor can be sued untill all the daies be past. And yet if the condition of an obligation be to pay money at severall daies, and the obligor doe fail to pay the money the first day, in this case the obligee may sue for the money due by the obligation presently. *Ca.* 8 153. *super Litt.* 292. *F. N. B.* 167.

If one be bound to pay money at a day certaine by a single obligation or Bill, and the obligor tender the money at the day to the obligee, so as he will give him his Bill or a Release for the money, and the obligee refuse so to doe, and thereupon he doth refuse to pay the money; in this case the obligation is not forfeit; for in this case the obligor is not bound to pay the money, unless the Obligee will give up his Bill or give him a release. But otherwise it is in case where one is bound to pay money by the Condition of an obligation; for there the obligor must pay the money at his perill, albeit the obligee refuse to deliver up the obligation or to give a release. *Brook. Oblig.* 62. *Fair.* 105. *Fine.* verast. 13.

10. When the condition of an obligation shall be said to be broken and the obligation forfeit, or not.

If one be bound to pay money on a single Bill at a day, and the obligor tender the money at the day to the obligee, and he refuse it; in this case, it seems he hath no remedy for his money; *See quare.*

In all causes when the condition is not performed or broken, the obligation is forfeit, and till then it cannot be forfeit. And therefore, if one be bound in an obligation

obligation, with condition to pay me 10*l*. at Easter, before the day come, the obligation cannot be forfeit; but if it be not paid at the day, the obligation is forfeit. And yet if the obligee himself be the cause of the breach of the condition, or the thing to be done by the condition, is now become impossible by the act of God, the obligation is now become without penalty. As if in the old days I had been bound in an obligation to an Abbot, that *A.* should enfeoff him before Christmas, if *A.* enter into Religion, my Bond had been presently forfeited. But otherwise it had been if *A.* had been professed under the obedience of the obligee himself. See more in *Brownlow's Rep.* 1 part. 64. 61. *Bro. Oblig.* 17. 4 *H. 7. 4.*

To make a Feoffment.

If the condition be to make a Feoffment of land to me, such a day, and he be not upon the land ready to make the Feoffment, albeit I come not there to receive it, yet the condition is broken. *Perk. Sell.* 768. 769.

If the condition be that when the obligor shall come to his Aunt, he will enfeoff the obligee, or the heirs of his body, in this case he must do it as soon as he doth come to her, and the obligee shall request the Feoffment, or the obligation is forfeit. 21 *Ed. 3. 29. Cook, 5. 112.*

If the condition be to enfeoff me of a Manor by a day, and before the day the obligor doth make a Feoffment of it to another, hereby the condition is broken, and the obligation forfeit, and though the obligor repurchase it againe before the day, and then make the Feoffment, yet this will not cure the breach. 21 *Ed. 4. 55.*

If the condition be, to enfeoff *B.* and *C.* and one of them die before the time be past wherein it should be done, in this case hee must enfeoff the survivor of them, or the condition is broken. 4 *H. 7. 4.*

If the condition be, that if the obligor before Michaelmas make a lease to the obligee for thirty one years, if *A.* will assent, and if he will not assent then for twenty one years, that then &c. if *A.* do not assent, and the Lease for twenty one years be not made before Michaelmas, the obligation is forfeit. *Dier.* 347.

To make a Lease.

If the condition be that the Obligor shall make me an estate upon request, and he tender me an estate before I request it, and afterwards I doe request it, and he doth refuse it, in this case the condition is broken, and the obligation forfeit. 7 *H. 6. 24.*

To make an Estate.

If the condition be that the obligor shall make me a good estate of land (being Copi-hold land) and he doth surrender it absolutely, and the Homage when they present it, doe present it conditionally; this is no breach of the condition. *Pafche.* 8. *Ca. B. Jac.*

If the condition be to make a good estate of land in Fee-simple to *A.* (a woman) before such a time, and before such time the obligor taketh *A.* to wife, and the day past, and no estate is made; in this case the condition is broken, and the obligation forfeit. But if the obligation be made to the woman herselfe, then it is dispensed with by the inter-marriage. 4 *H. 7. 4. Kel.*

If the condition be, that the obligor and his son shall doe all such acts for the better assuring of land, as the obligee or his Counsell shall devise, and the obligee devise and tender a Release to the obligor and his son to seale, and they delay and refuse to seale it untill they can shew it to their Counsell to be advised upon it, this is a breach of the condition; but if they be illiterate and refuse to seale it untill they can get it read; this is no breach of the condition, See more in *Brownlow's Rep.* 1. part. 70. *Ca. 1. 3. Dier.* 337.

To make further assurance.

If the condition be, that the obligor shall save the obligee harmless from such a debt, for which the obligee is surety for the obligor, and the obligee cometh at the time, and to the place when and where the money, for which he is engaged, is to be paid, and finding no body ready to pay the money, he doth pay it himself to save the forfeiture of the obligation; hereby the condition to save harmless is broken, and the obligation forfeit. And therefore much more if the obligee be sued, arrested, outlawed, or taken in Execution for the debt of the principall. So also if the obligee be put in feare of arrest for the debt of the principall, and therefore dare not goe about his business, by this the condition is broken. But if the obligee be sued unjustly, either because he is sued before the money is due, or otherwise, or if the bond in which he is bound, be against law and void, and he suffer himself to be unjustly vexed thereupon

To save harmless.

If the condition be, that I shall give me licence to goe over his ground, and I do so, but another doth interrupt me; this is no breach of the condition. And yet if the condition be that I shall have licence to goe over that ground, there perhaps such an interruption may be a breach of the condition. 18 Ed. 4. 23.

If an obligation be made to me with condition to appear in such a Court such a day, and at the day he is kept in prison at my suit so as he cannot appear; in this case his not appearance is no breach of the condition; for his imprisonment shall excuse him: But if his imprisonment be for Felony, or any other such like cause of his own; *contra. First Barre. 60.*

To appear.

If the condition be, to appear in such a Court such a day, and before the day a Sheriff doth come to the Sheriff; yet if the Obligor do not appear, the obligation is forfeit. *Dyer 35.*

If the condition be, that the Obligor shall ride with I S to Dover such a day, and I S doth not go thither that day, in this case it seems the condition is broken, and that he must procure I S to go thither and ride with him at his perill. *Per. 1st.*

To ride to Dover.

If I make a Lease for years, and the Lessee doth enter into an obligation with condition that he shall not alien the land demised without my licence; and I die, and then he doth alien it; it seems this is a breach of the condition. *Per. 1st. 21.*

Not to alien.

If the condition be that I S shall serve me in all my honest and lawful commands, or that I S shall be a good and honest servant to me one year; in the first case if I command him nothing, the condition is not broken, albeit he never tender his service; but in the last case it seems he is to tender his service to me, or otherwise the condition will be broken. But if I refuse his service when it is tendered, or he die within the time, the obligation is discharged. And yet if he depart away within the time, the condition is broken. *Per. 1st. 772, 6 Ed. 4. 23.*

To serve.

If the condition be that A shall marry B by a day, and before the day the Obligor himself doth marry her; in this case the condition is broken. But if the Obligor marry her before the day, the obligation is discharged. *Per. 1st. 79.*

To marry a woman.

If the condition be, to performe the covenants and payement of a deed; and the deed doth containe a Feoffment, and this is on condition that if the Feoffor pay such a sum of money he shall reenter, and he doth not pay it in this case this nonpayment is no breach of the condition. But if A let Land by Indenture to B for years rendering rent, and B doth bind himself in an obligation with condition to performe the covenants contained in the Indenture, and the rent is unpaid; this is a breach of the condition and cause of forfeiture of the obligation. See more in *Brownlow's 2 part 212. 213. Brisson's case. Trin. Jac. B. R. Adjunct Griffin & Bous case. 9. Jac. B. R.*

To performe covenants.

If the condition be for the safe keeping of prisoners, and one doth escape that is in execution, and in prison under colour of an excothion, or the like; but in truth and in judgement of Law is no prisoner; this escape is no breach of the condition. See more in *Comdike's ex. 10. To do other things. Brownlow's Rep. 2 part 32.*

To keep Prisoners.

54. 172. 54. 2 part 277. 211. 213. *Corie Trin. 37. Elie.*

If the condition of an obligation consist of two parts in the disjunctive, or be to do one of two things before, or at a day certain, and both the things are possible at the time of the making of the obligation; and before the time of performance one of the things is become impossible to be done by the act of God, or by the act of the Obligor himself; in this case the obligation is discharged for ever. And therefore if the condition be, That if the Obligor shall sell away his wives Land, if then he shall die in his life time purchase to his wife and her heirs and assigns Land of as good right and value as the money by him received; or had by or upon the said sale shall amount unto, or he do and shall leave unto her the said Land Excothion by legacy or otherwise as much money as shall be by him received upon such sale. Then the Obligor doth sell his wives Land; and then his wife doth die before him so that he cannot leave her the money; in this case the obligation is discharged, and the husband is not bound to purchase Land to her and her heirs. *Comdike's 167.*

11. By what means and when an Obligation good in his original creation, doth or may become void, bee discharged or gone by matter ex post facto. Or not.

So if the condition be, that if *I S* do not prove the suggestion of a Bill depending in the Court of requests before the feast of Hilary, that then he shall pay 10*l*. etc. and *I S* die before the time: hereby the obligation is discharged for ever, and he is not bound to pay the 10*l*. *Co. 5. 22. 15 H. 7. 21.* So if the condition be that if the Obligor appear in the Kings Bench in Easter Terme, or pay 10*l*. to the Oblige at Michaelmas, and the Obligor die before Easter Terme, hereby the obligation is discharged: but if he do not appear in Easter Terme and out-live the Term, and die after, then it seems the 10*l*. must be paid at Michaelmas, for the obligation is forfeit. So if the condition be that the Obligor shall marry *A* before Easter, or pay 10*l*. to the Oblige at Michaelmas, and *A* die, or become madd before Easter, or the Oblige marry *A* himself, and the marriage doth continue between them untill Easter be past: in all these cases the obligation is discharged for ever. But when the thing is become impossible by the act or laches of the Obligor, the Law is otherwise: And therefore if the condition be, that *A* shall marry with *B* before Easter, or that the Obligor shall pay unto the Oblige 10*l*. at Michaelmas, and the Obligor himself marry with *B*, and the marriage doth continue untill after Easter; hereby the obligation is not discharged. So if the condition be to deliver up an obligation before Easter, or give a release at Michaelmas, and the Obligor doth lose the obligation, or the obligation is burnt, hereby the obligation is not discharged, for if he doth not make the release at Michaelmas, he doth forfeit the obligation. *Dyer. 262. 15 H. 7. 4. 1. H. 7. 4. 1. Agree by 1*st* in Bathurst case.*

If the condition of an obligation consist of one part only, or be to do one thing at a time certain, and that thing at the time of the obligation made is possible to be done, but afterwards and before the time when it is performed it doth become impossible by the act of God, or the act of the Oblige; in this case also the obligation is gone and discharged for ever. And therefore if the condition be to appear in person such a day in such a Court, and before the day the Obligor die, or at the day the water doth arise so high that he cannot travell to the place without perill of life, in these cases the obligation is discharged. So if the condition, that *A* shall marry *A* before Easter, and before the time *A* or *B* die, or become madd, or the Oblige marry *A*, and the marriage doth continue untill after the day: in all these cases the obligation is discharged. But if the thing become impossible by the act of the Obligor, contra. And therefore if the condition be, that the obligor shall appear such a day, and before, and at the day he is imprisoned through some default of his own, so that he cannot appear, this will not excuse him, no more then in case where he is so sick that he cannot appear without perill of his life. So if the condition be that *A* shall marry *C* before Easter, and the obligor himself marry her, and the marriage doth continue untill after the time: in this case the obligation is forfeit. So if the condition give the obligor time all his life time to do the thing, the obligation is not discharged by his death, but in this case he must do it during his life time at his perill. *8 Ed. 4. 21. Co. 5. 22. Perk Sess. 719: 767. 4. H. 7. 4. 22 Ed. 4. 27. Seebell in the Exchequer. 3. Car. Curia Co. B. Hill. 37. Eliz.*

If the condition be that the obligor shall deliver to the obligee an obligation or such a release as the counsell of the obligee shall devise before Michaelmas, and the counsell of the obligee devise no release before Michaelmas: hereby the obligation is gone for ever. *Adjudged 37. Eliz. Co. B. Greeningham versus Ewre.*

If the obligation depend upon, or be necessary to some other deed, and that Deed become void, in this case the obligation is become void also; as if the condition of the obligation be to perform the Covenants of an Indenture, and afterwards the covenants be discharged or become void: by this means the obligation is discharged and gone for ever. And if one make a lease for years rendering rent, and the Lessee enter into an obligation with condition to pay the rent to the Lessor, and after it fall out so that the Lessee is evicted out of the land by an elder title, whereby the rent in Law is gone: in this case and by this means the obligation is discharged and gone also. But if the eviction be but of a part of the Land, contra. *Br. Oblig. 6. 88. 29. 4 H. 7. 6.*

If an obligation be made to me, and delivered to *I S* to my use, and when

is tendered to me, I do refuse it and disagree to it; hereby it is become void, and cannot afterwards be made good againe. So if an obligation be made to my wife, and I disagree to it; hereby it is become void. *Co. 5. 119.*

By a Release made from the obligee to the obligor, or to one of the obligors, if there be more then one, the obligation may be discharged. And therefore, if an obligation be made to me with condition to pay money, and I by my Deed release it, or acknowledge my self satisfied the Debt, albeit I receive none of it, or but part of it in full satisfaction of the Debt, by this the obligation is discharged for ever. *Fit. Bart. 37.*

If the obligee make the obligor, or one of the obligors, or all the obligors, his Executor, or his Executors; hereby the obligation is discharged for ever. But the granting of Letters of Administration to one, or more of the obligors, is no discharge of the obligation. And if the obligor make the obligee his Executor, this is no discharge of the obligation. *Brook. Oblig. 61. Co. 8. 136. 8 Ed. 4. 3. 21 Ed. 4. 2. 11 H. 7. 4.*

If the obligee be a woman, and take the obligor to husband, hereby the obligation is discharged. *Brook. Oblig. 61.*

If the condition be to enfeoff K S (a woman) before such a time, and before the day the obligor, doth marry the woman: this doth not discharge the obligation. *Fit. Barr. 133.*

If the condition be to serve me seven years, and within the time I licence him to depart, it seems that hereby the obligation is discharged; And yet if the condition be to stand to an Award; and it is awarded that one of the parties shall pay 5l. a year for seven years towards the education of I S, and I S die within the seven years, the obligation is not discharged by his death, but the money must be paid during the time notwithstanding. *Dyer 319.*

If the condition be to doe two things, or stand upon divers points; and the Obligee supposing the breach of one of them, doth sue the obligor, and the issue being joyned upon that point, it is found against the Plaintiff and he is barred; hereby the whole obligation is discharged; and so long as that Iudgement is in force, he can never sue the obligation upon any other point within the condition. *Dyer 371.*

If the condition be to satisfie me for goods I have delivered to I S if they be lost, and afterwards they be lost, and I sue I S and have him in Execution for them; by this the obligation is not discharged; but perhaps when I have satisfaction of I S being in Execution for the goods, the obligation may be gone. *Fit. Barr. 64.*

And in all other Cases by which a deed in Generall may become void by matter *ex post facto*, as by Rasure or the like, an obligation may become void, *See more in Brook. 1 part 47. 73. 74. 75. 79. 98.*

Of a Defeasance.

THis in a large sence doth sometimes signifie a condition annexed to an estate, sometimes the condition of an obligation made with, & annexed to the Obligation at the time of making thereof. But it is more peculiarly & properly applyed to such conditionall Instruments as are made in Defeasance and avoidance of Statutes and Recognizances at the time of entering into the same Statutes or Recognizances, and to such conditionall Instruments as are made in Defeasance of Statutes, Obligations, and the like, after the time of the same Statutes entred into, and obligations, &c. made: And it is therefore thus defined.

A Defeasance is a condition relating to a Deed, as to an obligation, Recognizance, Statute, or the like, which being performed by the obligor or Recognisor, the Act is disabled and made void, as if it had never been done; which differeth from a condition only in this that this, is alwaies made at the same time, and annexed to, or inserted in the same Deed, but that is alwaies made in a Deed by it self, and for the most part made after the Deed whereunto it hath relation.

There

2. Where and in what cases a Defeasance may be; and what things may be defeated and avoided thereby; and where, and what not.

There is no Inheritance Executory, as Rents, Annuities, Conditions, Warranties, Covenants, and such like, but may by a Defeasance made with the mutuall consent of all those who were parties to the creation thereof at the same, or at any time after be annulled, discharged and defeated. And so is the Law of Statutes, Recognisances, Obligations, and the like; yet so, as in all these cases regularly, the Defeasance must be made *eodem modo* as the thing to be defeated was and is created, viz. if the one be by Deed, the other must be so also; for it is a rule, that in all cases when any Executory thing is created by a Deed, that the same thing by the consent of all persons which were parties to the creation of it, may be by their Deed defeated and annulled, and therefore that Warranties, Recognisances, Rents, Charges, Annuities, Covenants, Leases for years, Uses at Common Law, and such like, may by a Defeasance made with the mutuall consent of all those that were parties to the creation of it by Deed, be discharged and avoided. *Nihil est tam conveniens naturali equitati quam quod unumquodque dissolvi eo ligamine quo ligatur.* And therefore by such a Defeasance, not only the Covenant which doth create; a power of Revocation, but the power it self created, may be utterly defeated and avoided: But estates of Inheritance, and other estates in Taile or for life, executed by Livery, &c. cannot be avoided by Defeasance made after the time of their creation and first making. And yet by another Deed of Defeasance made at the same time, a Feoffment, Release, Lease for life, or other executed thing, may be avoided as well as if it were by condition within the same Deed; as if a Disseisor release to the Disseisor: this Release cannot be defeated by an Indenture of Defeasance made afterwards, but it may be defeated by an Indenture of Defeasance made at the same time. *Quae in continenti sunt in esse videntur.* Co. super Litt. 236. 237. 1. 111. 112. Plow. 137. 193. 21 H. 7. 23. Bro. Defeasance in toto.

3. What shall be said a good Defeasance, and what not. For the manner of it:

To make a good Defeasance, these things are requisite.

1. That the Defeasance be made *eodem modo*, as the thing to be defeated is created, for if the obligee by word only discharge the obligor, or grant not to sue him; this will not defeat the obligation; it must be by Deed therefore as the former was, Co. 113.

But whether the Deed of Defeasance be indented or poll is not materiall. Bro. Defeas. 12. Fitz. Bar 93.

2. That if it do recite the Statute or the obligation (as for the most part it doth) that it be done truly; for if a Defeasance be made of a Statute or an obligation which is recited to be made the 10 day of May, whereas in truth it bareth date the first day of May; this defeasance is void. Plow. 393.

3. That it be made between the same persons that were parties to the first Deed, &c. And therefore if A be bound in an obligation to B in 20l. and B make a Defeasance to C, that if C pay him 20l: the obligation made by A shall be void; this is no good Defeasance, because it is not made between the same parties: And yet if a Statute be made to the husband and Wife, and the husband alone joyn in the making of a Defeasance, this is a good Defeasance. 14. H. 8. 10. Bro. Estrangal fait. 10. Bro. rit. Defeasance 3.

4. That it be made after the making of the Recognisance, obligation, &c. and not before; for if A grant to B, that if B will be bound to him in 20l. by obligation, that the obligation shall be void, and after B doth bind himself to A in an obligation of 20l. this defeasance is not good because it is before the obligation Bro. Defeasance 5.

And yet if the date of the defeasance be before the date of the Recognisance, &c. and it be delivered after, it is good enough, Dyer 315.

For the matter of it.

5. That it be made of a thing defeasable, Plow. 137. Bro. Defeasance 1. For if a Disseisor release his right to the Terre-Tenant, and after there is a defeasance made between them, that if the Releasee shall pay 20l to the Releasee, the Release shall be void: this is a void Defeasance.

And yet a Release may be avoided by a condition or Defeasance made at the time of making of a Release as well as a Feoffment. Bro. Defeasance. 6. 9. Co. super Litt. 236.

If the Defeasance of a Recognisance, Obligation &c. be, That if the Cognisor, or Obligor, &c. pay a sum of Money, or do not disturb the Execution of the Will of J. S. or do make a Lease for years to J. S. or the like; these are good Defeasances. As if the Grantee of a Rent-charge grant to his Grantor, that if he shall pay him twenty pound such a day, the grant of the Rent shall be void. See *West. Symb. Broo. Defeasance in toto*. Albeit the Condition of an Obligation, that is repugnant to the Obligation it self, is void, and the Obligation single, yet it is otherwise in case of a Defeasance made after the Obligation; for this is good, notwithstanding it be repugnant. And therefore if the Oblige after the Obligation made, grant by Deed to the Obligor, that the Obligation shall be void, or that he will not sue the Obligation at all, or that he will not sue the Obligation until such a time, or that the Obligation shall be discharged; these Defeasances are good to avoid the Obligation. 20 *Hen. 7. 24.* 21 *H. 7. 32. Fitz. Bar. 71.*

If the Feoffee with Warranty grant, that neither he nor his Heirs shall take benefit of the Warranty of the Feoffor, or his Heirs; this is a good Defeasance of the Warranty; and if he grant not to vouch, this will discharge the Voucher: And if he grant not to bring a *Warrantia Charta*, this will bar him of that remedy. In like manner it is, if the Grantee of a Rent-charge grant to the Grantor, that he will not take any benefit by the Grant; this is a total discharge: And if he grant he will not bring an Annuity, this is a discharge of the person; and if he grant that he will not disstrain the Land for the Rent, this is a discharge of the Land. *Broo. Defeasance 4.* 7 *H. 6. 43.* 21 *H. 7. 23. Park. sess. 69.*

If one make a Lease for life by Deed, and after by another Deed doth grant to his Lessee, that he shall not be impeached for Waste; this is a good Discharge: And if the Lessee afterwards grant by Deed to the Lessor, that if he shall bring an Action of Waste against the Lessee, that he will not make use, nor take advantage of the Deed of Discharge; this is a good Discharge of the Discharge: *Broo. Defeas. 11. Condition 120.*

So that hereby it seems a Defeasance may be of a Defeasance, and one Defeasance after another, and Regularly the last shall stand. *Agreement. Pasche, 8 Jac. Co. B.* And therefore if a Lease for years be made on Condition to pay twenty pound at Easter, and the Lease to be void, and before Easter the Lessor and Lessee agree; that if the Lessor pay it at Easter following, the Lease shall be void, and before that time they make the like Agreement for another year; it seems these be good Defeasances, and that the last shall stand. *Per Just. Bridgman.*

If the Defeasance after Execution made upon a Statute be thus, That if the Conuor pay so much money, the Statute shall be void; it seems, by this the Statute and Execution thereupon, is void: Howbeit, it is best to adde these words in the Defeasance [and the Execution thereupon.] *Broo. Defeas. 7.*

Ggggg

CHAP.

CHAP. CXIX.

Of an Office.

Sec. 1.
1. Office, what.

The kinds.



His word Office hath two significations, 1. It signifieth an employment about a work; and of this in the next Chapter. But it signifieth also an Inquisition or Inquiry made on the behalf of the Lord Protector of something by vertue of his Office that doth enquire. And by Office found, is meant nothing else but such things as are found by Inquisition made; and of this there are two kinds *Intitling* or *Instructing*. That is called an Office Intitling, when it doth vest the Estate and Possession of the Land, or other thing in

the Lord Protector, who had therein onely a Right or Title before that time; As where an Alien doth purchase Land, or a Body Politick or Corporation purchase in Mortmain, or of a person attaint of Felony, or the like. And such Offices as concern Fee or Frank-tenement must be found by vertue of Commission under the Great Seal, or they are not good. The other kinde of Office is, where the Land or thing is lawfully vested and settled before in the Lord Protector, but the particularity thereof doth not appear upon Record, so that it may be put in charge; and this is called an Office of Instruction, as where the Lord Protector's Tenant doth commit Felony, is attaint and dieth, or one is attainted of high Treason, in which cases he hath right to the Land without Office. And such things as these may be found by Commission under the *Exchequer* Seal, and it will be good enough. And the effect of this Office, that it doth put the Lord Protector into the actual possession of the thing, from the time of the finding; so that without any Entry or Seisure he shall be answered the profits from that time.

2. Inquest of
Office or Inqui-
sition, what.

The Inquest of Office, is nothing else but the Inquisition, or that which is found by the Inquiry that is made by the charge and office of them that are employed thereabouts, either as General Officers, and *Ex Officio*, or by special Commission. For these Inquisitions were taken sometimes *Virtute Brevis* (that is) by vertue of certain Writs; and sometimes *Virtute Commissionis*, by vertue of a special Commission directed to certain men for that time and purpose onely; and sometimes they have been more general, As to inquire of all Escheats, &c. and sometimes more Special to enquire of one particular thing. But which way ever they entitle the Lord Protector, they may be used as evidence to other men. See Co. 5. 31. *Stamf. Pr. chap. 20. § 2.* 13 Ed. 1. 25. 33 H. 8. 20. 4 Ed. 4. 20. 3 H. 7. 7. *Plow. 484. Co. 4. 58. F. N. B. 157. 170. Co. 1. 42. 11 H. 4. 5.*

3. Where and
of what the
Lord Protector
shall be in pos-
session present-
ly by the Of-
fice found
without Entry
or Seisure, or
not.

For answer to this point, these things are to be known:

1. The Lord Protector upon an Office found for him, is presently in possession, without Entry or Seisure; in cases where his Entry or Seisure is lawful, and the Possession void at the time. As if an Office finde, that the Lord Protector's Tenant hath seised, or his Tenant for life hath committed Waste; in these cases the possession will not be vested in him, because his Entry is not lawful, but he is put to sue a *Scire facias*. If it had been found by Office, that the King's Tenant had died seised without Heir, or his Heir within age, or he had made a Lease or Gift in Tail, and the Lease had been ended, or Donee dead without issue; in these cases the Office had put the King in Possession. But if it had found that the King's Tenant was disseised, and died without Heir; the King had not been in Possession, till the Possession and Seisin of the true Tenant be removed. So if the Office entitle the Lord Protector to a thing not Manual, (i.) of which no profit is to be taken, till it happen, as a Rent, Common, or the like, there he shall not be in possession till the day. And in all these cases the Lord Protector shall be answered the mean profits, from the time of his Title appearing of Record; As from the time of the Alienation in Mortmain, or making of void Letters

Mean Profits.

Patents

Patents afterward adnulled, and the like. 14 H.7. 23. Co.4. 38. 34 H.6.5. *Stamf. Prer.* 54. 41 Ed.3. 11. 11 H.4.5.

2. In case of Treason, and a Forfeiture to the Lord Protector, by that means the Lord Protector shall be adjudged in actual possession of the Land, without any Office or Inquisition at all, by the Statute of 33 H.8. 26.

The Tenant for years, Copiholder, and he that hath other profit, Apprender out of Land, whose Estates are not found in the Office, which doth intitle the Lord Protector to Land by any Attainder, shall enjoy their Estates notwithstanding. 2 Ed.6.8.

Things are sometimes found untruly by Offices; and in these cases, ~~both~~ that are like to be hurt, may be hurt, may be relieved, by a Traverse, *Monstrance de droit*, by Petition, or by Pleading. And the Traverse of an Office is nothing else, but the setting out of ones Right by a Judicial proceeding, to the end to ~~prethrow~~ the Lord Protector's Title. For every Office is in the nature of a Declaration, in which any man may plead, and either deny, or confess and avoid, by *Monstrance de droit*, (1.) by shewing a Right: As for example, If the Office had found that *J. S.* the Kings Tenant died seised of the Land, the party grieved by this might have said that *J. S.* did not die seised, or otherwise confess and avoid it, and say: That he was the Kings Tenant, and *J. S.* did disseise him; or that *J. S.* had onely an Estate upon Condition, and that before his Attainder he did break the Condition, or the like: And this Plea or Allegation shall be tried by a Jury in the Upper Bench; and if it be found against the Lord Protector, the party wronged shall have Restitution and Judgment be given, that the Lord Protector's hands shall be removed from the possession. So where the Office doth finde the Lord Protector's Title by a Purchase by an Alienee, or an Alienation in Mortmain, or the like; for where the Office doth intitle the Lord Protector by matter in fait onely, and by no matter of Record, but by the Office it self, thereby matter in fait onely proved to the contrary, it may be avoided, *Plow.* 488. *Broo.* 506. 34 Ed.3. 14. 36 Ed.3. 13. 8 H.6. 16. 1 H.8. 16. 2 Ed.6. 8. *Stamf. Prer.* 73. 42. 9 H.6. 15. 3 H.7. 3. 4 H.7. 4. Co. on *Littl.* 77.

4. Traverse of an Office, what Where and how an Office may be avoided, or not. By Traverse.

For the further opening hereof, take these cases.
1. If upon this Traverse it be found against the party, he is barred for ever, and and if it be found against the Lord Protector, he is barred for he cannot Traverse it: And yet in some cases he may have a *Melius Inquirendum*. Co. 8. 164.

2. In all cases where the Title of the party is found by the same Office, whereby the Lord Protector is intitled; As if it be found that *A.* did disseise *B.* and then alien in Mortmain, or the like; in this case the party shall avoid the Office by a *Monstrance de droit*, Co. 8. 168. But if the Office intitle the Lord Protector by matter of Record, as if it finde that *J. S.* was attainted of Treason, and seised of Land; if this be false, the party grieved by it, may avoid it by Traverse, or by *Monstrance de droit*, so long as the Attainder remains in force; and is not put to it to avoid it by Petition, as he was by the Common Law, 3 H.7. 3. 4 H.7. 4. 2 Ed.6. 8. Co. on *Littl.* f. 77. And yet by the very Common Law, if he had matter of as high a nature; and if the Office found an Attainder and Forfeiture by Parliament, and there be another Act of Parliament, whereby the same Attainder was repealed; he might by the Common Law have pleaded this without Petition, 4 H.4. 24.

By Monstrance de Droit.

By Petition.

3. If an Office do intitle the King to Personal Goods, as if it finde that *J. S.* was attainted of Felony, or outlawed in Debt or Trespas, and at the same time he was possessed of a Horse, when in truth, the Horse was not his but another mans; in this case the owner of the Horse may Traverse it, and being found with him, shall have his Goods again, if the Officer have not accounted for it in the *Exchequer*, 4 H.4. 24. 34 H.6. 5.

For the rest of the Law, as to this Subject, see *Dyer* 302. *Broo.* cap. 118. 23 H.6. 17. 18 *Elix.* 12.

CHAP. CXX.

Of Officers and Offices.

SECT. 1.
1. Officer and
Office, what.



The kinds of
Offices.

His word Office hath more acceptations then one in our Law, but (as it is here taken) it is that Function, by virtue whereof a man hath some Employment in the Affairs of another, whether of the *Supreme Magistrate*, or of a common person. And an Officer is he that is so employed.

The Office of the *Supreme Magistrate* now in this Common *Commonwealth*, is the Office of the *Lord Protector*, who is the Chief and Supreme Officer for the Government of the Country, and Administration of Justice amongst the people thereof, and that in general is his Office; but for his *Election*, Office, and *Oath*; see the *Government*, and *Prerogative*: And as to the Subordinate Officers under him, of these Officers, and their Offices, the old Division of them was into *Ecclesiastical* and *Spiritual* Officers; such as were *Bishops*, *Chancellors*, *Delegates*, and divers others, who had Offices and Employments about *Spiritual* Matters, now abolished; and *Ministers*, *Church-wardens*, *Clerks of Parishes*, and such like, which do yet continue; and into *Civil* Officers, and some are mixt, having some of both Powers: And these *Civil* Officers and Offices were again divided into such as had to do with Matters of *Justice*, or had to do in other matters. The first sort again into *Officers* and *Offices*, *Judicial* and *Ministerial*; *Judicial* (that is) such as consisted, and were employed in the Administration of Justice, Officers that had a *Judicial* voice in some of the Courts of Justice, as the Judges of the Court of *Star-Chamber*, and Court of *Wards* now removed (for which see *Courts*.) And the Judges of the one *Bench*, and the other *Counsellors* of the *Council Table*, the Commissioners of the *Great Seal*, and the Judges of all the Courts, yet continuing, and not abolished, whose Offices you may see in *Courts*.

And then there are *Ministerial* Officers of *Justice*; and of these the greater part do attend upon the *Judicial* Officers, either to prepare and make ready Matters for the Judges to determine, or else to execute what they have before determined: And such are *Sheriffs*, *Serjeants at Law*, *Counsellors*, *Attorneys*, *Coroners*, *Keepers of Prisons*, *Bailiffs*, *Church-wardens*, *Treasurers* of the County Stock, and many others.

And some Offices are partly *Judicial* and partly *Ministerial*; so is the *Sheriff's* Office, and so are some other Offices.

The *Ministerial* Officers do some of them belong to one Court, and some of them to another Court. The Officers that do not any thing in the Administration of Justice, are most of them such as attend upon the *Lord Protector*, or other great men, as *Bailiffs*, *Purveyors*, *Stewards*, *Surveyors*, *Parkers*, and the like: Also some Officers are County Officers, and some *Parish* Officers; and some Offices are more of Charge, then of Profit; and some more of Profit, then of Charge.

And as touching all sorts of Officers and Offices in the general, these things are to be known.

SECT. 2.
2. The Duty
of all Officers
in general.

1. Every man ought to be qualified and fitted for the Office he doth undertake; and this is especially required in *Judicial* Offices: And therefore if the King grant such an Office to an unskilful man, it is void. And if such an Office be granted in Reversion, it is void; for happily when it comes to be executed, the Officer may be disabled, *Non compos mentis*, &c.

2. *Judicial* Officers ought to come to their Offices freely, and not give money for them; for if they buy, they must sell them.

3. These Officers of all sorts are to attend their Offices, especially those that have to do with the Administration of Justice, they are to be industrious in execution

execution of the things given them in charge, and therein to be faithful and just.

4. They are to be contented with the Wages and Fees allowed them, which in most cases are certain and known, either being set down by some Law, or usually paid. And if they take any more then this, this is an offence called Extortion, and to be severely punished. Fees.
Extortion,
what.

5. If Officers that have to do in the Ministration of Justice be corrupt, cowardly, or negligent, they are to be punished; and sometimes they forfeit their Offices by it: See for this in *Forfeiture*.

And for Extortion in a Sheriff, see 23 Hen. 6. 26. 1 H. 4. 11.

In a Coroner, 3 Ed. 1. 10. 1 H. 8. 7. 3 H. 7. 1.

In a Clerk of the Market, 13 R. 2. 4.

In other Officers, 3 Edw. 1. 16. 33 Hen. 8. 39. 7 Edw. 6. 1. 27 Hen. 8. 11. 26 H. 8. 3. 2 H. 4. 8. 23 H. 8. 6. 2 H. 4. 23. 19 H. 7. 8.

But for all these things, see Co. 11. 3. 90. upon *Littl.* 233, 234. *Crompt. Jur.* throughout. Sir *Iho. Smith de Republica* 38. 6 R. 2. 9. 8 R. 2. 4. 1 R. 1. 5. 1 Ed. 4. 1. 5. 6 Ed. 5. 16. 2 Ed. 1. 3. 3 Ed. 1. 29. *Finches Law* 237. *Plow.* 379. *Dyer* 205. 5 R. 2. 16. 2 H. 4. 8. 10. 23. 23 H. 8. 9. 26 H. 8. 9. 27 H. 8. 11. *Westm.* 2. 42, 44. 4 Edw. 3. 18. 5 Rich. 2. 9. 12, 13, 14, 15, &c. 29 Eliz. 4. 23 Eliz. 3. And in *Title Forfeitures, Courts. Afts.* 7 Novemb. 1650. 7 Jan. 1650.

As touching Officers in general, these things are further to be known.

1. Offices of the King are to be granted, and that freely without reward to men fit for them.

2. They that have the making of *Justices of Peace, Sheriffs, Customs,* and other Officers of the King, may not choofe for Favor and Reward, but upon Merit and Desert. Co. upon *Littl.* 234. 12 R. 2. 2.

3. If an Office, either of the Grant of the King, or a Subject, which doth concern the Administration of Justice, or the Kings Revenue, or the Commonwealth, or the Interest, Benefit, or Safety of the Subject, or the like, be granted to a man that is unexpert, and hath no skill and ability to exercise it; the Grant is meerly void, and the party incapable. Hence it is, That a Grant of any Office of *Judicature* to an Infant, or one not of sound mind, is void: So the Grant of the *Stewardship* of a Manor to such a one is void. And hence it is, That the Grant of a Reversion of such an Office, though to a man never so skilful, is void, because he may be incapable when it happens, Co. upon *Littl.* 3. 6. Co. 11. *Heydens* case. Nor can such an Office be granted in Fee, or for years, to fall to an Executor; but it must be granted at will, or for the life of the Grantee: But a *Ministerial Office* may be granted in Reversion: And the Grantee of an Office of Trust to an Infant, to be executed by his Deputy, happily in some cases may be good, though it be in Reversion, *March. Rep.* f. 39.

4. Some Offices after they are granted, are grantable and assignable to others, and some are not grantable over. And in some Offices, the Officer may make a Deputy under him, and in some Offices he may not do so.

For the clearing of this therefore take these things.

1. If an Office that is an Office of *Skill, Trust, Fidelity,* and *Diligence*, be granted to one, as the *Chirographers Office, Clerk of the Crown, Clerk of the Pipe, Remembrancer, Stewardship of a Court, or Parkership,* or the like, be granted to one; in this case he cannot grant it over to another. Co. 4. *Mistons* case. Co. 9. Sir *George Reynolds* case, and *Countie of Salops* case.

2. That between an Assignee and a Deputy, there is a great difference; For the Deputy hath no Estate, nor Interest at all in the Office, nor may he do any thing in his own name, but in the name of the Officer, and here the Officer must answer for his Deputy: And if he cause of Forfeiture, the Office will be forfeit, as by the Master. But the Assignee doth all things in his own name, hath an interest in the Office, and must answer for himself. Co. 9. 48.

*Assignee.
Deputy.*

3. It is a general Rule, That a *Judicial Office* cannot be granted, or exercised by Deputy;

Sec. 3:

3. Some other things to be known of all Officers in general, and of Offices in general.

Deputy; and yet, it seems, a Stewardship of a Law days, or Courts Baron, may be executed by Deputy; but a Ministerial Office may be so granted or done; and in this case the things done by the Deputy are good. And yet, it seems, in this case the Officer must answer for his Deputy. *Brownl. 2 part. 334, 335. M. 13 Jac. B.R. Phelps and Winsons case.*

4. It is another Rule, That such Offices as are Offices of Science, Fidelity, and Diligence, are so Personal, that in these a man can make no Assignee, or Deputy, unless the grant of the Office be made to them, and their Assigns, or be made to be exercised by them, or their Deputies, or their sufficient Deputies. And of this nature is the Office of a Steward, Parker, and such like. And yet in this case, if such an Office as a Parkership be granted to a Nobleman, or to an Infant, they shall make a Deputy. *Co. 9. 48, 49. Plow. 384. 379.*

5. The Office or Deputation of any Office, or any part thereof, if it concern the Administration of Justice, or the Receipt, Controlment, or payment of the Kings money, or Surety of the Kings Lands or Customs, or any Administration or necessary attendance in the Kings Custom-house, or the keeping of the Kings places of strength, or the Clerkship of any Court of Record, shall not be bargained or sold, or any reward, or agreement for reward taken for it; if he do, the seller forfeits the Office, and the buyer is disabled to enjoy: And yet all the acts he doth, whilst he is in the Office, shall be deemed good. *5, 6 Ed. 6. 16. Co. on Lit. 234. Goldsb. 180.*

6. The great Officers that are made Judges, and other Officers in Courts of Justice, must substitute such under them, as be sufficient and faithful, and for whom they will answer. *2 H. 6. 10.*

7. Officers being sued for any thing done about their Offices, they may plead the General Issue, and give the Special Matter in Evidence, shall have increase of Costs, must be sued in their own County, and cannot be sued elsewhere. See *21 Jac. 12. Ord. 3 March, 1654. 7 Jac. 5.*

8. They must take great heed they go not beyond, or abuse their power, for their own profit or revenge, and so expose themselves to Sutes, and lose the Protection, which the Law doth give them in the Execution of their Offices.

9. That for such Offices as are of charge, and not of profit to the Officer, he that grants the Office, may at his pleasure discharge his Officer. But if there be profit to the Officer, *contra*, except it be granted at will. So if he have a collateral certain Fee, for one may not frustrate his own Grant. *Co. upon Littl. 233. Plow. 379.*

Bribery, what.

Extortion,
what.

10. If a Judicial Officer take Gifts or Rewards to pervert Justice, and doth so; this is Bribery, that upon Indictment in the Upper Bench, or before Judges of Assize, may be punished by Fine and Imprisonment. And if any Officer by colour of his Office, exacteth and forceth any man to pay any thing that is not due, or above what is due, or before the time it is due; this is Extortion. And for this he shall be punished by Fine and Imprisonment, and render double to the party grieved. *Co. upon Litt. 168. 10. 100. West. 1. 29. 31 Ed. 3. 4. 1 H. 4. 11. 28 H. 6. 5. Westm. 1. 26, 27. See more in Co. 3 part. Inst. c. 68, 69.* The word Extortion hath a larger sense, and is referred to all violent and injurious exactings and takings, especially by Officers, by colour, or by countenance of their Office. *Plow. 64. Crompt. Just. of Peace 8.*

Fees of Officers.

11. For the Fees of the Officers of all Courts, See in the *Compleat Attornay*, and for others, see *5, 6 Ed. 6. 25. 3 Hen. 8. 39. 2, 3 Phil. & Ma. 10. 23 H. 8. 4. 28 H. 8. 5. 31 Eliz. 8. 27 Ed. 3. 4. 8 Eliz. 12. 5 Eliz. 5. 27 H. 8. 6. 5 Eliz. 4. 1 Jac. 22. 2 H. 4. 23. 23 H. 6. 10. 11 H. 7. 4. 12 H. 7. 5. 17 Ed. 4. 4. 27 Eliz. 4. 39 Eliz. 19. 29 Eliz. 4. 23 H. 8. 6. and others.*

12. For the Fees in Chancery see the new Ord. 22 August, 1644:

The Officers Judicial and Ministerial of all the Courts of Justice, are very many, we shall name some of them.

Señ. 4.
In the Parlia-
ment,
Speaker of Par-
liament, what.

1. In the Parliament, the Judicial Officers are all the Knights and Burgesses, amongst whom there is one called a Speaker of the Parliament, which is an Officer that is (as it were) the Common Mouth of the rest, to him every man doth address himself in his Speech; and he is after debates to put the question, and to see that the Orders and Rules of the House be observed. See for this Mr. Rowles Book.

2. There

2. There is a Clerk of the *Parliament Rolls*, which is the Officer that recordeth and putteth into *Parliament Rolls*, all things there done for the preserving thereof to posterity. See for him, *Crompt Jur.* 4.8. *Sir Tho. Smith de Republica* 38.

Clerk of the
Parliament
Rolls, what.

3. There is a *Committee of Parliament*, which is a select number of the Members there, to whom any matter is referred by the whole *House*, to be considered of, and so prepared for, and reported to the *House*. *West. Symb. part 2. sect. 144.*

Committee,
what.

4. And there is an Officer called the *Black-Rod*, which is one that is an *Usher* to execute the Commands of the *House*: This word is used for other Officers also.

Black-Rod, what.

In the *Chancery*, the *Lord Chancellor*, or *Lord Keeper* of the *Great Seal*, or the *Lords Commissioners* of the *Great Seal* (which are all but one Officer) are the Judges called sometimes by one of these names, and sometimes by another. And these are great Officers, and have much power.

In the Chan-
cery.
Lord Chancellor,
or Keeper.

2. There are under these great Officers twelve *Masters of the Chancery*, the chief whereof is the *Master of Rolls*, who is an assistant to the *Lord Chancellor*, and one that in his absence, heareth Causes, and giveth Orders.

Master of the
Rolls, what.

3. The *Masters of the Chancery*, are a kinde of assistants to the *Lord Keeper*. Of these, some are Ordinary, as the Twelve, whereof the *Master of the Rolls* is one; and these sit in Court with the *Lords Commissioners*, and sometimes have matters referred to them. The rest of the *Masters* are at large about the Country, to take *Affidavits*, and the like.

Masters of
Chancery, what.

4. The Clerk of the *Crown*, whose office is by himself or his Deputy, always to attend the *Lord Keeper* to take care of *Commissions of Justices of Assize, Oyer and Terminer*, and the *Peace, Pardon*, the *Writs of Parliament*, and *Reforms* thereof, and *Writs of Execution* upon *Statutes Staple* forfeit.

Clerk of the
Crown in Chan-
cery, what.

5. The Clerk of the *Petti-Bag*, whose office is to Record the Return of all *Inquisitions, Liveries, &c.* To make all *Patents of Customs, Gawgeors, Comptrollers, and Admorsors, Conge de Esliors* for *Bishops*, all *Liberates* upon *Extent of Statutes Staple*, the *Recovery of Recognisances* forfeited, and all *Elegits* upon them, for *Selling of Subsidies, Writs* for *Nomination of Collectors*, and all *Traverses* upon any Office, Bill, or otherwise, and to receive the money due to the *King* for the same. And of these Officers there are three in this Court, of which three the *Master of the Rolls* is the chief.

Clerk of the
Petti-Bag,
what.

6. The Clerk of the *Hamper*, whose office is to receive all the money due to the *King* for the *Seal*, of *Patents, Commissions, Charters, and Writs*, which *Patents, &c.* he is to receive and deliver to them that owe them, and the Officers Fees.

Seal 5.
Clerk or Warden
of the Hamper,
what.

7. The *Comptroller* of the *Hamper*, whose office is to take all these Records, and overlook them, which are delivered to him by the Clerk of the *Hamper* in Bags, and the *Comptroller* takes Notes of them, and of the *Kings* and Officers of the Courts dues for them, and so chargeth the Clerk of the *Hamper* therewith. And of these there are two in this Court.

Comptroller of
the Hamper,
what.
Examiner,
what.
Cursitor, what.
Six Clerks.
Sergeant at
Arms.
Register.
Usher.

8. The *Examiner* whose office is to examine upon Oath, Witnesses and Parties that are to be sworn in any Sute.

9. The *Cursitor* is one that maketh out *Original Writs*, and of these there are four and twenty that divide the Counties amongst them.

10. There are also in this Court the Officers called the *Six Clerks*, the *Register* that keepeth the Books of the proceedings of the Courts, *Sergeant at Arms, Usher*, and *Crier* of the Court, *Clerk of Appeals*, the *Sealer*, the *Chafe Wax*, the Clerks of *Faculties*, of *Patents*, of *Presentations*, of *Dismissions*, of *Licenses*, of *Inrollments*, of *Protections*, of *Subpœnas*, and of the *Chappel*, of which are seven *Commissioners* to examine Witnesses, &c. The Clerks of the *Star-Chamber*, and *Court of Wards* that were there, are gone. See for these Officers, 7 R. 2. 14. 5. *Eliz.* 18. 14. 15 H. 8. 23 H. 8. 12. *Crompt Jur.* 41. *Sir Tho. Smith de Republica*. See before in Title of Courts, and my First part of the *Marrow of the Law*, in my *Treatise of the Chancery*, and the new Act for the *Regulating of the Chancery*.

In the *Upper Bench*, there are under the *Chief Justice*, and the other Judges that are the *Judicial Officers*, divers *Ministerial Officers*.

1. There is a *Prægnatory*, whose Office is to enter the Records, and Pleadings of

Clerks of Ap-
peals, of Facul-
ties, of Patents,
of Presentations,
of Dismissions,
of Licenses, of
Inrollments, of
Protections, of
Subpœnas, and
of the Chappel,
Commissioners
to examine Wit-
nesses, &c.
In the Upper
Bench.
Prægnatory, or
Protonotary,
what.

Clerk of the
Crown, what.
Secondary At-
torneys.

Clerks of the
Exigent, of the
Papers, of Er-
rors.
Custos Brevium,
Custos Sigilli,
Vergers.

Self. 6.
In the Common
Pleas.
Progenatory,
what.

Secondary,
what.
Clerk of the
Warrants, what.

Clerk of the
Kings Silver,
what.

Clerk of the
Juries, what.
Chirographer,
what.

Clerk of the
Treasury, what.

Clerk of the
Essoyns, what.

Clerk of the
Outlawries,
what.

Custos Brevium,
what.

Exigent,
what.

Filazer, what.

Clerk of the
Seal, what.

Self. 7.
In the Exche-
quer.

Chancellor of the
Exchequer, what.

Remembrancer,
what.

of all Civil Actions that are depending in the Court: And the Clerk of the Crown is to frame, read Inditeiments, and to enter the Records of all Criminal Matters depending in the Court: These are the chief of the Ministerial Officers; and the Secondary is the next Officer to them.

2. There are other Inferior officers belonging to this Court, called *Attorneys*, the Clerks of the *Exigent*, of the *Papers*, and of the *Errors*, the *Custos Brevium*, and the *Custos Sigilli*, and the *Marshal*, and in both Courts, *Vergers* or *Vergers*. 2 H. 4. 10.

There are likewise in this Court of *Common Pleas*, under the Chief Justice, and the other Judges, the Judicial Officers, divers Ministerial officers. As

1. There are here for the chief Clerks, three *Protonotaries*, whose work it is to enter and inrol all the Pleadings in Suits there, make out all *Judicial Writs*, *Vener facias*, and such like, and all *Exigents* and *Super sedas* to them, all Writs of *Execution*, Writs of *Privilege*, *Scire facias*, *Procedendo*, *Prohibitions*, *Audita Querela*, Writs of *False Judgment*; they inrol all *Recognisances*, acknowledged in that Court, and *Common Recoveries*; here are *Secondaries* also in this Court. 2. There is a Clerk of the *Warrants*, whose office it is to enter all *Warrants* of *Attorney*; inrol all *Deeds* of *Bargain and Sale*, acknowledged in or out of the Court, before any of the *Judges* of the Court, and extreat into the *Exchequer*, all *Issues*, *Fines*, and *Amercement*, growing to the *King* out of that Court. 3. There is a Clerk of the *Kings Silver*, whose office is to enter all the *Fines* that are levied in the Court, and what *Fine* the *King* is to have for his License. 4. The Clerk of the *Juries*, whose office is to make out the Writs of *Habeas Corpora*, and *Distingas*, to bring in *Juries*, and to take the Return thereof. 5. The *Chirographer*, whose office is to Inrol and Record all the *Fines* that are acknowledged in the Court. 6. The Clerk of the *Treasury*, whose office is to look to the Records of the Court, make out Records of *Nisi Prius*, certify Records into other Courts, make search for Records, and make *Exemplifications* of Records. 7. Clerk of the *Essoyns*, whose office is to enter all the Matters about *Essoyns*, and to provide Parchment, and make and mark Rolls for all the rest of the Officers of the Court, and to deliver them so, and receive them from them again. 8. The Clerk of the *Outlawries*, whose office it is to make out the Writ of *Outlawry* or *Capias Utlagatum*, that issue out of the Court. 9. The *Custos Brevium*, whose office is to receive and keep all the Writs, and put them upon Files, to enter the Writs of *Government* and *Concord* upon every *Fine*, and to receive of the *Protonotaries*, all the *Postes* upon the Records of *Nisi Prius*, issuing out of this Court, which he is to lay up. 10. The *Exigent*, whose office is to make out all *Exigents* and *Proclamations* in all Actions where *Process* of *Outlawry* doth lie, and Writs of *Super sedas* thereupon: There are four of these in this Court. 11. The *Filazer*, whose office is to make out all *Original Process* after the Defendant is returned summoned, he maketh out all the *Capias*, *al. Capias*, and *Pluries Capias*, all Writs of *Furn*; he may enter *Imparlanes*, the *General Issue*, and *Judgments* by *Confession*, and *Execution*, where the Apparance is made with him; and *Super sedas* when the Defendant doth appear upon the *Capias*: There are of these fourteen in this Court. 12. There is also a Clerk of the *Seal*, as there is in the *Upper Bench*, who in both Courts, it seems, is he that hath the Custody of the *Seal* of the Court. 5 H. 4. 14. 2 H. 3. 8. 18 H. 6. 9. F. N. B. 76. Co. 6. 63. 13. And there are *Attorneys* in this Court also, who do manage the businesses there depending for their Clients.

There are in the *Exchequer*, under the *Chancellor* of the *Exchequer*, *Lord Chief Baron*, and the rest of the *Barons*, there, the *Judicial Officers*, divers *Ministerial Officers*: As

1. The *Remembrancer*, whose office is to overlook and minde the Officers of the Court of their Duty for the benefit of the *King*. And of these there are three, one called the *Kings Remembrancer*, who enreth in his office all the *Recognisances* taken in this Court, taketh Bonds for any of the *Kings Debts*, or for Apparance, or performing *Orders*, and maketh *Process* upon them; he maketh *Process* against *Collators* of Publick money, to call them to account; receiveth all Informations upon *Grand Lays*, taketh the *Stallment* of *Debt*, and keepeth the *Evidences* of the *Crown Land*. Another

Another is called the *Treasurers Remembrancer*, whose work it is to make out Process against all Sheriffs, Escheators, Receivers and Bailiffs for their Accompts, and against men for Debts due to the King: He takes the Extreats of all Fines, Issues and Amerciaments set in other Courts, and certified thither, and delivers them to the Clerk of the Extreats, and he receiveth and recordeth all the Accompts of Officers. And the *Remembrancer of the first Fruits* taketh all Compositions for First-Fruits and Tenths, and maketh Process against such as pay not the same.

2. There are two Officers called *Chamberlains*, who were wont to keep a Controlment of the Pells of the Receipts and Layings out, and keep the Keys of the Treasury, where divers antient Books of matters of the Crown were kept. There are also *Under-chamberlains*. *Chamberlain, what.*
Under-chamberlains, what.

3. There is a *Clerk of the Extreats*, who did every Term return the Extreats out of the Lord Treasurers *Remembrancers* Office, and writeth them out to be levied for the King, and made Schedules for the summes that were to be discharged. *Clerk of the Extreats, what.*

4. There is the *Clerk of the Pell*, who is to enter every Tellers Bill into a Parchment-Roll of Receipts, and to make another Roll of Paiments, and to set down by what Warrant it was paid. *Clerk of the Pell, what.*

5. There is the *Clerk of the Pipe*, who hath all Accounts and Debts due to the King delivered and drawn down out of the *Remembrancers* Offices, charged into a great Roll: And he sendeth to the Sheriff to levy the same Debts upon the Goods and Chattels of the Debtors; and if they have no Goods, then doth he draw them down to the Lord Treasurers *Remembrancer* to write Extreats against their Land. He hath in charge before him the antient Revenue of the Crown, and is to see the same answered to the King by the Sheriffs and Farmers. He maketh the Charge to the Sheriffs of their Summons of the *Pipe* and *Green-wax*, and seeth to it that it be answered on their Accounts. And he hath the ingrossing of all the Leases of the Kings Lands. *Clerk of the Pipe, what.*

There is also a *Comptroller of the Pipe*, who sendeth Summons twice a year to the Sheriffs to levy the Debts of the *Pipe*, and keepeth a Comptrollment of it. And a *Comptroller of the Pell*, which are the two Chamberlains Clerks, who should keep an Account of all the Officers Receipts and Disbursements, and discover if any be false.

6. There is the *Clerk of the Pleas*, in whose Office all the Officers of that Court (by special privilege) are to sue or be sued in any Action. *Clerk of the Pleas, what.*

7. There is a *Clerk of the Nichils* or *Nihils*, who maketh a Roll of all such sums as are nihil'd by the Sheriffs upon their Extreats of *Green-wax*, and delivereth the same into the Lord Treasurers *Remembrancer* his Office, to have execution done upon it for the King. *Clerk of the Nichils, what.*

8. There are also Four *Tellers*, whose Office is to receive all money due to the King, and to give to the Clerk of the *Pell* a Bill to charge him therewith: And they are also to pay all money due from the King to any person, by Warrant from the Auditors of Receipt: And of these Paiments and Receipts they are to make weekly and yearly Books, and them deliver to the Lord Treasurer. *See 8. Tellers, what.*

9. There are *Auditors*, who take the Accounts of those Receivers, Sheriffs, Collectors and Customers who receive the Kings money, and set them down and perfect them. *Auditors, what.*

10. There is a *Forein Opposer*; and to him all Sheriffs and Bailiffs do repair, by him to be opposed of their *Green-wax*, and from thence draweth down a Charge upon the Sheriff and Bailiff to the Clerk of the *Pipe*. *Forein Opposer, what.*

11. There is a *Marshal*, who is Keeper to the Kings Debtors committed during the Term: He also assigneth Auditors to Sheriffs and other Accomptants, before whom they are to account. *Marshal, what.*

12. There are four ordinary Officers called *Ushers*, that attend the Judges of the Court at their pleasure. *Ushers, what.*

13. There are two *Parcel-makers*, that make the Parcels of the Officers Accounts, who are to accompt for money they have received to the Kings use, and this they are *Parcel-makers, what.*

are to deliver to one of the Auditors, that he may make up the Account thereof.

Attorney.
Receivers of
First-fruits.
Cutters of
Tallies.

In the Court
of Wards and
Liveries.

In the Star-
Chamber.

In the Court
of Requests.

In the Duchy
of Lancaster.

Admiral.

Lords Presi-
dents.

In the Courts
of the Justices
of Oyer and Ter-
miner.

Clerk of the
Assise, what.
Marshal.

Cryer.
In the Courts
of the Sessions
of Justices of
Peace.

Custos Rotulo-
rum, what.
Clerk of the
Peace, what.

Sec. 9.

Lord High-
Steward of
England, what.

Lord High-
Treasurer, what.

Under-Treasu-
rer, what.

14. There are also there, an Attorney, Receivers of First-fruits, and other Receivers, and Cutters of Tallies or Tally-makers. See for this, *Stat. of 5 R. 2. 1. ch. 14. 15. 37 Ed. 3. ch. 4. 34 & 35 H. 3. ch. 16. 31 H. 3. ch. 5. 33 H. 8. ch. 33.*

There were in this Court of Wards, besides the Master of the Court, the Attorney, Surveyor, Auditors and Receiver, who were the Judges, there were other Ministerial Officers, as Auditors, a Treasurer, a Receiver-general, the Register, Attornies of Clerks, and a Messenger. These are all gone with the Court. See Courts.

There were also in the Court of Star-chamber, besides the Judicial Officers, who were the Lord Chancellor, the Lord Treasurer, all the Kings Council, all the Temporal and Spiritual Lords, who were all of them Judges in this Court, divers Ministerial Officers, as Examiners and others. But these are also gone with the Court. See Courts.

There is to be in the Court of Requests, besides the Master of the Requests, who is Judge alone, a Register and Examiner, who are Ministerial Officers.

There is to be in this Duchy-Court, besides the Chancellor who is the Judge, divers Judicial Officers, as the Attorney, Receiver-general, Clerk of the Court, Surveyors, Auditors, besides some Assistants, as an Attorney in the Exchequer, and another in the Chancery, and four learned Lawyers of the Lord Protectors Council, *Crompt. Jur. 136.*

The Court of the Admiralty hath Ministerial Officers attending on it. See for this in Courts.

The Council-Table, the Courts of the High-Steward, of Redress of Delays, of General Surveyors, and the rest of the Courts not named, when they stood, had divers Ministerial Officers in them: But being all passed away, we pass them over. All other Courts also have Officers; it were infinite to name them, and therefore we shall pass them also, and content our selves that we have named the Officers of the most eminent Courts.

There were Lords Presidents of the Kings Council, of Wales, of York, of Barnick: We also pass them over.

There are in the Judges and Justices Courts in their Circuits, besides the Judicial Officers, some Ministerial Officers also; as the Clerk of the Assise, whose Office is to record all things judicially done by the Justices of Assise, Gaol-delivery, &c. in their Circuits; and the Marshal, who doth help to manage the business of the Court; and there is a Cryer also.

There are in the Courts of Sessions of Justices of Peace, besides themselves the Justices who are the Judicial Officers, other special Officers. The one is the Custos Rotulorum, he that keeps the Rolls and Records of the Sessions of the Peace, and commonly of the Commission of the Peace; and he is always one of the Justices of the Peace and of the Quorum. And the Clerk of the Peace, whose office in the Sessions is to read the Indictments, inroll the Acts, make out the Process, and take Returns thereof, and to certify into the Upper-Bench Transcripts of Indictments, Outlawries, Attainders and Convictions before the Justices in this Court, and Fines, Issues, Forfeitures into the Exchequer. See for this, *Lamb. Just. of Peace, 379. Añ, 17 Novemb. 1650.*

We shall now give you the names of the Officers of most eminencie, that had relation to the King, and his Court or House, or were otherwise under him.

There was a Lord High-Steward of England, who was next the King, and was but for a little time and for some special purpose only. See for him, *Crompt. Jur. 82. Co. 4 par. Inst. ch. 4.*

A Lord High-Treasurer of England, under whose charge was all the Kings wealth in the Exchequer, and he had the check of all Officers any way employed in the collecting of the Revenues of the Crown. See Sir Tho. Smith de Repub. ch. 14. And under him was the Under-Treasurer of England, 39 Eliz. 7.

The

The *Lord Keeper of the Privy-Seal*: And under his hands did pass all Charters signed by the King, before they came to the Great-Seal. *Lord Keeper of the Privy-Seal, what.*

The *Keeper of the Forrest*, was one that had the government of all things belonging to the Kings Forrests, and the check of all the Officers thereof: And he is upon notice from the chief Justice in Eyre of the Forrest, of a Justice-sear to be held, to warn all the Officers of the Forrest to be there. And under him there is a Warden of the Forrest. See *Manwood, Courts, and Forrest.* *Warden or Keeper of the Forrests, what. Warden of the Forrest, what.*

The *Lord Warden of the Cinque-Ports*, who hath some power like to the power of the Admiral, in the Ports or Haven-Towns towards France, called the *Cinque-Ports*, which he hath the special charge of, *Cv. 4 par. Inst. ch. 42.* *Lord Warden of the Cinque-Ports, what.*

There was an *Earl-Marshal* or *Constable of England*, or both; whose office was about matters of Arms, Chivalry and War, *13 R. 2 ch. 2. stat. 1.* *Constable of England or Earl-Marshal, what.*

There was a *Marshal of the Kings House*, whose office is to hear the Pleas of the Crown, and to punish faults committed within the Verge twelve miles of the Court, and to hear and determine matters between those of the Kings household, and wherein difference was between one of them and another. *Knight-Marshal, or Marshal of the Kings House, what.*

The *Marshal of the Kings Hall*, who was to place the Guests, and see other such like things done of that nature. *Marshal of the Kings Hall, what.*

The *Steward of the Kings House*, that was an Officer of great command, called the Master of the Household, whose Office it seems the Marshal of the House had, *24 H. 8. 13. 1 Mar. 2 Parl. ch. 4.* *Steward of the Kings House, what.*

The *Lieutenant*; which was either the Lieutenant-General, or Captain-General of his Army, or one that did represent his person or occupy his room in any work or place; and the President was no other, *4 H. 5. 6.* *Lieutenant, what. President, what.*

The *Lord Chamberlain*, who did command and order all Officers touching the Kings household for so much as was called the Chamber, which were the Bed-chamber, Privy-chamber, Presence-chamber, and Great-chamber, Council-chamber, Privy-Closet, &c. and to order all the Kings Servants to attend him to the Chappel, and to order how men might speak with him. And in his absence the Vice-chamberlain did all this, *13 R. 2. stat. 2. ch. 1.* *Lord Chamberlain, what. Vice-chamberlain, what.*

The *Lord Treasurer of the Kings Household*, who in the absence of the Steward of the Kings House, with the Comptroller and Steward of the Marshalsey, did hear and determine matters of the Crown committed within the Palace of the King, *Stamf. pl. Cor. 13 c. 5.* *St. B. 10. Lord Treasurer of the Kings Household, what.*

The *Comptrollers*. There was a Comptroller of the Kings House, who was to overlook the other Officers of the Household, and especially of their Accounts, and to discover if they did amis. So there is a Comptroller of the Navy, of the Custom, of the Mint, and of *Calis*, *35 Eliz. 4. 21 R. 2. 11. 2 H. 6. 12. Crump. fur. 105. 33 H. 8. 12.* *Comptroller, what. Of the Houses of the Navy. Of the Custom. Of the Mint. Master of the Kings Wardrobe, what.*

The *Master of the Kings great Wardrobe*, who had charge of all the ancient Robes of the Kings and Queens, and all their costly Hangings. And under him there was a Clerk of the Wardrobe, who also took some account of it, *39 Eliz. 7. 1 Ed. 4. 1.* *Clerk of the Kings Wardrobe, what.*

The *Clerk of the Signet*, who was wont to attend the Kings Secretary with the Privy-Signet for the sealing of Letters and Grants that had passed his hands by Bill assigned; and of them there were four, *27 H. 8. 11.* *Clerk of the Signet, what.*

The *Clerk of the Check*, who was one that had the check and controllment of the Yeomen of the Guard, and those that were to watch about the King, and to dispense with their absence, or keep up their wages, *33 H. 8. 12.* *Clerk of the Check, what.*

The *Clerk of the Privy-Seal*. Of these there were four to attend the Lord Keeper of the Privy-Seal, or principal Secretary, if there were no Lord Privy-Seal, for the signing of all things that have passed the Signet, and are to go to the Great Seal; or to make out Privy-Seals for Loan of money, or the like, *Stat. 27 H. 8. chap. 11.* *Clerk of the Privy-Seal, what.*

The *Cofferer of the Kings Household*, who was next the Comptroller, and in the Counting-house and elsewhere at other times, had a special charge and oversight of other Officers of the Household, how they carried themselves; and he paid their wages, *39 Eliz. 7.* *Cofferer, what.*

St. 11.
About the
Mint.
Warden.
Master of the
Mint.
Master-worker.
Comptroller.
Master of the
Assay.
Auditor.
Surveyor.
Clerk of the
Irons.
Graver.
Smiter.
Melters.
Blanchers.
Porter.
Provost.
Moniers.

Master of the
Horse, what.

Master of the
Posts, what.

Master of the
Ordnance, what.

Master of the
Armory, what.

Master of the
Kings Muster,
what.
Receiver-general
of the
Muster-Rolls,
what.

Master or Sten-
ard of the Kings
Houhold, what.
Master of the
Jewel-house,
what.

Sewar or Sew-
er, what.
Parveyor, what.
Conservator of
the Truce, what.

Comptroller of
the Market,
what.

Lieutenant of
the Tower, &c.

Serjeant at
Law.

Counsellors,
Attornies, Cry-
ers, Jurors.
Pursuivants or
Messengers.

About the *Mint* the King had many Officers. The *Warden* of the *Mint*, who took in and paid for the Silver, and did oversee all the work. The *Master-Worker*, who receiveth the Silver from the Warden, causeth it to be melted, and delivereth it to the Moniers, and taketh it from them again when it is melted. The *Comptroller*, who is to see that the Money be made the just assise, and to comptroll the Officers where it is otherwise. The *Master of the Assay*, who weigheth the Silver, and seeth it be according to the Standard. Then is the *Auditor* to take the Accounts, and make them up Auditor-like. Then is the *Surveyor* of the Melting to see the Silver cast out, and that it be not altered after it is delivered to the Melter, which is after the Assay-master hath made trial of it. Then is the *Clerk of the Irons*, to see that the Irons be clean and fit to work with. Then the *Graver*, who graveth the Stamps for the Money. Then the *Smiter of Irons*, who after they be graven smiteth them upon the Money. Then the *Melters*, that melt the Bullion before it come to the coining. Then the *Blanchers* who aneal, boil, and cleanse the Money. The *Porter*, who keeps the Gate of the Mint. The *Provost*, who is to provide for all the Moniers, and to oversee them. The *Moniers*, who are some of them to sheer the money, some to forge it, some to beat it abroad, some to round it, some to stamp or coin it, 21 R. 2. ch. 16. 9 H. 5. 5. 2 H. 6. 14.

The *Master of the Horse*, who was one that had the Rule and charge of the Kings Stable of Horse, 39 Eliz. 7.

The *Master of the Posts*, or Post-master, who was to appoint, pay, and displace all such through the Nation as provide Post-horses of their own keeping, or shall have power to take them up, 2 Ed. 6. 3.

The *Master of the Ordinance*, whose office was to look to all the Ordnance and Artillery of the King, 39 Eliz. 7.

The *Master of the Armory*, who was to take care of the Kings Armor for his person or horses, and the store and provision of Armory in any standing Armories, 39 Eliz. 7.

The *Master of the Kings Muster*, was a Martial Officer to look to the Officers and Soldiers of his Army, Horse and Foot, to see that the Companies and Troops were full and well armed, and duly paid. There was also a Receiver-general of Muster-Rolls, 35 Eliz. 4.

The *Master of the Kings household*: He was the same with the Steward of the Kings household; a great Officer he was of command in the Kings house, and was (as it seems) that Officer that was after Marshal of the Kings house, 32 H. 8. 39.

The *Master of the Jewel-house*, who had the keeping and charge of all the Kings Gold, Silver, Plate and Jewels, 39 Eliz. 5.

The *Sewer or Sewar*, who did use to usher in the Meat to the Kings Table.

The *Purveyor*, who was to make Provision of Diet for the Kings Household, 23 H. 8. 14.

The *Conservator of the Truce and Safe-Conducts*, which was in every Port to enquire of things done against the Kings Truce and Safe-Conducts, Stat. 2 H. 5. chap. 6.

The *Comptroller of the Market*, who did see to the Kings Measures and Weights, and that they be observed all England over, 13 R. 2. ch. 4.

These were most of the Officers about the King that were eminent, or had relation to him for the ordering of his Estate, Household, and that which was his. There were also other Officers, as the *Lieutenant* of the Tower of London, and Governors of Castles, the Constable or Warden of the Castle of Dover, or of the Cinque-Ports, and many more. And many now out of use, as *Marchers*, and many others.

There are other Civil Officers yet many more: Some that are general, or have relation to Courts, and are almost in, or have dependance upon every Court; as Serjeant at Law, Counsellors, Solicitors, Attornies, Cryers, Jurors, who are to find and judg of matters of fact in civil and criminal causes, and such like: And in some Courts, Pursuivants or Messengers to fetch men in Prisoners, as in the *Exchequer* and

and other Courts. The *Verger* or Port-bearing Verge, that carries the Rod before the Judges. *Porters* that keep doors, and the like.

Verger, or
Port-bearing
Verge.
*Conservators of
the Peace*, what.

There are also Officers now out of use, and whose Offices are devolved to Officers of other names, as *Conservators of the Peace*, whose Office is now in the Justice of Peace, and many others.

There are other Officers appointed in special places, or for some special use, that have no dependance on any Court; as the *Corrector of the Staple*, that recordeth the Contracts of Merchants, 27 Ed. 3. 2. *ch.* 22, 23.

Staple, 12:
*Corrector of the
Staple*, what.
Gauger, what.

A *Gauger*, who is to examine Tuns, Hogsheds, Pipes, Barrels, and Tercians of Wine, Oil, Honey, Butter, and to give them a Mark of Allowance before they be sold in any place, 27 Ed. 3. 8. 31 Ed. 3. 5. 4 R. 2. 1. 14 R. 2. 8. 18 H. 6. 17. 22 H. 6. 6. 31 Eliz. 1.

Officers or *Rulers* of Markets and Fairs, who are to see there be an open place for Sale of Horses, and that Toll be entred in the Toll-book upon the Sale, 2 & 3 Ph. & M. 7.

*Rulers of
Fairs and
Markets*.
*Common In-
former*, what:

A *Common-Informer*, who hath leave and power to present any man upon a penal Law, 18 Eliz. 5. 29 Eliz. 5. *Co.* 3 par. *Inst.* c. 88.

Searchers and Sealers of Leather, 1 Jac. 22. Searchers of Tile, 17 Ed. 4. 4.

*Searchers and
Sealers of Lea-
ther*.

Overseers of Cloth, 3 Ed. 6. 2. 21 Jac. 18. 39 Eliz. 20. 43 Eliz. 10.

*Searchers of
Tile*.

A Toll or Tax-Gatherer or Customer, or Collector of monies, 14 Eliz. 7.

*Overseers of
Cloth*.

Forresters or Parkers, who look to the Games of Forrests and Parks, 21 Ed. 1.

*Customer or
Toll-gatherer*.

Receivers-general of Muster-Rolles, Muster-Masters, Aulnegeor to look to the Measure of Cloth, 25 Ed. 3. 4. 1. Searchers or Finders, Heralds, and many others such like. So the Minister of the Parish is to keep a Book to register the Names of Rogues punished.

Aulnegeor.
*Receiver-
general*.
*Minister of the
Parish*.

There are some Officers of inferior Courts which we have not named; as Stewards of Law-day Courts, Hundred-Courts, and Manor-Courts or Court-Barons; Free-suitors, Homagers, Bailiffs, Reeves and Beadles. And in the Forrest-Courts divers, as Constable, Verderors, Beadles, Bailiffs-errant, and the like. For which see *Forrest*. And amongst these in some places there are some strange Officers, as Ale-tasters or Ale-cunners, Carvals, Port-Reeves, and others, which the Law doth scarce take notice of.

The *Stewards* of these inferior Courts, are in the Law-day Court the Judge and principal Officer, and in the other Courts a special Officer, who is to govern these Courts according to Law, and to record all the proceedings thereof. See *Manor*.

*Stewards of
Courts*, what.

In the Hundred-Court and Court-Baron, as to the Trial of Actions, the Freeholders or Free-suitors are the Judges, and they are to order and judge matters according to Law. And in the Copiholders, or Customary Court of the Manor, the Lord or his Steward is Judge. But the Steward is to see, that all things in Surrenders, Admittances, and other passages be done according to the Custom, and that they be duly entred and recorded in the Rolls of the Court, *Co.* 1 par. *Inst.* 61. of *Copihold*, 123. *Co.* 4. 30. 9. 48. See my *Court-keepers Guide*, *St.* 1 Jac. 5.

Free-suitors,
what.

In the Copihold or Customary Court, the Jurors are called *Homagers*, whose work is to present and find the Custom, and all matters of fact done within the Manor in relation to the Custom.

Homagers,
what.

The *Bailiff*. This word is a general word, and is applied to Officers for Counties and Hundreds that belong to the County and Hundred, that serve Process, summon to Court, and execute the Warrants of the Stewards of those Courts, and of the Sheriff and other superior Officers. And it is applied to Bailiffs of Manors, who do use to dispose of the affairs of his Lord there, pay and receive his Rents, look to Forfeitures, &c. and see the Customs observed. He in some Manors is called a Reeve. See for this, *Co.* 4. 30. *Dyer* 148. 12 H. 7. 23. *Bro. Bail.* 31. *Tresp.* 288. 14 Ed. 3. 9. *Stat. of Lincoln*, 10 Ed. 2. See *Manor*.

Bailiff, what.

This word *Beadle* is used but of Forrests also, for an Under-Bailiff of a Manor, or Messenger of a Court, who is to execute the Attachments and other Process directed from the Lord or Steward of the Court, and to present all Pound-breaches, Waifs and Estrays.

Reeve, what.

Beadle, what.

There

Major of a City
or Corporation.
Aldermen.

There are also in Cities and other Corporate Towns, divers Officers, as Major, Aldermen, Bailiffs, Recorder, Town-Clerk, Sword-bearer, Serjeants, Stewards, and the like. The principal Officer in most places is called the Major, and next to him in those places are the Aldermen. In other places the principal Officers are one, or more, called Bailiffs. And all these of the one sort and the other, are within their Liberties Justices of the Peace, and have within their Precincts all or much of the same power which the Justices of Peace have within their Counties.

Justicarii ad
pacem infra
liberates.

Recorder, what.

The Recorder is he, whom the Major and other Magistrates of such Cities and places, having Jurisdiction or Court of Record within their Precinct by the Kings Grant, do associate to them for their better direction in matters of Justice, and proceedings according to Law. And in some Cities they have under him a Town-Clerk, in his absence to do all this for them. Their Stewards receive and lay out their money for the Corporation, and give account of it. And their Serjeants are to arrest men for Debts, &c.

Town-Clerk,
what.
Steward, what.
Serjeants, what.

There are also some Officers newly appointed, and that are but for a time, that perhaps will continue but a while, the Laws by which they are made being but of short continuance; as the Commissioners and Sub-Commissioners, and Clerks of Excise; the Commissioners, Receivers, Assessors and Collectors for the Contribution, and divers others. See the Ordinances for that purpose.

Commissioners
of Excise.

Water-Bailiffs.
Wharfinger.
Portgreve.

There are Officers also belonging to Sea-Towns and Ports; as Water-Bailiffs, to search Ships, Fish, and gather the Toll of the Wharf, Stat. 28 H. 6. ch. 5. Wharfinger, the Keeper of a Wharf. A Portgreve, being a chief Magistrate in some Town.

Stat. 13.

There are other Officers, that are some of them County-Officers; such as is the Sheriff, the Coroner, the Escheator, the Treasurers of the County, Masters of Bridewell, Gaolers, Escheators, Clerks of the Market, and such like.

And then there are some others that are Parish-Officers; such are the Church-wardens, Overseers of the Poor, Surveyors of the High-ways, Registers, Constables, Clerks, Haywards, and such like.

And there are some Officers that are for a Hundred, as High-Constables, High-Collectors, and the like. And some of these County-Officers have Courts, and some have relation to Courts, as the Sheriff, Coroner, Clerk of the Market.

Sheriff, what.

The Sheriff is a County-Officer, partly Judicial, and partly Ministerial, of great antiquity and authority; who was anciently always an Earl, and he was always chosen by the King; and made by his Letters-Patents only for one year. His charge and duty is, to look to the preservation of the Kings Peace, to see the Writs and Executions that come out of the Courts executed, to impanel Juries, to gather up the Kings debts, to look to the profits of the County, and the registering of the Acts of the County-Court, and the like; and herein his Office is Ministerial. He is also to punish the lesser criminal matters in his Leet or Turn-Court, wherein his Office is Judicial; for in the greater causes, the Justices of Assize that go about in their Circuits yearly do dispatch them. And these Officers do usually make a Deputy or Under-Sheriff, who doth execute the Office under them.

Under-Sheriff,
what.

But for all that doth concern this Office, see Statutes; 28 Ed. 1. 14. 19 Ed. 2. of Sheriffs. 1 R. 2. ch. 11. 1 H. 4. 11. 4 H. 4. 3. 12 Ed. 4. 3. 17 Ed. 4. 6. 21 Jac. 1. 13 Eliz. 21. 11 H. 7. 15. 1 Ed. 4. 2. 13 H. 6. 10. de finibus terrarum. 4 Ed. 3. 10. 21 Ed. 1. 2. 2 & 3 Ed. 6. 4. 8 Eliz. 16. Aff. 11 July, 1650. Co. 9. 49. 97. Dyer 60. Plow. 74. 43 Eliz. 6. 29 Eliz. 4. 27 Eliz. 7. 12. 8 Eliz. 16. 1 M. 1. 14 H. 2. 16. And see the Books that treat of this Office only, as Dalton of the Sheriffs Office, at large. See Springers Abridgment of the Statutes.

Feodary, what.

The Feodary was an Officer authorized by the Master of the Court of Wards and Liveries, to assist the Escheator in the finding of Offices and other things concerning the Kings Wards. This Office and Officer is now laid aside, there being no use of him.

The *Escheator* was an Officer of the Common-Law, that did look to the Escheats of the King within the County, and certifie them in the *Exchequer*: But he is now laid aside. See the Books made of this Officer and his Office.

Escheator, what.

The *Clerk of the Market* is an Officer (for the most part) set up in every County to look to this, That all the Measures wet and dry, (that is) Ells, Yards, Lagen, Quarts, Pottles, Gallons; and Weights, as Pound, Ounce, &c. be answerable to the example of the Standard in the *Exchequer*. Sometimes there hath been an Officer in the Kings house, to take care of the Standards, and to look to the examples thereof all over the Land; and so it may be done by one Officer. He is the *Comptroller of the Market*. *Stat. 1 Ed. 4. ch. 1. 13 R. 2. 4.* See more of this, *Stat. 16 Car. 19.*

Clerk of the Market, what.

The *Coroner* is an ancient Officer appointed by the Common-Law for matters of the Crown; and of these are many in one County. His work is principally to enquire of every man that is killed and doth come to an untimely death, by what means he came to his end; keep a Court, and call a Jury to consider of every circumstance, and to enquire who they were that committed the fact, and what Lands or Tenements, Goods or Chattels they had at the time of the fact committed, and to seise them to the Kings use: They are also to enquire of Treasure-trove. He is also to look to the keeping of the Peace: He is to keep the Records of the Pleas of the Crown taken before him: He is also to view the dead bodies slain, and cause the Murderer to answer for it upon the Indictment taken before him. This Officer is chosen by the Freeholders of the County at their County-Court. But for this see the Treatises of this Officers Office at large, *Stamf. lib. 1. ch. 5 2.* and in many other places. *1 H. 8. 7. 28 Ed. 3. 6.*

Sc. 14. Coroner, what.

The *Treasurers of the County-Stock* for the relief of poor maimed Soldiers and Mariners, are certain Officers yearly chosen by the Justices of Peace, to have the charge of the Receipt and Disbursements of the money taxed and levied upon the whole County yearly for the relief of poor maimed Soldiers and Mariners. For this see my Book of the *Offices of Constables, &c. par. 2. ch. 5.*

Treasurer of the County-stock for relief of poor maimed Soldiers and Mariners.

The *Treasurers of the County-Stock* for the Relief of poor maimed Soldiers caused by the late Wars, and the Widows and Orphans of such as have been slain or dead in the Service, are certain Officers yearly appointed by the Justices of Peace, to have the charge of the Receipt and Disbursement of the money taxed and levied upon the whole County yearly for the Relief of poor maimed Soldiers and Mariners, and the Widows and Orphans of such as died in the Service of the *Parliament*. For which see the Ordinance of *May 28. 1647. and Aug. 10. 1647.*

Treasurers of the County-stock for relief of poor maimed people, and the Widows and Orphans of such as died in the Service of the Parliament.

The *Treasurers of the County-Stock* for the Relief of Prisoners in the *Kings-Bench* and *Marshalsey*, and for the Relief of Hospitals and Alms-houses within the same County, are certain Officers yearly appointed by the Justices of Peace, to have the charge of the Receipt and Disbursements of the money taxed and levied upon the whole County yearly for the Relief of the Prisoners in the *Kings-Bench* and *Marshalsey*, and for the Relief of Hospitals and Alms-houses within the same County. See for this my Book of the *Office of Constables, 2 par. ch. 6.*

Treasurers of the County-stock for relief of the Prisoners in the Kings-Bench and Marshalsey. See. 19.

The *Collector of the money for the Relief of the Prisoners in the Common-Gaol*, is an Officer appointed by the Justices of the Peace, to have the charge of the Receipt and Disbursements of the money taxed and levied upon the whole County for the Relief of the Prisoners in the Common-Gaol. See for this my Book of *Constables, &c. 2 par. ch. 7.*

Collector of the money for the relief of the Prisoners in the Common-Gaol, and his Office.

The *Governor or Master of the House of Correction*, is an Officer appointed by the Justices of Peace, to have oversight and government of the House of Correction, and of persons committed to the same. See my Book of *Constables, &c. 2 par. chap. 4.*

Governor of the House of Correction, and his Office.

The *Constables* are said to be Officers of the Commonwealth, appointed for the maintenance of the Peace thereof, and to be attendant to Court-Leets, Justices of Peace, and Coroners, for the Executions of their Warrants within their Precincts and Liberties. And Mr. *Lambert* saith, The name of a Constable in a Hundred or Franchise, doth mean that he is an Officer that did support the Kings Majesty in the main-

Constables, Tythingmen, &c.

High-Constables
what.

maintenance of his Peace within the Precinct of his Hundred or Franchise. And of these Constables there are now said to be two sorts: The first sort are the High-Constables, which are for the whole Hundred, Lathe, Rape or Wapentake, the which do comprehend many Parishes, Tythings and Villages; and therefore these Officers in respect of place have a more large command then Petty-Constables have. These Officers were ordained by the Statute of *Winchester*, which doth appoint (amongst other things) That for the better keeping of the Peace, two Constables in every Hundred and Franchise shall make the View of Armor. And they are called High-Constables, in comparison of the Constables or Petty-Constables that be in the Towns or Parishes within their Hundreds or Franchises; whose duty is likewise to maintain the Peace within the several limits of their Towns or Parishes. And of these High-Constables there were to be, and were antiently two in every Hundred; but at this day there is but one in many Hundreds.

The other sort of Constables are the Petty-Constables or the Under-Constables, who are only for some part, as for a Town, Parish, Village, Tything or Hamlet within the Hundred; (for, every Hundred hath his High-Constable, and every several Tything within the Hundred hath the Petty-Constable, Tythingman, or the like within it.) So that the command of the Petty-Constable is only in one part of the Precinct of the High-Constable: But otherwise for his Authority, by the antient Common-Law, his Office (as far as his Precinct doth extend) is the same with the Office of the High-Constable over the whole Hundred.

The Tything-men, Borsholders, Boroughead or Headborough, Thirdborough, and Chief Pledg, or by whatsoever names they be called in any Towns, Parishes, Tythings, Boroughs, Hamlets or other places, and their Offices, are in effect in most places but one and the same; for in some Counties this Officer is called by one name, and in other Counties by another name: As in *Kent* he is called Borsholder, in *Warwick-shire* Thirdborough, and in other places he is called Constable, and in some places he is called Tythingman; for he that is called and sworn the Tythingman of any place, is (in effect) the Constable of the place: And therefore in such places for the most part there is no other Officer called or sworn by the name of a Constable. For as Petit-Constables, about the beginning of the Reign of *Edward* the Third, were devised in Towns and Parishes for the aid of the Constables of the Hundred; so afterwards Borsholders, and such like, were used as Petit-Constables within their own Tythings and Boroughs.

But if it be so (as in some few places) that there is one Constable for the Commonwealth, and there is also one or more Tythingmen, and the Constable doth execute all the Office, and the Tythingmen are but as Attendants on him, and seem to have but little power, or it be as in some places; the Tythingman is to do service to the Lord of the Manor rather then to the Commonwealth, and he is a Customary Tythingman chosen at the Lords Court: Or if it be so that there are two or more Tythingmen, and one of them is for the Commonwealth to execute the Office of Constable, and is always chosen at the *Leet*, and this Tythingman time out of mind hath been used to do nothing about the Office of the Constable, but to do other things; in these cases the Custom of the place may and must be continued, and such Tythingmen shall not be compelled to do more then by Custom they have used to do: Howbeit otherwise, and in all other places, all these Officers are comprehended within this word *Constable*, and all these Offices are contained within this Office. See for this at large in my Book of the *Office of Constables*, &c. 1 par. chap. 1.

Self. 16.
Churchwardens.

Churchwardens are Officers chosen yearly by the major part of the Parishioners according to the Custom of the place, to look to the Church and Church-yard, and things thereunto belonging. See for this at large in my Book of the *Office of Constables*, &c. par. 2. ch. 1.

Sidemen or
Questmen.

Sidemen were those that were yearly chosen according to the Custom of the place, to assist the Churchwardens in their Presentment to the Ordinary.

Overseers of the
Poor.

The *Overseers of the Poor*, are certain Officers appointed yearly to be joyned with and assistant to the Churchwardens of the Parish, in the oversight and ordering of the

the Poor of the Parish. See this at large in my Book of *Constables, &c.* part 2. chap. 2.

The *Supravisors* of the Surveyors of the High-ways, are Officers yearly chosen by the Constables and Churchwardens of the Parish, to look to the Amendment of the High-ways within the Parish. See for this also a large Treatise in my Book of the *Office of Constables, &c.* par. 2. ch. 3.

The *Register* of a Parish, is a new Officer of a Parish chosen by the Parish, and allowed by the Justices of the Peace, for the publication of Contracts of Marriage, and for the taking and keeping of an Entry of all the Marriages, Christenings and Burials within the Parish. *Act, Aug. 24. 1653.* See for this in the same Book also.

The *Hayward* is an Officer appointed in every Town to be the common Herd of the Town, to impound the Cattel that do trespass in the Fields, to look to the Fields, to see that no Pound-breaches be made, and if any be, to present them at the Leet, and to make Replevins, &c. *Kitch. f. 46.*

The *Parish-Clerk* is a Civil Officer that is in every Parish; whose work is to keep the Church clean, look to keep the things there in safety, ring the Bells at occasion, bury the dead, and the like: And he is to be chosen and removed according to the Custom of the place, *March Rep. 101.*

The next and last sort of Officers are such as were the Spiritual or Ecclesiastical Officers, such as were the Ordinary, Chancellor, Register, Commissary, and the like who are now gone.

The Ordinary was an Officer instituted by the Common-Law, to have ordinary Jurisdiction in causes Ecclesiastical. His Office was partly Judicial; for he was to judge in Ecclesiastical matters about Wills, Administrations, Bastardy, Marriage, and the like: And partly Ministerial; for he was to execute the commands of the Kings Courts. See for his Office, *D. & St. 28. Perk. sect. 486. Co. 2. 37. 5. 51. upon List. 96. 300:* and by divers Statutes. And thus in every Diocese was the Bishop of the Diocese, and under him he had his Chancellor, *St. 32 H. 8. c. 15.* and his Register to enter and record all that the Chancellor did.

The *Commissary* was an Ecclesiastical Officer that had special Jurisdiction in some places remote in the Diocese far from the chief City, where the Chancellors principal Consistory was, where he did exercise his ordinary Jurisdiction. And he was ordained to supply the Bishops Jurisdiction and office in the out-places of the Diocese, or else in such Parishes as were peculiar to the Bishop, and exempt from the Archdeacon: For where by Composition or Prescription the Archdeacons had Jurisdiction within their Archdeaneries, as in most places they had, this Commissary was superfluous. But of this see *Co. 5. in the Ecclesiastical case, f. 9.*

The *Official* was sometimes he that the Chancellor did appoint under him: And sometimes it was taken for him that the Archdeacon did substitute in the executing of his Jurisdiction, *32 H. 8. c. 15.*

The *Custos* of the Spiritualities, was an Officer that had the Ecclesiastical Jurisdiction in any Diocese during the vacancie of the See; which did by Law belong to the Dean and Chapter.

This word did signifie any one that was deputed under one of these Ecclesiastical Judges: he was called *Delegate* or *Surrogate*.

By what means an Office may be lost, see *Forfeiture.*

Who shall be exempt from Offices, or not, see *Privilege.*

For the making and ordering of Officers under the power of Justice of Peace, see my *Justice of Peace Book, Chap. 24.*

See more the old Statutes for Officers, *12 R. 2. 2. 14 R. 2. 10. 17 R. 25. 1 H. 4. 13. 2 H. 6. 10. 31 H. 6. 5. 5 & 6 Ed. 6. 16.*

Steward of a Leet, *Stat. 1 Jac. 5.*

CHAP. CXXI.

Of Pardon, Patents, Painters, Peace, Paving,
and Perpetuity.

Of a Pardon.

Pardon, what.

The kinds.



His word *Pardon* is used in the Law, for the remitting or forgiving for a Felonious or other offence committed against the Supreme Magistrate.

It hath been divided from the ground, or the manner of it, 1. It hath been said to be, *Ex gratia Regis*: which is that which the Supreme Magistrate doth in some special cases, out of respect to the Person, or for some other circumstance; shew and afford out of his own Royal prerogative or power. 2. Of course: which is that the Law gives, and the King of course was to grant in case of some light offence, as Homicide casual, and the like. It is also express, or implied; which may be called, in Fact, or in Law. And it is also general, when it is of all offences or Felonies; or it is special, of some particular offence. See *Stat. 13 R. 2. ch. 1. 2 R. 3. 2. Plow. 401. See Co. 3 par. Inf. cap. 105* and *101. Inst. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.*

Sec. 1.

What offences may be pardoned, and how, See *Stat. 6 Ed. 1. 9. 1 Ed. 3. 2. 4 Ed. 3. 1. 10 Ed. 3. 1. 14 Ed. 3. 1. 27 Ed. 3. 2. 13 R. 2. 1. 5 H. 4. 2. 5 Ed. 3. 1. 27 H. 8. 1. 13 H. 8. 1. 23 H. 6. 8.*

How it shall be taken.

For the Answer of this, take these Cases.

1. By the Kings Pardon of Murder, Manslaughter is pardoned.

2. By the Kings Pardon of Felony or Treason, the Lands or Goods forfeit were not restored without a special Patent of Restitution.

3. By the Kings Pardon the blood was not restored, but the further corruption of blood was prevented. So that if a man have a son, and then be attainted and after pardoned, after that he doth purchase other Lands, and then hath another son; this other son shall inherit it.

4. Where a Statute doth give part of the Penalty to the King, and part to the Prosecutor, and after the Suit begun the King had pardoned the offence; by this the Kings part was discharged, but the party might have prosecuted still for his part of the Forfeiture; but if the Release had been by the Pardon before the Suit begun, it had been otherwise.

5. If the King had pardoned the not making of a Bridge, the Bridge must be made notwithstanding; the offence past by *non feasant* is only pardoned.

6. If one sinne a man the first of May, and the second of May the King had given him a Pardon for all Felonies, and the third of May he had dyed of this blow; by this he had been pardoned.

7. If after a man had been attainted of Felony or Treason, the King had pardoned him all Felonies, Murthers, and Executions of them, Outlawries, Waiving, &c. and pardon and release all Forfeitures of Lands and Goods; by this his life is saved, and his Land, if no Office be found; but not the Goods without Restitution. See for these things, *Addition to Inst. Doddr. Treatise, f. 88. Brownl. Rep. 1 par. 701 37 H. 6. 4. Keth. 361. Dyer 286. Bro. chap. 204. 103. 6 Ed. 4. 4. Plow. 401. March 214.*

See for Pardons, *Stat. Glouc. 9. 2 Ed. 3. 2. 4 Ed. 3. 1. 10 Ed. 3. 2. 14 Ed. 3. 1. 15. 27 Ed. 3. 1. 2. 13 R. 2. 1. 5 H. 4. 2.*

For the last General Pardon; see it, *At 24 Febr. 1651.*

Of a Patent.

Patents are certain Writings made and published by the Lord Protector, and sealed with the Broad-Seal, giving to him something which he had not before: And by these the Kings have been used to grant such things as they have passed to their Subjects. And these are Records of a high nature; and therefore they need not Delivery, nor Livery of Seisin, or any such thing to perfect them, as the Deeds of other men do, but the thing will pass without it.

Self. 1.
Patent, what.

Non obstante, is a Clause inserted into these Patents, which in some cases will help some default that otherwise would be in them. See for this, and Patents, and *Constat* and *Inspeimus*, Statutes, 21 Jac. 25. 29. 45 Eliz. 3. 18 Eliz. 2. 19 H. 7. 7. 37 H. 6. 21. 18 H. 6. 11. 27 H. 8. 11. 3 & 4 Ed. 6. 4. 1 & 2 Ph. & M. 1. 4 & 5 P. & M. 1. 43 Eliz. 2. 18 H. 6. 1. 6. 28 H. 6. 2. 1 H. 4. 6. 2 H. 4. 21. 6 H. 8. 15. 34 H. 8. 21. 1 Ed. 6. 8. Co. 4. 36. *Crompter* 81. 94. and in other places.

Non obstante,
what.
Constat and *Inspeimus*.

Of Painters.

OF Painters in London, See Stat. 1 Jac. ch. 20.

Of Paving:

FOR paving the Streets in London, See Stat. 24 H. 8. 11. 32 H. 8. 17. 34 & 35 H. 8. 12. 13 Eliz. 23. 23 Eliz. 12. 1 Jac. 22. For paving of Chichester, See 18 Eliz. 19.

Of Peace.

Pease is a quiet and harmless carriage and behaviour towards all the people of the Nation. And Surety for the Peace, is a Recognisance taken by a Justice of Peace or other that hath authority so to do, of a man to the Lord Protector, to keep the Peace. But see for this a large Discourse in my Book of *Justice of Peace*, 1 part.

Peace, what.
Surety of the
Peace, what.

The Good-behaviour is much of the same nature with that of the Peace, and so is the Surety for it: But that this Surety doth comprehend the Surety for the Peace, and much more; and less will break this, then will break the other. See for this also in the same Book.

Self. 1.
Good-behaviour
and Surety for
it, what.

For the Peace, these things are to be known.

1. That all men are required to keep it between themselves and others, and forbidden to break it.
2. They are to do what they can to keep it between others; and for this every man is as a Constable.
3. There are divers Offices appointed and impowered of purpose to look to it, and to punish the breach of it.
4. It is broken, when any thing is done contrary to that quiet, friendly and harmless behaviour required of all men; which is an offence against the Law.
5. This offence hath its degrees, and is greater or less according to circumstances. The greater are Felonies, Riots, Routs, unlawful Assemblies, Forcible Entries, pulling down of walls, houses, and the like. The circumstances are, Persons: To strike a Judge, for a Servant to strike a Master, is a great offence: For any man to strike an Officer, is a greater offence than to strike another man. So the place doth aggravate: To strike a man in a Church or Church-yard with a weapon, or to draw a weapon to that purpose, is very penal. So all fighting and quarrelling every where is punishable.

Challenge.

So to challenge another to fight with him, or to receive such a Challenge, is very penal. See my Book of *Justice of Peace*, ch. 36.

All these are greater Breaches of Peace. The lesser and more ordinary are, by light blows, words and gestures. And for these, if men do but speak any disgraceful or provoking words to, or of one another, or use any disgraceful or provoking gestures towards another, they may be punished by the Justices of Peace.

6. Process of the Peace and Good-behaviour, shall not issue out of the *Chancery* or *Kings Bench*, but upon Motion in open Court, and good cause shewed upon Oath, which shall be indorsed upon the back of the Writ. And if that cause be after disproved, the Judges of that Court may commit the Offender to Prison, till he pay the grieved his costs and damages, *St. 21 Jac. 8.* But see more of this in my *Justice of Peace*, and see *Imprisonment*: See *Co. 3 par. Inst. cap. 72, 73.*

7. Riding armed in a terrible way, is against the Peace, and punishable, *Co. 3 par. Inst. cap. 72, 73.*

of Perpetuity.

Perpetuity was an Entail with an Addition, a Devise taken up to make a Perpetuity: That whereas an Estate-tail by a Devise of a Common-Recovery was made barrable; to bar and prevent this, men did entail their Lands with this Condition, That none of them that had the Land by the Entail, should do any Act to put it from the next Heir; and if he did, that he should forfeit his Estate, and that the next Heir should enter upon him. But this being found of dangerous consequence, the Law hath adjudged all these Conditions against Law, and so void, and by this avoided Perpetuities. See *Condition*.

CHAP. CXXII.

Of Pewter, Brass, and Pewterers. Physicians and Chyrurgeons. Pillory and Tumbrel. Pyracie. Plague.

Pewter, &c.

Señ. 1.
Physicians, Chyrurgeons, and Apothecaries.



Here and how Pewter and Brass shall be made, sold and weighed, See Statutes, 19 H. 7. 6. 4 H. 8. 7. 25 H. 8. 9. 33 H. 8. 4.

For Physicians, Chyrurgeons and Apothecaries, these things are to be known.

1. The College of Physicians in London is a Corporation. And for that which doth concern that Corporation, see Statutes, 14 H. 8. 5. 1 M. 9. 34. 35 H. 8. 8.

2. The Physicians in London, how they may practise Chyrurgery, See Statute 32 H. 8. 40.

3. No man but an Under-Graduate of an University here, is to practise Physick in the Country; unless he have been first examined and approved by, and have a Testimonial of his Sufficiencie from the College of Physicians. Co. 3. 114. Statute 14 H. 8. 5.

Officers.

4. Physicians in London may not be put into the Office of Constable, or any such like Office, or serve in Juries, Watching, Bearing of Arms there. But by this it followeth, that in other places they are not exempt, but they may be made to serve in any such Office, 32 H. 8. 40. 3 H. 8. 11. 14 H. 8. 5. 5 H. 8. 6.

5. In London they have power to search Apothecaries Wares, 31 H. 8. 40. 5 H. 8. 6.

6. The

6. The Physicians and Chyrurgeons in London, and within seven miles thereof, might not before that College was erected, have practised, unless he had been allowed by the Bishop of London or Dean of Pauls, in other places by the Bishop of the Diocese. But these are gone, and therefore now Chyrurgery is not prohibited to any man: But men may be indicted and punished by Fine and Imprisonment, till payment of the Fine, that practise Physick, not being allowed by the College of Physicians, upon the Statutes of 14 H. 8. 5. 3 H. 8. 11.

Pillory and Tumbrel.

The Pillory is an Engine appointed for the punishment of some certain offences, whereby the Offender stands aloft, and putteth his head through a kind of door.

Tumbrel is an Engine appointed for the punishment of Scolds; it is now called a Cucking-stool or Ducking-stool; wherein she is to be made to pass down into water over head and ears three or four times, 31 H. 3. Kitch. 13.

Plague.

For this matter of the Plague, See how sick persons must be provided for and ordered, and what Officers of all sorts are in this case to do, Stat. 1 Jac. ch. 31. and Wingates Abridgment of it.

CHAP. CXXIII.

Of a Pledg. The Pope, and Papists.



His word *Pledg* is sometimes applied to Things; and of this see in *Pledg*, what *Mortgage*. And sometimes to Persons; and so it is no more but one that is Surety for another, and bound to see that done which that other hath undertaken: And if the Principal do not discharge the duty for which they are bound, the Surety when he is charged may relieve himself by a Writ called *Plegia acquiescendis*. But this Writ lieth for no Pledges, but such Pledges are called Pledges in the

Plegia acquiescendis, what.

Especialty, and bound by the name of Pledges. Nor in that case neither are they chargeable, where the Principal is sufficient. And if the Surety be made to answer the debt, he shall hold the goods and debts of the Principal till he be satisfied, F. N. B. 137. Mag. char. 8. This word is taken for a Surety in another sense; and for this see *Chief Pledg*.

Pope, Papists and Recusants.

For that which doth concern the Pope and Papists, see Statutes, 3 R. 2. 3. 27 E. 3. de provisionibus. 7 R. 2. 12. 1 H. 5. 7. 13 R. 2. 2. 7 H. 4. 6. 3 H. 5. 4. 25 H. 8. 20, 21. 28 H. 8. 26. 1 & 2 P. & M. 8. 5 Eliz. 1. 13 Eliz. 1. 23 Eliz. 1. 29 Eliz. 6. 35 Eliz. 1. 2. 1 Jac. 4. 13 Jac. 4. 7 Jac. 2. 6. 13 Car. 2.

Jesuites and Seminary Priests here are Traitors, 23 Eliz. 1. 27 Eliz. 2.

To say Mass, is Two hundred Marks forfeit, and a years Imprisonment. To hear Mass, is a Hundred Pounds, and a years Imprisonment, 23 Eliz. 1.

For Popish Books, *Agnus Dei*, Crosses, Pictures, Beads and Images, Stat. 3 & 4 Edw. 6. 10. 3 Jac. 5. 13 Eliz. 2.

For their Popish Bulls and Absolutions, see St. 13 Eliz. 2. 23 Eliz. 1.

For Appeals to Rome, and the owning of Authority from thence here, see Pope before, and Stat. 13 H. 8. 19, 20, 21.

Jesuites or Seminary Priests.
Mass.
Images and Books.
Bulls and Absolutions.
Rome.

CHAP.

CHAP. CXXIV.

Of Poor people, Possession, Possibility, and Præmunire.

Poor and Beg-
gers.

Sett. 1.
Bridewel.



Or the Poor, take these things.

1. As touching such Poor as are painful, and have need of help, they are to be relieved, and the impotent Poor to be maintained.

2. The idle Poor are to be forced to work, or to be punished: And they may be sent to *Bridewel*, a Work-house for idle persons. As touching which, these things are to be knowne. 1. The

Justices of the Peace at the Quarter-Sessions, at the charge of the County, may erect Houses of Correction to keep, set to work, and correct the poor, idle or disorderly.

2. Incorporate the same. 3. And that without Licence of the King. 4. Make and appoint Bridewels or Workhouses, the Governors thereof, and give allowance of wages to them. 5. Provide Stocks of money, and all that is necessary for this end.

6. Make what Orders they please, according to Law, for the Government of the same. 7. Thither may the Justices send, First, all such as be of any Parish, and have able bodies to work, though they do not wander, yet refuse to work at the wages taxed, or commonly given in those parts, if they have not means to live by. Secondly, Or having lawful means to live by, if they be either idle, or disorderly persons.

Thirdly, such lewd women who shall have Bastards, which may be chargeable to the Parish: But if they will discharge the Parish of the keeping of the Bastard, they cannot be punished by Bridewel. Fourthly, any man or woman able to work, that shall threaten to run away and leave their Families to the Parish; unless they give sufficient Sureties to discharge the Parish. Fifthly, And he or she that doth so run away, is to be punished as an incorrigible Rogue. 8. These the Governors of these houses may punish by putting fetters or gyves on them, or moderate whipping of them. 9. These idle and disorderly persons must be in no sort chargeable to the Country, but shall have Allowance as they deserve by their own labour. 43 Eliz. 1.

7 Jac. 4. 39 Eliz. 4. 18 Eliz. 3. 21 Jac. 1. Co. 2 par. Inst. 728.

Alms.
Overseers of the
Poor.

3. None may beg Alms; nor may any give to them that do beg Alms.

4. To see to these things, there are special Officers called Overseers of the Poor, appointed in every Parish.

5. These Overseers may raise money on the Parish by Rates.

6. They may binde the Poor Apprentices.

7. They may set up any Trade to put the Poor to work.

Hospitals.

8. There are in some places Hospitals or publike houses erect for the Relief of Poor people. As touching which, these things are to be understood.

Any man that will, that may grant Land, may make and found, or take order to have made and founded a Corporation for a Bridewel, or the Relief of poor, needy or impotent people, by the name of the Master and Brethren, or what other names he pleaseth. 2. Then may he, being seised of Land in Fee-simple, grant so much as is above Ten, and under Two hundred pounds a year, to it by that name in Fee-simple. 3. He may do this without the Kings Licence. 4. It must be by Deed inrolled. 5. He may give any Goods or Chattels to it. 6. After this, make what Orders he pleaseth for the Government thereof. 7. Appoint a Visitor, and his power, Stat. 13 Eliz. 17. 39 Eliz. 5. 21 Jac. 8. If any mis-employment be hereof, it may be helped by a Commission to enquire of Charitable Uses, upon Stat. 43 Eliz. 4. See the Statutes at large.

9. And in some places there is Money given to Charitable uses, as to binde forth Apprentices; and the like.

10. If a man be become poor by reason that any rich man keeps his Estate from him, and so he becomes chargeable to the Parish; happily the Churchwardens may

by a Suit in Equity force the payment of something, *March 90. pl. 145.*

11. For poor Soldiers, Soldiers married in the Wars, and the Wives and Children of such as were slain in the Wars, see *stat. 13 Sep. 1651. and Act 8 May, 1647. 10 Aug. 1647. 30 Sep. 1651.*

For all these things, you may read Statutes, 41 *Eliz. 1. 3 Car. 4. 18 Eliz. 3. 35 Eliz. 7. 1 H. 3. 39 Eliz. 5. 21 Jac. 1. 43 Eliz. 4. 31 Eliz. 6. 1 Jac. 25. 3 Car. 4. 7 Jac. 3. 18 Eliz. 10. 2 H. 6. 13.*

Possibility and Impossibility.

Possibility (in the Law-sense) is a thing that may, or may not be: And it is either remote, or near; or common, or extraordinary. As, that one man may die before another, is a near, common, or ordinary Possibility: But that one man shall be married to a woman, and then that she shall die, and he be married to another woman; this is a remote and extraordinary Possibility, or a Possibility upon a Possibility.

Impossibility is a thing that (by our Law) cannot be: As that a man should be Heir to another man, whilse he to whom he should be Heir is living. Or that a man should give and take by one and the same Deed, is impossible, *stat. 15 H. 7. 10. 1 H. 4. 1.*

Possession.

Possession or Seisin of Lands, is the actual enjoying of that which either in truth or pretence is ours. And so it is either in Deed, or in Law. In Deed, where a man hath Right or Title to Land, and he doth actually enter and put his foot upon it: *Possessio, quæ pedis possessio.* Or else it is in Law: which is, where Lands are descended or given to a man, and he hath not as yet actually entered into it; yet in eye of Law he is in the possession of it, because he is Tenant to every mans Action that will sue for the Land. So was it in case of the King; he was not said to be in actual possession till an Office found, *F. N. B. 194. Co. upon Littleton, iii. 153. Kels. 3.*

Possession or Seisin, what. The kinds.

Seizure seems to be the same with Possession; but that term is usually applied to Lands, and that to Goods and Chattels, the which a man is then said to seize when he taketh them into his hands, *Co. upon Lit. 153. 118.*

Seizure, what.

Esplees is (as it were) the seisin or possession of a thing, by the taking of the profit or commodity thereof. As the *Esplees* of a Common, is the taking of the Grass or Common by the mouths of the Beasts that common there: The *Esplees* of an Advowson, is the taking of the gross Tythes by the Parson presented thereunto: The *Esplees* of a Wood, is the selling of the Wood; the *Esplees* of an Orchard, the selling of the Apples and other Fruit there growing; and the *Esplees* of a Mill, is the taking of Toll. And this in Actions that are in the meer Right, and not meer possessory Actions, must be alleadged in pleading. But for this see *Finches ley, 357. 26 H. 8. 3. 8 Ed. 3. 38.*

Esplees, what.

As to Possession, in this place take these things.

1. Where there are two in possession of the same thing at one time, the Law will adudge him in possession that hath the Right.

Rules concerning Possession. Conditio possidentis.

2. If one only be in possession, and he only hath the Right, the Law will keep him there.

3. Where each party contending hath an equal Right, he that is in possession is in the best condition; but otherwise master of Right is more favoured in Law, then master of Possession.

4. Entry of Possession will make a Suspension or Extinguishment. As if the Lord purchase a Tenancy of his own held of him by *Manor-service*; in this case the *Manor* is extinguished by Entry of possession, because the *Seignior* and *Tenancie* are now in one mans possession, *Kels. 134. Bin. 158. Old N. B. 97. 14 H. 7. 3. Plow. 296. See *Bringtons case. Co. upon Lit. 368.**

Præmunire,
what.

Of a Præmunire.

PRAEMUNIRE was a Writ, or the offence on which the Writ was grounded. The offence was by suing to Rome for any thing of Presentations, or in any Suits, or suing in the Spiritual Courts for such things as for which remedy was to be had in the Temporal Courts; and by this they lost their goods, and were to be imprisoned at the Kings pleasure. The punishment is to be inflicted in other cases now out of use. See *Stat. 23 Ed. 3. 5. ch. 12.* and divers others. *Co. 3 par. Inst. cap. 54.*

CHAP. CXXV.

Of Presence and Absence. Prices.

Presence and
Absence.



Or Presence and Absence, this only is to be known.

1. That a Gift or Grant of Land or Goods may be to a man absent, but in case where Livery of Seisin is necessary.
2. In that case the Presence of one may serve for all the rest of the Feoffees or Grantees. For these things see *Co. 3. 26, 27, 29, 54.* See *tit. Feoffments.*
3. Sometimes a Livery of Seisin, and so a Deed, is weakened by the Presence of others upon the Land. See for this, *Co. 3. 23.* and *Feoffments, chap.*
4. Sometimes the Presence of a man where an offence is done, will make a man guilty of the same offence. See *Accessory, chap.*
5. Sometimes the power of a superior Magistrate doth take away the power of an inferior Magistrate, *Co. 9. 118.*

Of Prices.

FOR Prices, these things are to be known.

1. Victuallers are to sell their Victuals at reasonable Prices, *23 Ed. 3. 6.*
2. Corporations may set the Rates, *3 H. 8. 8. 12 Ed. 4. 3.*
3. Justices may assesse the Price of Wines, *24 H. 8. 14.* And who may sell Wines, and how, see *Stat. 7 Ed. 6. 5. 5 Eliz. 5. 1 Jac. 25. 8 Eliz. 9, 10.*

CHAP. CXXVI.

Of Prerogative.

Prerogative,
what.



Prerogative is (in a Legal sense) the Priviledg, Power, or Preheminence that is given to one man above another, to have or do something more then another. And this is either separable, or inseparable; certain, or casual.

Señ. 1.

Lord Protector.

This Prerogative is greater and less, according to the quality of the Persons in whose hands it is. And because the King was, as the *Lord Protector* now is supreme and above all others, being killed by Law, the Head of the Commonwealth, Father of the Country, Master of the whole Family of the Nation, Chief Justice of all England, and a kind of Perry-God on Earth; the Law (for the excellency of his person) did attribute to him (similarly after a kind, and by way of resemblance) divers of the Excellencies of God: as Immortality; and therefore in some sense he was said not to die, and the death of the King was called the Demise of the King: Sovereignty, Majesty, Power, Verity, Justice, and the like.

Demise of the
King, what.

For this purpose he is considered in a twofold capacity; the one Politick, the other Natural. In the first capacity it is, that he is said just, yet not absolute as God is, but limited; yet he was said not to die, &c. not to do injustice, that he cannot do wrong. And upon this account it is, that the Lands, Jewels and Goods he hath in this capacity as Head of the Commonwealth, and are the Lands and Goods of the Commonwealth, shall go after his death to his Successor, not to his Heir or Executor. But considered in his Natural capacity, he dieth like other men, and his Lands and Goods he hath in this capacity shall go to his Heir and Executors as the Lands and Goods of other men, and not to his Successor.

And yet these Capacities do somewhat participate one of another. And therefore all Obligations and Especialties made to him (whatsoever they be) shall go to his Heirs or Executors at his own disposing. See for these things, *Stamf. Prerogative* cap. 1. Co. 11. 74. 12 H. 7. 19. 10 H. 7. 18. 1 H. 7. 18. 7 Ed. 4. 17. Stat. 3 H. 7. ch. 8. 21 H. 7. 21. Co. 7. 7. 6. 27. *Plow.* 338. 331. and other places.

In the opening of this point, we shall first shew his Prerogative alone; and what he of himself may have and do more then any other man. These things we shall distinguish into, 1. The things he is to have and do by the ancient Common and Statute Laws of the Land. 2. The things he is to have and do by the New Act of Government. In shewing of his Power, we shall shew, 1. What he may not do. 2. What he may do. 2. Then in the second place, we shall set forth his Power as he is assisted by, and accompanied with his Parliament. 3. And then we shall speak of his Power, as it is assisted by, and joyned with his Council.

The Lord Protector alone hath very many large and great Privileges and Pre-eminencies given him (as in the place of the King) by the ancient Laws of the Nation, and by the New Act of Government, above all other men. And these are some of them more Royal, as to make Judges, confer Honors, and the like. And some are less Royal, as to grant Waifs, Strays, &c. Some of them are inseparable to his Office, and cannot be granted over and communicated to, or taken or used by others. Some of them are in matter of Profit; some in matter of Honor and State only: Some of them do consist in doing, and some in having and taking. As in the particulars that follow.

The King was, and the Lord Protector is stinted and restrained by the ancient Laws of this Nation, thus. That he cannot make or alter Laws, or change Customs: He cannot make a man inheritable to Land, that is not inheritable; change the Custom of *Gavelkind*, create a new Manor, change a *Hariot*-Custom into Money, create a *Copihold*-Tenure.

He may not sell, deny or delay to any man the Law as the mean, nor Justice and Right as the end. He may not therefore by his Letters forbid Judges to do right, or command them to do wrong; nor, did he, are they to obey him. Much less may he do wrong and injustice. The Rule is therefore, *Nihil aliud, &c.* (i) He may do nothing but what of right he may do. *Potentia injuria est impotentia*: It is weakness to be strong to do evil. (See the Authorities before cited)

The King could not therefore compel his people to make or yield any Gift, Loan, Benevolence, Taxe, or such like Charge, without common consent by Act of Parliament: He could not compel men to give, or lend him money, and upon refusal administer an unlawful Oath, nor constrain men to be bound to make appearance before, and give attendance upon him and his Privy-Council, nor imprison, confine, or otherwise molest them for it.

He could not without cause shewed imprison any man, or when any man was imprisoned, keep him and his Cause from his Trial at Law, and sending into the Courts of Justice being sent for by *Habeas corpus*, &c. or command a man to Prison against the Writs and Process of Law.

He could not in time of Peace billet or quarter Soldiers or Mariners upon men against their will in their houses, nor give Commissions to try men by Martial Law. For, all these things were declared by the whole Parliament to be against the Fundamental Laws of the Nation, 3 Car. The Petition of Rights.

K k k k k

He

The Prerogative of the Lord Protector alone.

1. What he cannot do, or have.

Sec. 2.

He may not make nor inflict Punishments or Mulcts upon any man for any thing as an offence, which the Law doth not make an offence; nor greater, or other, or otherwise than the Law appointeth.

Nor may he enter upon or take away any mans lands or goods, but in a course of Law another man may do. And therefore it is, that if Goods be pledged for Ten pounds to a man that by some offence hath forfeited it to the Lord Protector, he must pay the Ten pounds, if he will have the Pledge.

He cannot suppress lawful Trades, nor grant Monopolies, or do any such like things to grieve or prejudice his Subjects, though it be only in Recreation, if it be lawful.

Cons. 187. Flow. 487.

All these (and such like things he may not do by the antient and standing Laws of the Nation.) And now by the new *Act of Government* it is declared, 1. That he shall not alter, suspend, abrogate or repeal the Laws now in force. 2. That he cannot lay any Tax or Imposition of money, but by common consent in Parliament, or by the consent of his Council in one special case hereafter named. 3. He cannot enforce men by Laws and Penalties to change their Religion. 4. Nor alter or revoke any thing in the Writing of Government, *Govern. Numb. 31, 36, 37, 38, 41.*

What he may have, and do.

Now for the things which he by his Prerogative may have, receive and do more than ordinary men, they consist in these things following.

The Lord Protector, called by the Government, *The Protector of the Commonwealth of England, Scotland and Ireland*; He is the Supreme Magistrate of the three Nations; and from him as from a fountain is all Magistracie and Justice to be derived.

In the making of Officers and Courts of Justice.

He now by the *Act of Government* hath, as the Kings heretofore had by the Laws of the Nation, the making of all subordinate Officers and Ministers of Justice, Commissioners, Judges, Justices, Sheriffs, and the rest; save only the Chancellors, Keepers of the Great Seal, the Treasurer, Admiral, Chief Governors of *Ireland* and *Scotland*; and the Chief Justices of both the Benches, who by *Art. 34.* of the *Government*, are to be chosen by the approbation of Parliament, and in the intervals of Parliament by the approbation of the major part of the Council, to be afterwards approved by the Parliament. And if any new Courts of Justice be to be erected, he must do it, *Flow. 498. Government, Numb. 3, 26. Stat. 27 H. 8. 34.*

In the conferring of Honors.

All Honors likewise flow from him: And therefore if any be to be made Duke, Marquis, Earl, Viscount, Knight, or the like, he must make them such. *Govern. Numb. 3, 26.*

In the stile of Writs, Commissions, &c.

All the Writs, Proseses, Commissions, Patents, Grants, and other things which did use to go in the name, and under the stile of the King, and after of the *Keepers of the Liberty, &c.* are now to go in the name and stile of the Lord Protector: And all persons that are sued for publike offences, are to be sued, and acts of Justice to be done in his name. *Govern. Art. 2. 32.*

In his Revenue and Income.

There were divers Manors, Honors, Castles, Houses and Lands, Jewels and Goods antiently belonging to the Kings as Kings, annexed to the Crown; most of which are sold: But that which remaineth, he is to have. And now by the *Government* he is to have a constant yearly Revenue provided and settled by the Customs and such other ways as he and his Council shall agree upon; to maintain the standing Army and Navy, and to make up Two hundred thousand pounds a year to defray the other necessary Charge for Administration of Justice, and expence of the Government, *Art. 27.* And by the 31 Article of the *Government* it is declared, That all the Lands whatsoever unfold and undisposed, belonging to the Commonwealth, (except the Forests and Chafes and Lands thereto belonging, the Lands of the Rebels in *Ireland*, in the Counties of *Dublin, Cork, Kildare* and *Caserlagh*, and the Land forfeit in *Scotland* in the late Wars, and the Lands of Papists and Delinquents in *England* who have not compounded) that they be vested in the Lord Protector and his Successors; not to be aliened but by consent of Parliament.

In things forfeit.

He hath a Prerogative in Lands and Goods forfeited for offences done. And as to this, these things are to be known.

1. That

1. That in case of Attainder of Treason, he is to have all the Lands of the Traitor of whomsoever they be held; and his entailed, as well as his Fee-simple Land.

2. And in case of Attainder of Felony, he is to have all the Lands of the Felon that are held of the Protector himself, and all the rest of his Lands of whomsoever they be held, for one year and a day, to the end he may make a destruction upon them. And in cases of Treason and Felony both, he is to have the Forfeiture of all the Goods and Chattels of the Offender, unless some other can make a Title to them by Grant of some of the Kings, or by Custom or Prescription, (which was by Grant at first.) But for this see *Forfeiture, Treason, and Felony. Co. upon Lit. 310.*

3. He is to have (in rigor of Law) as forfeit by every man outlawed in any personal Action, an Appeal of Maihme, or Indictment of Treipass, all his Goods and Chattels of what nature soever for ever, and the profits of all his Land for the Offenders own life. For this see *Outlawry.*

4. All the Forfeitures, or parts of Forfeiture that are limited and given by any penal Law to the King, Commonwealth, Keepers of the Liberties, shall go to him, according to the limitation of the Law. See *Statutes.*

5. All the Fines and Amerciaments generally imposed upon Offenders in any of the Courts of Justice at *Westminster*, are given to him, and he shall have them, if they have not been granted away by former Kings. See *Fines and Amerciaments.*

6. All Issues forfeit by default of Appearance, and the like, are given to him also.

7. If Lands be given to Superstitious uses, he shall have them as forfeit. See *Uses.*

8. If an Alien purchase Land, the Lord Protector shall have it from him as forfeit. See *Alien.*

9. And all Debts due by Recognisances and the like Engagements forfeit, are his. But for all this of Forfeiture in general, see 9 *Aff. 63. 25 Ed. 3. 2. 17 Ed. 2. 14. 17 H. 8. 25. 9 H. 3. 22.*

10. It is by the 31. Article of the *Government* declared, That all Debts, Fines, Issues, Amerciaments, Penalties and Profits certain and casual, due to the Keepers of the Liberties, &c. shall be due to him to be paid in the publique Receipt; and be sued for in his name.

He is by his Prerogative to have divers other matters of profit. As,

1. The King was to have the First-fruits, (that is) the profits of one year, and the Tenth after of all the Spiritual Livings. But this it seems is now disposed to other uses. For this see *Service of God*, and *Statutes 26 H. 8. 3. 25 H. 8. 20. 27 H. 8. 8. 32 H. 8. 23.*

2. He is to have all Mines of Gold and Silver, and that are mixed with other Oar, if the Gold and Silver be of the greater value, in whose ground soever they be found, *Plow. 314. Cromp. Jur. 112.*

3. All Waifs, Estrays, Wreck, do originally belong to him, and he must have them, unless any Subject can shew a Grant, or a Custom or Prescription for them, *Plow. 315. Stams. Prer. 40.*

4. All the Lands and Goods that no man can make any property in, are his: As the Lands that are gotten by the Sea or Seavern are his, and not the mans whose Land is adjoining.

5. He is to have all the Royal Fishes, as Whales, Sturgeons, and the like; and Fowls, as Swans, and such like, by whomsoever or wheresoever they be taken.

6. The Tythes that arise in such places in Forrests as are not within any County, are his.

7. All Coin and Treasure found under, or above ground, whose Owner cannot be known, doth belong to him or his Patentee, *Co. 7. 16. Plow. 315. Stams. Prer. 40.*

8. By the antient Common-Law, the King might have made any Coin he had pleased current here by his Proclamation only; and the Value, Weight, Baseness and Fineness, Stamp and Print thereof were wholly at his disposal. But for other Weights and Measures, the King could not alter them by his Proclamation. And now also it seems, in the Coin he can make no alteration, because it is settled by Parliament, *Act 17 July, 1696. Co. 5. 114. Plow. 316.*

- In the Lands of Ideots, &c. 9. He is to have the Custody of the Body and Lands of Natural Fools and Ideots, and he is to take their Lands during their lives without doing waste, 17 Ed. 2. 9; 32 H. 8. 46. See *Ideot*. He also is to preserve the Lands of Lunaticks, 17 Ed. 2. 10; Co. 2 par. Inst. 14.
- In Wardships, &c. 10. The Kings formerly had the Wardships of those Heirs under age, that their Antecessors held their Lands by the *Capite-Tenure*; and divers profits he had by this Tenure: But all this is gone, and the Law herein now changed. See *Gard*. So also the Kings had formerly a Prerogative in the Temporalities of the Bishops, during the vacation: But this is also now lost and gone with the Bishops.
- In Temporalities of Bishops. 11. He is to have the Customs to be paid by Merchants for the Goods and Merchandises that are brought into, and carried out of the Land. See for this
- In Customs and Impos. Customs.
- In making of Corporations. 12. He alone by his Prerogative may make what Corporations he pleaseth, *Finches ley* 84.
- Franchises. 13. About Franchises, 1. He may make and grant Franchises, Fairs, Markets, and the like; and it is said he may impose a small Toll where none was before. But most of those Franchises which belong to him, he may grant over to others, as Felons goods, Waifs, Estrays, and the like. See for this, *Franchises*. 2. He may by a *Quo War-ranto* put any man to shew what Right he hath to any Franchise. 3. And it is said he alone may infringe the Liberties he himself hath granted to another, without a *Non omittas*, *Pasche* 21 Jac. by *Coke* and *Hobard* in the *Exchequer*.
- About Denization. 14. He alone may make of an Alien a Denizen; but he cannot Naturalize him. See *Alien*.
- About Entire things. 15. In case of entire things, he shall have all. If one Obligee be outlawed, the Lord Protector shall have the whole Obligation.
- In Assent to Bills in Parliament. Royal Assent. There are other Prerogatives, that are not so much in matter of profit; As, 1. The King had a Prerogative called a Royal Assent; which was to the Election of a Bishop by a Dean and Chapter, and to a Bill passed by both Houses of Parliament. All the power that the Lord Protector hath herein now, is: The Bill agreed upon in Parliament must be presented to him, and he must have twenty days time to consider it; and if in that time he do not assent to it, nor satisfy the Parliament about it, the Parliament may pass it for a Law without him. *Government*, Art. 26.
- In Pardons. 2. He may pardon any offence (but Treason and Murder) after, not before the offence is committed: And he may restore the Offender to his lands and goods: And he may prevent a further Corruption of Blood, but the Blood that is corrupted be cannot restore; nor can he by his Pardon prevent an Appeal, 31. 27 H. 8. 24, 35. *Bro. ch.* 356. *March* 213. *Government*, Art. 4.
- About making of Proclamations. 3. No public Proclamation can be made by any but by him; only in some Corporations they claim it by Custom, and it is probable it came at first by a Kings grant. See *Proclamation*.
- About a Protection. 4. No Protection for a Defendant can be to keep him off from a Suit, but by him, which can be but for a time, and because he is in his service, *F. N. B.* 28. 25 Ed. 3. 19.
- About Patents to beg. 5. He only can give Patents to beg; and without such a Patent no man can beg.
- About making Appropriations, Forfeits and Castles. 6. No Appropriation could have been made, nor Tenant in *Capite* have aliened, or his Wife have married without his Licence. No Forfeist could have been made but by the King. But these things are gone, or out of use. No man may build a Castle now without his leave. *Charta de Forrefta*, 1 Ed. 4. 1. 27 H. 8. ch. 24.
- Stat. 4. About matters of War. 7. By the antient Common-Law, the King alone commanded the *Militia* by Sea and Land; might have raised War against, and made Peace with any Nation, and therein might have required all men bound by their Tenure, to serve him according to their Tenure; but this Tenure is now gone. But all other men were by Law to serve the King in his Wars; only this, he could not force them to serve him at their own charge. For the rest, see *War*. But now by the *Government*, Art. 5, 6, the Lord Protector (sitting the Parliament) is to dispose and order the *Militia* and Forces

Forces both by Sea and Land, and direct in all things concerning the holding of a good Correspondence with Foreign States, by consent of Parliament; and in the Intervals of Parliament, he is with the advice and consent of the major part of his Council to dispose and order it. And in *Art. 27.* it is declared, that Ten thousand Horse and Dragoons, and Twenty thousand Foot be kept and maintained in *England, Scotland and Ireland*, for the defence thereof, and a convenient number of Ships to guard the Seas; and that a constant Revenue for the Pay of them be settled by the Lord Protector and his Council, not to be altered but in Parliament.

8. His Person is privileged, and cannot be arrested in any case, nor his Goods taken for a Distress, Toll, Custom, or otherwise; nor can he be sued as other men are sued.

About Arrest of his person or his goods.

About a Presentment to a Church.

9. He hath a Prerogative in many things above others about a Presentment to a Church, wherein these things are to be known. 1. If he present to a Church by Lapse, and the party die before Induction, he shall present again, *Co. 9. 132.* 2. The Church shall not be said to be full against him till Induction, *Bro. Present. 46.* 3. There shall be no Lapse against him, but he may present notwithstanding, *Prerog. Reg. cap. 9.* 4. Double and treble Usurpations cannot hurt his Inheritance to the Presentment. And yet if a Common person usurp and present upon him, and the Clerk of the Usurper is instituted and inducted; the Lord Protector may not present till he have removed him by a *Quare impedit*, *Co. 6. 30.* 5. Plenarie is no bar to him in a *Quare impedit*, *Co. 7. 28.* See more in this, *Stat. 13 Ed. 3. 1. 13 R. 2. 1. 4 H. 4. 12.* 6. And now by the new Ordinance, That such as do not present to Benefices void within six months after the avoidance, to the Commissioners for Approbation, a fit person; the Lord Protector shall present for that turn, *Ordin. March 20. 1653.* 7. And where a Minister is put out for Scandal, &c. the Patron hath four months to present; and if he do it not in this time, it doth come to the Lord Protector by lapse, *Ord. 30 Aug. 1654.*

10. No Act of his shall be construed an Estoppel, to conclude and prejudice him.

About Estoppel.

11. He hath a Prerogative above others in his Possession; which doth lie in these things. 1. He cannot be put out of possession of a permanent thing, as Land, or the like. And therefore if one that had been his Ward, had made a Feoffment of his Land whereof he had the Wardship, this had not put him out of possession, nor can he be disseised of his Land. But otherwise it is of a transitory thing, as of a Ward, Advowson, or the like. 2. No Freehold or matter of Inheritance can be translated from him to another by matter in fact alone; but by matter in fact, and matter of Law together, it may be divested. 3. There can be no Discontinuance of any Land, whereof there is any Reversion or Remainder in him. See for these things, *H. 7. 19. Stat. Prerog. 74. 75. Plow. 553. 32 H. 8. 36. 34 H. 8. 20.* 4. The Sale of his Goods in a Market, will not take away his Property therein, *Hil. 6 Jac. per Chief Justice.*

About his possession and estate, and property of lands and goods.

Discontinuance.

Property.

12. No Laches nor folly shall be imputed to him, nor shall he be hurt thereby. And therefore a Fine, and no Claim in five years, or a Lapse to a Presentation of a Church cannot hurt him. And yet he shall be barred by twenty years possession upon the Statute of 21 Jac. 1 *H. 7. 14. 17 Ed. 1. 8.*

About Laches.

Time of Limitation.

13. He may by his Officers require things necessary for the provision of his Household and Stable, of them that have to spare, at reasonable Rates, and cannot be denied. See for this in *Purveyors.*

About Purveyance.

14. The Kings Palace at *Westminster* did extend from *Charing Cross* to *Westminster Hall*. And the same, and some other of the Kings ancient Palaces have divers Privileges annexed to them, *28 H. 8. 12.*

About his Palaces at Westminster and elsewhere.

15. His Servants in Ordinary are privileged by Law from serving any such Offices as may require their attendance; as the Office of Constables, Churchwardens, and the like. But if any shall put themselves into his Office Extraordinary, of purpose to escape Offices, this will not do, *Resolution of the Judges.*

About his Servants.

16. He may countermand his Presentment to a Church at any time before Induction and Induction, which another may not do. *Dyer 481 202.*

About Countermand.

In Equality of
Titles.

17. If his Title and another mans come together, he shall be preferred. And therefore if a man make a Feoffment in Fee of Land, on Condition that the Feoffee shall not commit Treason, and he doth so; the Lord Protector shall have the Land, *Brownl. 1 par. 20. Goldsb. 20.*

There are yet divers other things wherein the Lord Protector hath a Prerogative above other men: As,

In Exemption
from Statutes.

1. In things that do relate to the penal Laws and Statutes of the Nation. For the opening whereof, these things are to be known. First, that albeit he shall have advantage by any penal Law or Statute, as another man shall, though he be not named in the Statute; yet he shall not be bound by any Statute in the affirmative or negative, that doth restrain him, or that may be prejudicial to him in his Prerogative, as the Statutes of Limitation, *Merton chap. 8. 32 H. 8. 2. 32 H. 6. 6. Westm. 2. 5. 13 Eliz. 10.* Or that doth bar him of some Estate, Right, Title or Interest that he hath, unless he be particularly named in the Statute, as in *Westm. 1. 35. 25 Ed. 3. 11.* And yet such Statutes as are expressly, or by consequence *pro bono publico*, being to suppress fraud, wrong, or any wickedness, as the Statute *de Donis*; these do binde him, unless he be particularly excepted, *Co. 11. 68. upon Lis. 43. Co. 4. 33. 5. 14. Plow. 240. 223. Crompt. Jur. 15.* Secondly, He may dispense with penal Laws:

In Dispensation
with Penal
Laws.

And as to this, these things are to be known. 1. When there is any necessity, or reason of inconvenience to the party with whom he doth dispense, he may dispense with breach of any Statute that is penal, when the Forfeiture is popular, and given to him alone, if it be so that the thing to be dispensed with be *malum prohibitum*: But if the thing to be dispensed with be *malum in se*, or there be not some special reason for a dispensation, he cannot dispense with it: And yet this also which is *malum in se*, he may pardon after it is done; and therefore it is held he may license a man to coin money, but cannot license him to levy a Nuisance in the High-way, *Co. 11. 86. 2 H. 7. 6. Bro. Parl. 16. 28 Ed. 3. 46. 21 Jac. 3. 11 H. 6. 7. Plow. 246.* 2. If a Statute say, that the Kings Licence in that case shall be void, and the Licence have a Clause of *Non obstante* in it; there it is held to be good, *11 H. 7. 11.* 3. But a Licence with, or without a *Non obstante*, to dispense with a Statute before it is made, cannot be good. And therefore it hath been held, that a Licence to carry Bell-metal notwithstanding any Statute that shall be made to the contrary, is void, *11 H. 7. 7. 23 H. 6. 18. Dyer 52.* 4. He may dispense with his Chaplain while he is attending his service, *Articuli Cleri, chap. 8.* See for this, *Co. 3 par. Inst. chap. 26.*

Sec. 6.

In Suits.

2. He hath Prerogative above other men about Suits; and that either in Suits brought by him against others, or brought by others against him: As to the Suits brought by him against others, take these things. 1. He may in his Suits brought in any Court, (for he may sue where he will) amend his Declaration the same or another Term, *F. N. B. 7. Crompt. Jur. 18.* 2. He cannot be Non-suited in any Action, *Bro. ch. 1. 8.* 3. He may put in double matter, and the party must answer to it all, *6 H. 7. 5. 14.* He may waive his Issue, and demur in Law; or waive a Demurrer, and plead to Issue in the same Term; but not in another Term, *7 H. 6. 84.* 5. No Wager of Law can be in a Suit of his, or a Suit concerning him, as in *Quo minus* brought by another in the Exchequer, *Co. 4. 95.* 6. He may have an Action of Accompt against Executors, *Plow. 321. Lis. 118.* 7. His Title is always found by Office, and he is not to be put to a real Action for the Trial thereof. 8. He shall pay no Costs, nor others that sue to his use, *Bro. c. 353.* 9. He shall recover Costs in all Suits brought by him upon any Especialty, *33 H. 8. 39. 20 H. 6.* If any man be indicted of Treason or Felony, which is always at his suit, and the party accused deny the fact, he can have no Council to plead for him: But if it be matter of Law that he hath pleaded, he shall have Council to plead for him, *1 H. 7. 3. Stauf. Perreg. 1. 101.* No Plaintiff that doth sue to his use, shall pay Costs in any such Suit, *24 H. 8. 8. 19.* No Juror in a Suit between him and another, may be challenged by his Adversary: But he may challenge a Juror without shewing of any cause, *Fincher. 101.* And for Suits brought by others against him, he hath these Preeminences above others. 1. He may not be sued as another man may be; but whoever

will

will sue him, he must sue by Petition in the Chancery, *Stat. Prer. 76. Plow. 553. Stat. 25 Ed. 3. ch. 19.* 2. Nor can he be vouched on a Warranty, which is in the nature of a Suit, and yet one may have aid of him, *15 H. 7. 10.* 3. Nor shall he be received, *Plow. 553.* 4. In cases where he is made a party to a Suit, or may be prejudiced in any Real Action, a Writ of Search lieth, which is to search in the Treasury before the Plea proceeth, if any thing may be there found to maintain his Title. But in an Ejectione firmæ or Personal Action, this may not be granted, *Stat. 27 H. 8. 18. Dyer 320. Co. upon Lit. 77.* See more in the next.

5. If a thing in Action be granted to him, he may sue for it in his own name, *Dyer 232.* 6. The Lord Protector hath Prerogative above other men about the means of getting and recovery of any thing that is due to him from another. And for the opening of this, these things are to be known.

Search, what.

1. All Obligations and Especialties made unto him, are in the nature of Statutes Staple, and he shall have that remedy upon them for the gaining of his Debt, as another man hath upon a Statute Staple. For which see *Stat. 33 H. 8. chap. 39. 14 Eliz. 4.*

About the Recovery of his Debt or Duty.

2. Though Heirs be not named in the Especialty, yet they shall be bound by it, *33 H. 8. 39.*

3. All the Lands that a man hath (of what Estate soever he hath it) his Body and Goods also, shall be subject to the payment of the Debts men owe to him: And if the Debtor die, all his Lands (whether entailed or otherwise) all his Goods and Chattels shall be put in Execution to satisfy the Lord Protector's debt. And herein also he shall have Preheminence: He shall be first paid, although he do not first bring his Action against the Executors or Administrators. And thus he may recover, albeit there be no Executor or Administrator. But if there be Goods to satisfy, the Lands are not to be medled with. See for this, *Stat. 33 H. 8. 39. 9 H. 3. 18. 27 Eliz. 3. 33 Eliz. 4. 14 Eliz. 4. Plow. 440. Co. 7. 19. 8. 171. 7. 20. Plow. 340. 241. 301. Co. 3. 4. 11. 203. Mag. charta, ch. 81.*

4. And yet if an Executor bona fide shall sell a Lease left him, or any Issue in tail shall bona fide sell his entailed Lands; these Sales are good, and he shall not have Execution of this Land, *Plow. 340. 249. Co. 11. 93.*

5. And if two Jointenants be of Land, and one of them be indebted to the Lord Protector, he may not have Execution of the other Jointenants part, *40 Ass. 1. 36.*

6. If there be Sureties for these Debts, they are not to be medled with where the Principals be sufficient and willing to pay, *33 H. 8. 39.*

7. He shall have a *Distringas*, a special Writ to bring in the party.

8. And for Officers and others that take up his money, or are Accomptants to him, their persons, lands and goods of what nature soever, in their own or their Executors or Administrators, or in the hands of whomsoever, (if they have them by Covin) shall be chargeable for it. For it is a Rule, That if any Accomptant to the King be, for any money, goods or chattels come to his hands, or any such thing come of his into the hands of a Subject by matter of Record or matter in fait, that all the Land of such a Subject is chargeable for it, and the Kings Officers may seise the same into whose hands soever it is come afterwards by descent, purchase, or otherwise: And all the Land that any such Officer or Debtor hath at the time of his being Officer or in Debt, is chargeable for the Debt. But it seems no Goods are chargeable, but such as the Debtor hath at the time of the Extent and Execution. And no shifting Devise of the Accomptant in this case by purchasing Lands in other mens names, or the like fraudulent Conveyance, will prevent the Lord Protector of his full remedy against it. And if the Accomptant come not in to accompt, or withdraw himself from his Accompt, he forfeits his Office, and may be further punished. See for all this, *Stat. 7 Jac. 15. 27 Eliz. 3. 14 Eliz. 4. 7. Mag. charta, 8. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100. 101. 102. 103. 104. 105. 106. 107. 108. 109. 110. 111. 112. 113. 114. 115. 116. 117. 118. 119. 120. 121. 122. 123. 124. 125. 126. 127. 128. 129. 130. 131. 132. 133. 134. 135. 136. 137. 138. 139. 140. 141. 142. 143. 144. 145. 146. 147. 148. 149. 150. 151. 152. 153. 154. 155. 156. 157. 158. 159. 160. 161. 162. 163. 164. 165. 166. 167. 168. 169. 170. 171. 172. 173. 174. 175. 176. 177. 178. 179. 180. 181. 182. 183. 184. 185. 186. 187. 188. 189. 190. 191. 192. 193. 194. 195. 196. 197. 198. 199. 200. 201. 202. 203. 204. 205. 206. 207. 208. 209. 210. 211. 212. 213. 214. 215. 216. 217. 218. 219. 220. 221. 222. 223. 224. 225. 226. 227. 228. 229. 230. 231. 232. 233. 234. 235. 236. 237. 238. 239. 240. 241. 242. 243. 244. 245. 246. 247. 248. 249. 250. 251. 252. 253. 254. 255. 256. 257. 258. 259. 260. 261. 262. 263. 264. 265. 266. 267. 268. 269. 270. 271. 272. 273. 274. 275. 276. 277. 278. 279. 280. 281. 282. 283. 284. 285. 286. 287. 288. 289. 290. 291. 292. 293. 294. 295. 296. 297. 298. 299. 300. 301. 302. 303. 304. 305. 306. 307. 308. 309. 310. 311. 312. 313. 314. 315. 316. 317. 318. 319. 320. 321. 322. 323. 324. 325. 326. 327. 328. 329. 330. 331. 332. 333. 334. 335. 336. 337. 338. 339. 340. 341. 342. 343. 344. 345. 346. 347. 348. 349. 350. 351. 352. 353. 354. 355. 356. 357. 358. 359. 360. 361. 362. 363. 364. 365. 366. 367. 368. 369. 370. 371. 372. 373. 374. 375. 376. 377. 378. 379. 380. 381. 382. 383. 384. 385. 386. 387. 388. 389. 390. 391. 392. 393. 394. 395. 396. 397. 398. 399. 400. 401. 402. 403. 404. 405. 406. 407. 408. 409. 410. 411. 412. 413. 414. 415. 416. 417. 418. 419. 420. 421. 422. 423. 424. 425. 426. 427. 428. 429. 430. 431. 432. 433. 434. 435. 436. 437. 438. 439. 440. 441. 442. 443. 444. 445. 446. 447. 448. 449. 450. 451. 452. 453. 454. 455. 456. 457. 458. 459. 460. 461. 462. 463. 464. 465. 466. 467. 468. 469. 470. 471. 472. 473. 474. 475. 476. 477. 478. 479. 480. 481. 482. 483. 484. 485. 486. 487. 488. 489. 490. 491. 492. 493. 494. 495. 496. 497. 498. 499. 500. 501. 502. 503. 504. 505. 506. 507. 508. 509. 510. 511. 512. 513. 514. 515. 516. 517. 518. 519. 520. 521. 522. 523. 524. 525. 526. 527. 528. 529. 530. 531. 532. 533. 534. 535. 536. 537. 538. 539. 540. 541. 542. 543. 544. 545. 546. 547. 548. 549. 550. 551. 552. 553. 554. 555. 556. 557. 558. 559. 560. 561. 562. 563. 564. 565. 566. 567. 568. 569. 570. 571. 572. 573. 574. 575. 576. 577. 578. 579. 580. 581. 582. 583. 584. 585. 586. 587. 588. 589. 590. 591. 592. 593. 594. 595. 596. 597. 598. 599. 600. 601. 602. 603. 604. 605. 606. 607. 608. 609. 610. 611. 612. 613. 614. 615. 616. 617. 618. 619. 620. 621. 622. 623. 624. 625. 626. 627. 628. 629. 630. 631. 632. 633. 634. 635. 636. 637. 638. 639. 640. 641. 642. 643. 644. 645. 646. 647. 648. 649. 650. 651. 652. 653. 654. 655. 656. 657. 658. 659. 660. 661. 662. 663. 664. 665. 666. 667. 668. 669. 670. 671. 672. 673. 674. 675. 676. 677. 678. 679. 680. 681. 682. 683. 684. 685. 686. 687. 688. 689. 690. 691. 692. 693. 694. 695. 696. 697. 698. 699. 700. 701. 702. 703. 704. 705. 706. 707. 708. 709. 710. 711. 712. 713. 714. 715. 716. 717. 718. 719. 720. 721. 722. 723. 724. 725. 726. 727. 728. 729. 730. 731. 732. 733. 734. 735. 736. 737. 738. 739. 740. 741. 742. 743. 744. 745. 746. 747. 748. 749. 750. 751. 752. 753. 754. 755. 756. 757. 758. 759. 760. 761. 762. 763. 764. 765. 766. 767. 768. 769. 770. 771. 772. 773. 774. 775. 776. 777. 778. 779. 780. 781. 782. 783. 784. 785. 786. 787. 788. 789. 790. 791. 792. 793. 794. 795. 796. 797. 798. 799. 800. 801. 802. 803. 804. 805. 806. 807. 808. 809. 810. 811. 812. 813. 814. 815. 816. 817. 818. 819. 820. 821. 822. 823. 824. 825. 826. 827. 828. 829. 830. 831. 832. 833. 834. 835. 836. 837. 838. 839. 840. 841. 842. 843. 844. 845. 846. 847. 848. 849. 850. 851. 852. 853. 854. 855. 856. 857. 858. 859. 860. 861. 862. 863. 864. 865. 866. 867. 868. 869. 870. 871. 872. 873. 874. 875. 876. 877. 878. 879. 880. 881. 882. 883. 884. 885. 886. 887. 888. 889. 890. 891. 892. 893. 894. 895. 896. 897. 898. 899. 900. 901. 902. 903. 904. 905. 906. 907. 908. 909. 910. 911. 912. 913. 914. 915. 916. 917. 918. 919. 920. 921. 922. 923. 924. 925. 926. 927. 928. 929. 930. 931. 932. 933. 934. 935. 936. 937. 938. 939. 940. 941. 942. 943. 944. 945. 946. 947. 948. 949. 950. 951. 952. 953. 954. 955. 956. 957. 958. 959. 960. 961. 962. 963. 964. 965. 966. 967. 968. 969. 970. 971. 972. 973. 974. 975. 976. 977. 978. 979. 980. 981. 982. 983. 984. 985. 986. 987. 988. 989. 990. 991. 992. 993. 994. 995. 996. 997. 998. 999. 1000.*

Distringas.

9. And hence it is, that his Debtor hath a kind of Prerogative-remedy by a *Quo minus* in the Exchequer, which any man indebted to the Lord Protector may have against

Quominus.

against his Debter, supposing that hereby he is disabled to pay the Lord Protector, and in this Suit the Plaintiff hath many Priviledges that other men have not.

9. His Suits for his Debts shall be in the proper Court where they grow due, 33 H. 8. 39.

In taking Distress.

10. His Officers in distraining for him, may do that which other men may not do, as in these things, (i.) For Issues lost, they may distrain in any place, the Highway or Street, and upon the Church-land. But the Oxen of the Plough may not be taken, no, nor for the Lord Protector in any case, if there be enough besides to be had, Co. 2 par. Inst. 132.

11. For Rents due to him, he may either call for them in by Process out of the Exchequer, or recover them by Distress. Wherein these things must be known,

1. He may distrain for a Rent-seck, as well as for any other Rent. 2. He may distrain for any Rent-charge, Seck or Service out of the Land charged with it, or out of which it issueth, and out of the Seignory and Manor upon any of the Lands of the same Tenant which he hath in his own hands, and doth manure with his own Cattel. But the Cattel of his Lessee for life, years, or at will upon their Land so held, are not liable to this distress. 3. He may distrain for such a Rent in the Highway or Street. 4. It seems he may sell the Distress, if the Owner do not redeem it in the time of fifteen days. 5. But in case of Forfeiture of a Rent for not payment, there it seems the Lord Protector must make his demand as another man must do. See for all this, Co. 2 par. 132. Brownl. 1 par. 17, 18. 6. Delay of payment of the Rent to him, is very penal and dangerous. See Stat. 33 H. 8. 39. 7. The money in another Court may be arrested for his Debt, Plow. 322.

Sec. 7.
About Grants
from, and to
him
Infant.

4. He hath a Prerogative above all others in matters of Grants and Gifts. And that either in such as are made by him to others, or such as are made by others to him. As to the first, these things are to be known.

1. He may, though he be an Infant and under age, give or grant any thing; and Nonage in the King would not have hurt his Grant, Bro. chap. 373. 6. upon Lit. 43.

2. Nothing but things in Action, Chattels personal, and transitory things, is Felons goods and the like, will pass from him otherwise then by matter of Record, 1 H. 7. 14. Plow. 553. Dyer 232.

3. He may grant over to another a Thing in Action, a Possibility, a Condition, and such like thing not grantable by any other man, 2 H. 7. 8. See Chafe in Action.

4. He may in his Gift or Grant except and sever a thing that in its own nature is inseparable, Dyer 288.

5. His Grant shall not be construed to enure to several intents, nor to any other intent then what is expressed in the Deed; nor to enure to two intents, unless they be both expressed in the Patent, Plow. 502. Bro. Pat. 44. 37 H. 6. 20.

6. He may give or grant Fee-simple on Condition not to alien, which another cannot do, 21 H. 7. 8.

7. He may upon an Estate granted by him, reserve a Rent to a stranger, which another man cannot do, 21 H. 7. 8.

8. When it doth appear in the body of the Grant, that he is deceived either by a false Suggestion, or with a false Consideration, or in a point of Law, he may avoid his own Grant. And therefore it is held, that if he grant Land to one and his Heirs-males, that this is void; for he intends by this a Fee-tail, and this in Law is a Fee-simple, Plow. 455. Co. 11. 74. 10. 110. Goldsb. 120. 20.

9. Every Gift and Grant of his made upon the surmise of the party, shall be construed most beneficially for him, and most against the party to whom it is made, Co. 10. 110, 111. 37 H. 6. 20. and shall have a most benigne interpretation. And therefore if an Obligation be made by two jointly and severally, and he release to one of them, this will not release the other, as it will in the case of a common person. And if a Lease be made of three Acres, reserving Rent upon Condition, and the Reversion is granted away of two Acres; this, if it be in the case of a common person, is an Extinguishment of the Condition; but otherwise it is if it be by the Lord Protector, Co. 5. 112.

10. Knight

10. Knights Fees, Advowsons. Dowers, will not pass by general words in his Grant, without special words to pass them, 17 Ed 2. 15.

And as touching Grants made to him, these things are to be known. 1. He cannot take any Lands, though it be but for years, but by matter of Record, as Office, or the like; and so the thing will pass without Livery of Seisin: But all Gifts and Grants to him of Land in any other manner, are void. But for Obligations, Chattels personal, and Transitory things, as *Catalla Felonum & Fugitivorum*, Wreck, Treasure-Trove, the profits of Land, of a person outlawed in a personal Action; to these he may be entitled without Office or matter of Record, Co. 11. 77. Pl. 242. Dyer 232. 2. A Thing in Action, as a Debt, or the like, may be granted or assigned to him, and he may sue for it in his own name, Dyer 232. Stat. 7 Jac. ch. 15. But they must be such as grew due to his Debtor or Accomptant *bona fide*, and not otherwise.

The Power of the Lord Protector assisted and joyned with the Parliament, is in these things. 1. The supreme Legislative power is in them over England, Scotland and Ireland; and they together may make Laws: But if he agree not to their Bills in twenty days, they may pass them without him, *Government Art. 2. 32.* 2. He is to order and dispose the *Militia* during the Parliament with their consent, *Government Art. 4.* 3. So also is he during this time to direct all things concerning the keeping of Correspondencie with Foreign Princes and States with their consent, *Government Art. 5.* 4. The raising of money to bear the charges of the Forces by Sea and Land, must be by the Parliament. 5. And yet a constant yearly Revenue for the maintenance of the ordinary Forces, is to be settled by the Lord Protector and his Council. See *Government Art. 27.* and see *Parliament*.

The power of the Lord Protector assisted with his Parliament.

The Council of the Lord Protector, are such Officers as are chosen and sworne to assist him in the exercise of the chief Magistracie and Administration of the Government of the three Nations. For their Election, Number, and Oath, see *Government Art. 21. 41.*

Of the Council.

The Power of the Lord Protector assisted with his Council, is in these things. 1. The exercise of the chief Magistracie, and Administration of the Government of the People of England, Scotland and Ireland, is in the Lord Protector assisted with his Council, *Government Art. 2.* 2. The Lord Protector with advice and consent of the greater part of this Council, in the Intervals of Parliament, are to order the *Militia* and Forces by Sea and Land, direct in all things a Correspondencie with Foreign Princes and States; and they have the power of the *Militia*, and of the making of War and Peace, *Government Art. 5.* 3. They are to raise, settle and establish out of the Customs, and by other ways they shall think fit a yearly Revenue to be paid in to and issued out of the publique Treasury, to maintain Ten thousand Dragoons and Horse, and Twenty thousand Foot for the security of the three Nations, and for a convenient number of Ships for the guarding of the Seas, and Two hundred thousand pounds a year besides to defray the other charge for Administration of Justice, and other expences of Government; not to be altered but by the Lord Protector and the Parliament. And if any Abatement be made of these Forces, and money thereby saved, it shall be employed to publique use by consent of Parliament, when any is, or else by the Lord Protector and his Council, *Government Art. 27, 28, 29.* 4. He and they are to approve or disapprove of the union or severing of Churches. See *Religion*. 5. They also are to approve of all Grants of, and Additions to, and Substractions from Augmentations. See *Religion*.

The power of the Lord Protector assisted with his Council.

CHAP. CXXVII.

Of Priviledges.

Priviledges,
whar.

Señ. 1.
The kinds.

Writ of Privi-
ledg.



Priviledges are Liberties and Franchises granted to a Person, Office, Place, Town or Manor, or which they do claim above other persons or places.

And these are either Personal, or Real. The personal Priviledge is that which is granted to any person either against, or besides the course of the Common-Law. As for example; A Parliament-man may not be arrested himself, or any of his Attendants during the time of the Parliament. An Officer attending in the Chancery, or Court of Upper-Bench, or Common-Pleas, regularly cannot be sued in any other Court, but must be sued in his own Court, and is to be exempt from certain Offices: And if he be sued elsewhere, he may remove the Suit by Writ of *Priviledg*, in which is included a *Superfedas*, and on which he may have an Attachment. So Tenants in ancient Demefne.

The Real Priviledges of Places are many: As of the *Universities*, as that none of them shall be called to *Westminster* in Suits upon any Contract. Ancient Demefn-Manors, and Townsmen and Citizens in divers ancient Towns to be exempt from Toll, and the like. Of this nature is Toll, Turn, Sake, Soke, Infangthief, Outfangthief, and Ordelf, and the like. All this began by the Kings Grant, but is now claimed by Custom and Prescription. For all which, and that which doth concern this Title, see more in *Franchises*, chap. and in *Dyer* 61. 328. 377. 9 *Ed.* 4. 53. 27 *H.8.* 20. 2 *H.7.* 7. *Finches ley*, 321. *St.* 5 *H.* 8. 6. *Crompton* 4. 7. 11. 14. 1948. 52. 59. 230: See *Custom and Prescription*.

Who are pri-
viledged from
serving Office,

For Answer to this point, these things are to be known.

1. That all men are liable to serve the Offices of Constables, Churchwardens, and the like Offices, that are not persons exempt by Law, as all Clergy-men, Peers, and some others.
2. None but Men are to serve these Offices, not Widows or Maids.
3. Clerks attending the Courts at *Westminster*, and whose attendance is necessary, cannot be put in such an Office wherein a personal and continual attendance is necessary, as Constable, Churchwarden, or the like: But any Office that may be executed by Deputy, they may be forced to serve.
4. Some that heretofore had a desire to exempt themselves, made themselves Servants to the King Extraordinary; but the Judges did disallow it: otherwise the Kings Servants are to be exempt.
5. Physicians and Chyrurgeons in *London* are not to serve these Offices, but otherwise Physicians, Lawyers, and all such men are liable to serve in these Offices in extremity; but because of their much employment otherwise, they are thought fit to be spared, *March*, 30. See *Physician*.

CHAP. CXXVIII.

Of Privies, Parties, and Estrangers; and Prohibition.



Privies, Parties and Strangers are relative terms used in reference to many cases of Law. The Parties to a Fine or Deed, are those which are named therein as Parties to it; and in relation to them, all others are said to be strangers. Privies are said to be such, as by common intendment in respect of something hath passed between them, are acquainted with a thing done, and are partakers or have interest in it. And these are opposed or related in this respect to strangers, between whom no such dealing or Conveyance hath been. And in respect of this, there is said to be a Privy between them. The which is said to be either in Deed, or in Law.

Privies and Privities are also said to be either in Estate, as where a Lease is made at will for life or years, or a Feoffment in Fee, there is a Privy between Lessor and Lessee, Feoffor and Feoffee, and his Heirs, &c. and they are called Privies. So if one make a Lease for life of Land to A. the Remainder to B. here is a Privy of Estate between A. and B. and the Lessor. So between Jointenants, and between Parceners till partition, Husband and Wife, Donor and Donee in Tail, Gardein in Chivalry and his Gard, Tenant in Dower or by the Courtesie, and the Heir, there is a Privy, and they are Privies. So if a Gift be in Tail, the Remainder in Fee; there is a Privy between the Tenant in Tail, Donor, and he in Remainder in Fee. So if one lease for years, and after the Lessee assign all of part of the Term; the Assignee and the Lessor are Privies in Estate. So if the Lessor grant over his Reversion, or the Reversion elsewher; here is a Privy between the Grantee or the Lord by Escheat, and the Lessee, Co. 4. 117. 8. 42. id. 92. upon Lit. 252.

Another kind of Privies and Privities are in Contract, which is by reason of a personal Contract; and this extendeth only to the person of the Lessor and Lessee: As where a man doth make a Lease for years, there is such a Privy between the Lessor and Lessee, Co. 3. 23.

Another kind of Privy is in Estate and Contract both; and this can be between none but Lessor and Lessee. Another kind of Privy and Privies is by Deed. And this is where a Lease is made for life, and afterwards by another Deed the Reversion is granted to a stranger in Fee; this Grantee is called a Privy by Deed, because he hath the Reversion by Deed. Another sort are Privies in Law, which is where there is Lord and Tenant, and the Tenant leaseth the Tenancie for life, and dyeth without Heir, so that the Reversion doth escheat to the Lord; in this case he is said a Privy in Law, because that he hath his Estate only by the Law, that is, by Escheat; which is an act of the Law. And he sometimes is called a Privy in Tenure, Co. 4. 27. Perk. 117. 432. And so it is if the Tenant alien in Mortmain, and the Lord enter for a Forfeiture; here is a Privy in Law. So it is, where ever there is a Lord and a Tenant that holdeth by service, Co. 8. 43.

Another sort of Privies and Privities, are Privies in Blood, which are such as are linked in Consanguinity; as Heir general, Heir special, or Heir general and special, F. N. B. 137. Dyet 3. Co. 4. 126.

Another sort of Privies are Privies in Right only: So is it where one possessed of a Term granteth his Estate upon a Condition, and maketh his Executors, and dieth; in this case they are called Privies in Right or Representation. So also Administrators are called Privies in Right or Representation. Also the Successors of every Body Politick or Corporate, are called Privies in Right, Co. 4. 127. upon Lit. 17. 214. Dyet 112.

Privies in Succession, are the Successors of a Corporation. See more for this, Co. upon Lit. 310, 311. & 316, 317, 318. Co. 6. 58. 10. 48.

Privies and Privities, what.

The kinds:

SeE. 1.
In Estate.

In Contract.

In Estate and Contract.
In Deed.

In Law of Tenure.

SeE. 2.
In Blood.

In Right or Representation.

In Succession.

There is a Privy also by Delivery. If I deliver a man Goods to carry to D. and then he steal them, this is Felony; for the Privy is gone, when the Goods come there, *Stamf. pl. Cor. lib. 2. 5.*

Where a Privy is necessary, and what Privy, for the maintenance of an Action of Debt, Covenant, Waste, or for Entry for a Condition broken, making good of a Surrender or of a Release, see the *Titles*.

Where a Privy shall be said to be gone or no, but to continue still.

For answer to this, take these Cases. 1. If Tenant in tail do make a Lease for his own life, this doth not determine the privy of Estate. But if he make a Lease for anothers life, *contra*, Co. 8. 75. 2. Where Tenant in tail doth become Tenant after possibility of Issue extinct; this doth not determine the privy, Co. 8. 75. 3. The death of one Jointenant doth not determine the privy that was between them and the Lord above them, Co. 8. 75. But if one Jointenant assign away all his Estate, it is otherwise. 4. If Lessee for life or years assign away all his Estate, the Privy in Estate is gone between Lessor and Lessee; and so between Jointenants, if one assign all his Estate. But if the Assignment were only of part of the Estate, or of the whole upon a Condition, and he enter for the Condition broken, it were otherwise, Co. 8. 75. 5. If there be Lessor and Lessee for years rendering Rent, and the Lessee assign away all his Interest, yet the Privy doth continue, and the Lessor may bring an Action of Debt for the Rent still. But if the Lessor grant away the Reversion, the Privy and Action are gone, Co. 8. 75. 76. 6. If there be Lord and Tenant, and the Tenant is disseised, yet the Privy of Tenure doth remain, Co. 8. 43.

Of a Prohibition.

Señ. i. Prohibition, what.

A Prohibition is a Writ framed for the forbidding of any Court to proceed in a Cause there depending, upon suggestion that the cognition thereof belongeth not to the said Court. But the word was usually taken for the Writ which did lie for one which was sued in the Spiritual Court for a cause belonging to the Temporal Jurisdiction. And by this Writ, the Party his Counsel, the Judge and Register were forbidden to proceed any further in the Cause, *Fitz. Br. 39.* It was usually granted to the High-Commission, Council of the *Marches of Wales*, and other Courts now abolished; and therefore we shall pass them over.

The proceeding in it.

And these Writs issue out of the Chancery, Upper-Bench, or Common-Pleas, and are grantable to the Court of Requests, Admiralty, County-Court, Court-Baron, or any other inferior Courts of Record; or not of Record now remaining, in cases where they meddle with things out of their Jurisdiction, or otherwise misbehave themselves; to command the Judges, Officers and Parties to proceed no further. And if they do proceed afterwards, an Attachment doth go forth against them for their Contempt. But if it do after appeal, that the matters for which he was impleaded in those inferior Courts, are to be determined there; then the party shall have a Writ of Consultation, commanding the Judges of that inferior Court to proceed again, and the cause shall be remanded to them: And then no new Prohibition was to be had. See for all this, Co. 4. 127. 11. 16. *Brownl. 2 par. 1. 2. &c.* many Statutes now of little use, and there is little of this at this day. But when it was given and granted, it was given and granted where the inferior Court did meddle beyond their Jurisdiction, as where the Spiritual Court did meddle with Lay matters, and other Courts did meddle beyond their Commission and Instructions, as when the County-Court or Court sue for above Forty shillings, or for Charters, or Freehold, or for Trespas *vi & armis*, &c. Or else they did deny Law and Justice to the Defendants there: As when in the Court of Requests they did sue for a Debt there after the time of Limitation, or a man hath a Release, and they will not allow it, or the like, *Fitz. 46. 47. F. N. B. 46. O. N. B. 31. Bro. Justices 5.*

Consultation.

Where it was grantable, or not.

The *Indicavit* is also much of the nature of the Prohibition, and was directed to the Court Christian, now gone, *F. N. B. 36.*

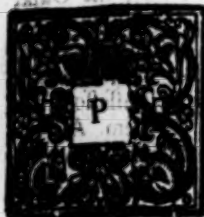
Consultation, what.

Consultation is a Writ, whereby a Cause that was formerly removed by a Prohibition out of an inferior to a superior Court, is sent back again, *F. N. B. 50. March 141.*

See in Stat. de Circumspēctē agatū, de Consultatione, Articuli Cleri, 1 Ed. 3. St. 2.
18 Ed. 3. 2. 5. 45 Ed. 3. 30. 50 Ed. 3. 4.

CHAP. CXXIX.

Of Property.



Property is the Right that a man hath to any thing which no way dependeth upon another mans courtesie : And he that hath this, is called a Proprietary. 1. Property, what.

Property is either of Lands, or of Goods and Chattels. And of both these there are said to be three kinds. 1. Absolute, which is where a man hath a power to do with a thing what one will ; and he hath such a Right in it, that therein he hath no dependance on any other. 2. Qualified or limited, which is a Property to some purposes only. So the Husband Proprietary, what. The kinds. Sect. 1. Husband and Wife.

hath property in his Wives real Chattels and Debts, by the Marriage ; but in her Chattels personal he hath an absolute property. So of a Pledge, he to whom it is pledged hath but a special property in it, and the general property is in him that did pledge. So Lessee for life or years hath a qualified or special property in the Trees growing on the Land, to shroud them, and to have the fruit and shadow of them ; but he cannot cut and take them away, as the Lessor who hath the general Property of them may do by the leave of the Lessee. Pledge. Lessor and Lessee.

There is also a possessory Property of Lands, Goods and Chattels. So a man may have a Possession of Lands, to which he hath no Right at all. And such a Property only a man hath in things which are *fera natura*, (i.) of a wild nature, as Fish in a Pond or River ; wild Beasts, as Deer, Conies and Hares, and the like, in a Field or Park ; or Fowl, as Pheasants, Partridges, Swans, or the like, by reason of Priviledge, as because it is a Free Warren, or the like, and old Pidgeons in or about a house. And yet if any of these things be made tame, as a Hawk be reclaimed, or a Deer, Ferret, Pidgeon, Cony, Pheasant, Partridge, or other such like Creature be made tame, so long as it is tame, a man is said to have a Property in them as in his Oxen and Kine. But if once they get away and turn wild again, not having *animus revertendi*, (i.) a mind to return, the Property is gone. And yet it is held, that a man whiles his Hawk is in flight of a Partridge, or his Hounds in pursuit of a Hare, or a mans Deer get out of his Park, and he make fresh pursuit after him ; that in these cases he hath a kind of property in the wild creature : But if they once get away from him, every man that can may take them. Also if a man take wild Beasts or Fowl, and keep them alive in a Room, though they be not tame, yet he hath a property in them whiles they are there. So also a man hath a property in Fish in a Trunk, young Pidgeons in his House or Boxes, young Hawks in his Wood till they flie : And if any take them away, he may have an Action of Trespass, and say they were his. So he may likewise for breaking his Close, and taking away his Conies, Deer, Pheasants or Partridges out of his Warren ; but he cannot say for taking [his] Deer, &c. Fera natura.

Nor can any Felony be committed by the taking away of any of these wild things, unless they be made tame : So also Felony may be by taking away the Fish of a Pond. But in all living tame things, as in Oxen, Cows, Sheep, Hens, Ducks, Geese, Capons, Horses, Swine, Goats, and their Eggs and young ones, and the like ; and in all dead things, as Emblements, Timber, Jewels, Householdstuff, Implements, Uensils, Money, Plate, Corn, Hay, wood fell'd, wares, merchandises, Carts, Ploughs, Instruments of Malick, Sect. 2. Felony.

Coaches, and such like Moveables, a man may have an absolute and general Property.

Trespass.

Also a man may have a Property in some things of a base nature, by the taking whereof no Felony can be committed; as a Blood-hound, Mastiff, Hounds, Spaniels, and the like: And for these a man may have an Action of Trespass, and say he took his Dog. And so a man may have a Property in Swans.

Action of the
Case.
Trove.

Also of things that are of a tame nature, one man may have but a possessory, and another man may have the absolute Property. As for example: If I borrow a Horse or other thing for a purpose, in this case I have a special possessory property in it to use it to that purpose for which I borrowed it; and therefore he that hath the general property of it, which is the Lender, cannot take it away against our agreement; and if he do, I may have an Action of the Case against him for it. And if I borrow a Horse to ride to Dover, and ride out of the way, the Owner cannot take him away, but may have his Action of the Case against me for it. And if one man deliver the Goods to deliver over to another, he hath the general property or ownership of them, inasmuch that they may be taken in Execution for his Debt, and he may have a Trover for them: And I have such a possessory property in them, that if they be taken from me, I may have Trover for them. And thus (as it seems) one may have a special property in a Chattel personal during one's life by agreement, as where for money I hire a man's Horse for my life. And in all these cases of a double interest or property, one of them cannot deprive the other of his interest or property without injury, *Co. 7. 17. Plow. 324. 21 H. 7. 14. 7 H. 7. 18. 8. Dyer 308. Co. 11. 145. 14 H. 8. 1. Kely. 88. 118. Ca 11: 30. March 12. 11. 34. 48. 77. 110. 118. Regis. 93. 101. 22 H. 6. 59.*

Sec. 3.
2. How the
Property of
Lands or
Goods may be
gained or al-
tered, or not.

The Property of Lands may be gained many ways: For a man may get the property or ownership of Lands by Entry, by Descent, by Escheat, or by Conveyance; and by Conveyance a man may take and get a Property in Land, and attain an Estate therein in Fee simple, Fee-tail, for life or years: And so he may have it by Fine, Recovery, Deed, or last Will. And by Deed he may take by way of Feoffment, Use, Gift, Grants, &c. See the Titles. *Plow. 524. Dyer 334.*

The Property of Goods and Chattels may be gained or altered by Act in Law; so by Forfeiture, Executorship, Administration, and the like: Or by Act of the party; so by Gift, Feoffment, Fine, Recovery, Use, Covenant, Grant, Bargain, Sale, and Will. And for things that are wild, a man may get a possessory or qualified property in them four ways. 1. By Industry, as when he maketh them tame. 2. Or by the place, when they are in his House or Chamber-close, or as Fish in a Trunk, or the like. 3. By weakness, as young Hawks or Pigeons. 4. By the privilege of the place, as in a Warren. But for the opening hereof further, take these Cases following.

By Act of Law.

1. If a Ship be taken by Piracie, or by Letters of Mart, and be not brought *infra presidia* of that King, by whose Subject it was taken; in this case it is no lawful prize, and the property not altered, and therefore the sale by the Taker thereof is void. *March 110. 4188.*

Forfeiture:

2. An Alien-Enemy doth take my Goods in battel, and a Denizen doth take them away from him, and the Owner doth not come and demand them before the forfeiture: by this they are lost, and the property is in him that did retake them, *Kely. 62. 63. 58.*

Felons goods.
Waif, Estray,
&c.

3. If Goods become forfeit by Felony, or as Goods waived, an Estray or Wreck; by this the Property is altered and removed from the Owner. See *Waif, Estray, Forfeiture.*

Goods attached.

4. Goods are attached to bring the party in to appear, and the Defendant doth make default and not appear; by this the Goods are forfeit, and the property altered. *Dyer 338. Bro. Attach. 10.*

Trespassor.

5. If a Tenant hold by Custom to pay a Harriot at his death, and he die, the property is in the Lord, *8 H. 7. 20. See Harriot.*

6. If one take away my Goods as a Trespassor, and I sue him for this, and recover damages for it; by this the Goods by act of Law are made his, *Kely. 62. 63. 58.*

7. By

7. By an Executorship or Administration, the Property of the Deceased's goods is altered and vested in the Executor or Administrator. And if an Executor pay so much money out of his own Estate as the Goods come to, by this he hath gained the Property of the Goods in his own right, which he had before but as Executor: And if he pay but in part to the worth of the Goods, for so much the Property is gone. And if two Executors be, and one of them only having Goods enough to pay the Debts, and he pay them; by this he alone hath gotten the Property thereof, *Goldsb. 79. pl. 50. Kelm. 62. 13 H. 4. 2.* Executor.

8. If a man marry a wife that hath personal Goods in her own right; by this the Law doth give them to him as his own Goods, *21 H. 7. 29.* Husband and Wife.

9. If a Sheriff take my Goods in Execution upon a *Fieri facias*, yet is the Property thereof still in me until he doth make sale thereof, *Dyer 98. 67. Brownlow, 1 par. 41.*

10. If a man take away my Goods under pretence of Title; it hath been said, this will alter the Property thereof, *Bro. Prop. 35.* But I doubt of this.

11. If my Servant (I being a Mercer) take away my Goods, or my Shepherd, Butler, or other Servant take, or sell away my Goods, unless it be in case of Sale in Market overt, no Property is altered by this; for by this relation as a Servant, and his Possession, he hath by Law neither general nor special Property; and therefore I may have Trespass for his taking, and if he imbesil them, it is Felony, *Goldsb. 72. pl. 18.* And if a man borrow my Goods, or find my Goods, or take them from me in jest, or as a Distress, or steal them from me, and no more; by this no Property is altered, *20 H. 7. 52. Bro. Prop. 27.* But by a Sale hereof afterwards in a Market overt, the Property may alter. See afterwards. Trespass. Felony.

12. One doth grant to another a hundred Cords of Wood, to be taken in such a Wood by the assignment of the Grantor; in this case before assignment nothing passeth, and therefore he cannot till then grant it away; and if he die before it be done, the Grant is void, and the Executor shall not have it, *Goldsb. 184. pl. 123.* So if I sell to one the best Horse in my Stable, and there be more Horses there then one; by this no Property is altered till the Vendee hath made election, *Kelm. 69. 77.* Election. Executor.

13. If the man that hath Goods or Chattels do give them away in his life time, this will alter the Property. See *Gift.* Sell. 4. By all of the party.

14. If he give away his Goods by his Will, this may alter the Property. See *Testament.*

15. If a man sell away his Goods by word or deed, by this the Property may be altered. For this see *Bargain and Sale*, and *Contract*. And for the further clearing of this point, take these things: That in every Sale or Contract of Goods that must alter Property, there must be these things. 1. There must be a good Consideration for the Sale, and the Contract must be perfect. And for both these points, see *Contract*. 2. If it be perfect and well made; and the Goods sold are the Sellers own Goods; there, wherever the Contract be made, in or out of a Market, it is good between the parties to change the Property, and to pass the thing sold to the Vendee; yea, albeit the Seller know of an Execution against him, and sell the Goods to prevent it. *Addition to Just. Doddridge. f. 40.* But see *Collusion*. And if a Sheriff sell the Goods he hath in Execution, the Sale is good and unavoidable, albeit the Judgment be afterwards reversed, *Dyer 98. 67.* And if one sell Corn in Sacks, the Property may be altered, though it be not delivered, *33 H. 6. 5.* So it seems it is where Goods be taken on a Statute, and not delivered to the party Plaintiff. But before Sale by the Sheriff, the Property is not altered, *Dyer 67. 98.* But by a special Act of Parliament it is provided, That the Sale of Goods wrongfully gotten to any Broker in London, Westminster, Southwark, or within two miles of London, shall not alter the Property thereof; *Stat. 1 Jac. 21.* 3. The Sale of any living or dead Goods (except Horses) in a Fair or Market, on the Fair or Market-day, (be the Goods whole they will, and however come by) yea, although they were stolen, is good, and shall change the Property thereof and settle it in the Buyer. And this Sale will not only bind and conclude the parties buying and selling, but all others that have any right to the thing sold, *D. & S. 328. Perk. fell. 93.* But herein these Cautions must be taken in. Contract. Sheriff. Horses.

1. It must be a Sale by one that is able to sell, and one capable of buying. And therefore it is held, That a Sale there by a tender Infant that the Buyer may perceive to be within age, or a Woman covert that the Buyer knows to be so, (except it be of such things as she doth usually deal in, or by her Husbands consent;) or if a man sell to another his own Goods, these Sales are not good, 21 H. 7. 40. 23 Eliz. Gibsons Case. Co. upon Lit. 20. Perk. 713.

2. It must be a Sale, and not a free Gift without any valuable Consideration, 12 Ed. 4. 10. Co. 2 par. Inst. 713.

3. The place wherein the Sale is, must be in the Market or Fair: for a Sale out of a Market or Fair, is not good: Nay, it was held by Justice Bridgman, That a Sale in a place which in reputation is a Fair or Market, and in truth is not so, is not good. And if one the day before the Market or Fair buy stolen Goods of one, and give him Earnest, but he hath time to take or leave till the next day by Noon, and then the things are brought into the Fair or Market, and then and there they agree, the Buyer pays his money and Toll; it seems this is not good to alter Property, Co. 5. 83. Dyer 99. And therefore it seems the whole Contract must be made in the Fair or Market.

4. The Sale must be made *bona fide*: And therefore if there be any Covinous agreement made between me and another to sell the Goods of a third man in a Fair or Market, to the end to deprive him thereof: Or if I do sell the Goods of another man so to one that knoweth them to be his, and not my Goods; this will not alter the Property, nor conclude him, 33 H. 6. 5. Co. 3. 78. 5. 83.

5. Some have held, That the Sale must be on a Working-day, and not upon the Lords day, to alter Property. And therefore it is held in London, That a Sale any day but the Lords day, there, is good, because every day there is a Market-day. But others hold the contrary for the alteration of Property: And so it seems the Law is taken, that the Sale is good, and Property changed; but the parties may be punished for prophaning the day. *Fieri non debet, sed factum valet*: It ought not to be done; but being done, it is good, Stat. 12 Ed. 4. 8. Dyer 11. Co. 5. 83. Comins Case, 38 Eliz. B. R.

Sell: 5.

6. The Sale must be in open place, and in the usual and proper place of the Sale of such things. And therefore it is held, That a Sale of Goods in London in an open Shop where such things are used to be sold, as Plate in a Goldsmiths shop, Cloth in a Drapers shop, or the like; this Sale is good. But if Plate lost, or a Jewel borrowed be there sold in a Drapers or a Scriveners shop openly, or in a Goldsmiths shop or house privately behind the doors or curtains; or if Cloth be there sold in a Ware-house or Back-house, and not in the Shop; or a Horse be sold in *Chap-side*; that these Sales are not good to alter the Property, Co. 5. 83. Stat. 4 H. 7. 5. 1 Jac. 21. D. & S. 149. Co. 2 par. Inst. 713.

7. The Goods so sold must be the Goods of a Subject, and not the Goods of the Lord Protector; for in this case the Sale is not good, nor is the Property altered, Stat. 7 H. 7. chap. 12. Co. 2 par. 713. Plow. 243. Stat. 35 H. 6. chap. 39.

8. The Sale must be made in the day-time between Sun-rising and Sun-set. And therefore it is held, that a Sale in the night is not good, Co. 2 par. Inst. 714. Old B. Entries, 327.

Felon.

Restitution.

9. The Goods must be free at the time of the Sale. And therefore it is held, That if one steal my Goods, and after the Lord Protectors Officer seise them; and then he or another sell them in a Fair, &c. this Sale is naught: And therefore if I prosecute the Felon, and cause him to be attainted, I shall have Restitution of my Goods again, Stamf. pl. Cor. 365. Co. Inst. 2 par. 714: 21 H. 8. 11.

10. It hath been held by some, that Toll must be paid, or at least entred upon the Book after the Sale, and that otherwise the Sale is not good. But the Law is held to be otherwise; and it is held in all cases, and for all things but for Horses, the Sale is good, and Property changed without paying or entring of Toll. And so it hath been adjudged for Law upon a Sale in any Fair or Market in England, in Cumin and Bowyers Case, 38 Eliz. B. R. Co. 2 par. Inst. 714. 716, 2 & 3 P. & M. 7. 9 H. 6. 45: But

But by the Statute of 34 H. 8. 16. the Sale of Goods or Chattels stolen in any Market or Fair in the Dominion of Wales, will not change the property thereof, but the Owner upon proof thereof shall have his Goods again. But in England the Law is otherwise.

11. If the thing sold be a Horse beast that is stolen; the sale will not be good, nor property changed as to the Owner of the thing sold, unless all these things following do concur in the case.

1. It must be ridden, led, walked, driven, or kept standing by the space of one hour together at the least, between ten of the clock and sun-set.

2. This must be in an open place, and in the places wherein Horses there are commonly used to be sold, and not within any Yard, Back-side, House, or other privy or secret place.

3. All the parties to the Contract there present in the Fair, &c. must come together with the Horse to the Toll-taker or Book-keeper.

4. The Book-keeper must then write down in his Book the names, Christian and Surnames, and dwelling-places of the parties to the Contract, the colour, and one special mark at the least of the Horse.

5. If any Toll be due, it must be paid; otherwise a Penny must be paid for the Entry.

Sec. 6.

Vouchers

6. Either the Book-keeper or other Officer of the Fair or Market must take upon him the perfect knowledge of the Seller, both his names and place of dwelling, which must be entered into the Book there; or else the Seller must bring to the Book-keeper or other Officer of the Fair, one sufficient person a Voucher, that must testify that he knoweth the Seller, his true names, Myserie, and place of dwelling. And it is held, this Branch extended to all Horses, stolen or not stolen.

7. Not only the Christian name, Surname, Myserie, and place of dwelling or residence of the Seller, but also of the Voucher (if any be) must be entered in the Book.

8. The very true price bona fide given for the Horse, must also be entered in the Book. But in this case it seems there needs not any large Entry; and no more is required in the Entry, but that the Book-keeper or Voucher did know the parties, &c. For if they say they know, and do not know, yet the Sale and Entry is not good. And yet if in truth it be all false that is testified by the Voucher or the Book-keeper, in this case the Sale is void. But the Book-keepers Entry *prima facie* shall be presumed to be true, till the contrary be proved, that there is no such person as the Seller owned by the Book-keeper or Voucher: But being proved that none such was there at the time of the Sale, the Sale is void. And all this was agreed by the Court at Gloucester-Affise, by the Lord Chief Baron Wild, Trin. 10 Car. B.R. A. brought Trover against B. for a Horse: B. pleaded Sale and Toll paid, &c. A. replied, that there were no such Vouchers *in rerum natura*, (i.) in being: B. demurred, and it was adjudged for A. the Plaintiff upon a special Verdict. Stat. 2 & 3 Ph. & M. 7. 2 Ed. 3. 15. 5 Ed. 3. 3. 27 H. 6. 5. But all this notwithstanding, a man may without all this caution sell in a Fair or Market his own Horse to which no man hath any pretence of Right. See more, Stat. 31 Eliz. 12. 3 Eliz. 22. Co. upon Littleton, 714, 715.

9. There are divers other things by the Statutes required herein: As, that the Rulers of Fairs must appoint, 1. A set and fit place for the sale of Horses. 2. A sufficient Book and Book-keeper. 3. That the Book-keeper shall take his Toll, if any be due, between ten a clock and sun-set. 4. That he deliver his Book to the Ruler of the Fair. 5. That no man shall make a false Voucher, or vouch that he knoweth not to be true. 6. That no Book-keeper shall enter that as of his own knowledge, which he knoweth not to be true. 7. That the Book-keeper shall give to the Buyer requiring it, and paying two pence, a Note in writing of the Contents of the same Bargain, under the Book-keepers hand. But these extend not to the prejudice of the Sale; for albeit these be omitted, yet the Sale is good, and Property changed,

M m m m m

10. And

Stat. 7.

10. And if any stolen Horse be sold according to all these Conditions; yet if the Owner thereof, his Executor or Administrator, or any other by his appointment shall within six moneths of the Felony done, claim, and by two Witnesses within forty days after prove his claim, and that the Horse was his within six moneths before the claim, before a Justice of Peace in or near the place where the Horse is found, and shall pay or offer to pay so much money as the Buyer gave, or shall depose before the Justice of Peace he did give for him; the Property is saved to the Owner, and he may either take him, or bring an Action for him, *Stat. 31 Eliz. 12. Co. 2 par. Inst. 715, 716, 717, 718.*

11. If one sell my Goods unduly, not as before is set down, I may have them again, for the Sale will not bind me that am a stranger; but the Sale is good between the parties themselves: And the Goods being duly sold as before, will change the Property, albeit the Goods be the Goods of an Infant, Woman-covert, Ideot, in prison or beyond sea; and such as have right to them in anothers right, as an Executor or Administrator, *D. & S. 39. Plow. 243. Co. 2 par. Inst. 713, 714.*

12. If I promise another for good consideration to deliver him twenty Bushels of Corn by a day, by this no property hereof is altered: So if I for good cause buy twenty Bushels of Corn of a man at large, and not in Sacks, or set apart in a place certain; by this the property thereof is not altered. Otherwise it is if it be divided, and in a place certain, *Kelm. 77. 69.*

13. If one covenant with me, That if I pay him Ten pounds such a day, I shall have all his Goods in such a place, and I pay him the Ten pounds; this is a good Sale, and the Property is in me, *27 H. 8. 16.*

But by a bare stealing or taking away of Goods, or borrowing, without a Sale in a Market or Fair, no Property is altered; and therefore the Owner may seize them where-ever he find them. See more in *Chattels and Contract.*

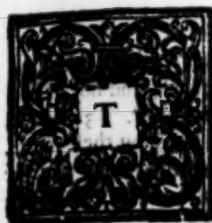
3. Where a Property is determined, or not.

If one have my Corn, and after he turn it into Malt; or my Money, and turn it into Plate, or my Plate into Money; or my Timber, and turn it into a House: In these cases I may not take the things in kind, for hereby my Property is gone. And yet if the thing remain in kind as it was, and may be known, though it be mixed with another thing, or somewhat altered; as if one take my Cloth, and make a Garment; or my Leather, and make Shoes or Boots of it; or my Iron, and make a Bar of it; or my Timber, and make a Bar of it: In these and such like cases it is said I may take my own again, *5 H. 7. 15.*

Also if one take my Sow, and after she happen to have young Pigs; in this and such like cases the Property doth continue, and I may take the old and young together;

CHAP. CXXX.

Of Prophecies, Proclamation, Protection, Protest.



He Penalty of publishing any false Prophecie, to the intent to make Insurrection or Division, see *St. 5 Eliz. 15. Co. 3 par. Inst. cap. 55.* Prophecies.

Proclamation is a publike notice given of any thing whereof the Supreme Magistrate thinketh fit to advertise the people: As that if a man do not render himself at such a time, he shall be reputed a Rebel; or to forbid, or command such a thing. This is a piece of the Prerogative of the Lord Protector; and is in case of necessity, and for a time, of Self. 1. Proclamation.

the force of a Law, called therefore *Lex temporis*: And many things he may do by this alone, as change the Coin of the Nation, &c. For which see *Prerogative*. And none other may do this, but Corporations in some case, and where they have a Custom for it. See for this, *Stat. 31 H. 8. 8. 7 R. 2. 6. 34 H. 8. 13. 18 Ed. 6. 12. Cromp. Jur. 42. Bro. Proclam. 10.* See *Prerogative*. And yet where any Law doth enable to it, as about Fairs, or the like, there it may be done. See *Fairs*. This word is used for other Proclamations, or Proclamations in other cases, For which see *Cromp. Jur. 14. 16. 20. 21. Stat. 3 R. 2. 3. 8 H. 6. 10. 13 H. 4. 7. 33 H. 8. 9. 5 Eliz. 9. 23 H. 6. 11. 7 H. 4. 15. 32 H. 8. 9. 2 Ed. 3. 15. 5 Ed. 3. 5. and others.*

Protection is a word of divers significations: For there is a general Protection of the Lord Protector, which is extended to all Subjects, Denizens and Aliens, whose offences have not made them incapable thereof. And there is a particular Protection by Writ. And so it is of two sorts: One to give a man freedom from Suits, which lieth for a man that is to pass over the Sea in the Lord Protector's service, to quit him in the mean time from all Pleas between him and other men, except Pleas of Dower, *Quod Impedit*, Assise de novel Disseisin, Darrein Presentment, Attaints, and Pleas before the Justices in Eyre. The second is for the safety of a mans Person, Servant, Goods, Lands and Tenements whereof he is lawfully possessed, from violence, &c. These are now of little use. See a large Treatise of them in *25 Ed. 3. Stat. 5. 5 Ed. 3. 7. 13 R. 2. 16. 7 H. 4. 4. 1 R. 2. 8. Co upon Lis. 131.* and in many other places, See for the first, *Allégeance*. This word also is sometimes taken for the Priviledg of a Parliament-man, and his Servants from Arrest, during the Parliament-time: For which see *Priviledg*. Protection.

This word *Protest* hath two significations in Law. The one is by way of Cautel, to call Witnesses (as it were) or openly to affirm, that he doth either not at all, or but after a sort yield his consent to an Act; as to the proceeding of a Judge in a Court wherein his Jurisdiction is doubtful; or to answer upon his Oath further then he is bound, *Plow. 176.* Another is by way of Complaint; to protest a mans Bill. For example: If I give money to a Merchant-man in France, and take his Bill of Exchange to be repaid in England by one to whom he assigneth me; if at my coming I find not my self satisfied to my content, but denied or delayed, then I may go in the Bourse, or some open concourse of Merchants at the Exchange or elsewhere, and protest that I am deceived by him; and thereupon if he have any Goods remaining in any mans hand in this Land, by the Law of Merchants I am to be paid out of them. Protest. what. Merchants. Bill of Exchange.

CHAP. CXXXI.

Of Purchase.

Purchase, what.



Purchase strictly taken, is the Possession that a man hath in Land or Tenements, which he hath by his own act, and not by title of descent from his Ancestor, *Co. lib. Inst. f. 3. par. 1.* And a Purchasor is he that comes to Land by these means. But it seems this word [Purchase] sometimes hath a larger extent, and is taken by way of opposition unto Descent; when one hath, or cometh by Land in any other nature by Limitation of Estate, then by Descent.

For Answer to this Question, take these Cases.

Self. 1.
Where an
Heir shall be
said to be in
as a Purchasor,
and not by
Descent, or
not:

Infant born
after.

1. When an Estate doth originally rest in the Heir, and was never, neither might ever by any possibility be in the Ancestor; there the Heir shall be said to be in the nature and manner of a Purchasor; and he shall never be said to be in by Descent, where no Right, Title, Action, or Use doth, or might descend to him from the Ancestor. As if a woman consent to a Ravisher, and have a daughter, and she enter by the Statute for the Forfeiture; now she shall be said to be in by Purchase: And therefore a son born after shall never divest this out of the daughter, *Co. 1. 93. 98. 5 Ed. 4. 6.* See *Infant.*

2. So if a Remainder be limited to the right Heir of *J. S.* and he die having a Daughter; the Daughter is in nature of a Purchasor, and not by Descent; and therefore the Son born after shall never have it from her, *Co. upon Littleton, f. 164.*

3. So if a power of Entry for a Condition broken descend, and the Daughter enter for the breach of a Condition, and after the Son is born, the Son shall never have it; and yet here the Daughter shall be said to be in by Descent, especially in case where she doth pay the money to redeem Land conveyed away upon Condition. But if the Condition were broken in the life of the Ancestor, being to be performed by the Feoffee, &c. or it were performed by the Feoffor, and the Land descend; here the Daughter shall be in by Descent, and the Son born after shall have it, *Co. 1. 99. lib. Inst. par. 1. f. 76.*

4. Where by any Conveyance to the Ancestor, an Estate for years only is limited to him, the Remainder to another for life, the Remainder to the right Heirs of the Lessee for years; there the Heirs shall be said to be in as Purchasor. So if a Remainder for life be limited to the Heir in the singular number, there the Heir shall be said to take by Purchase for life: But where the Ancestor taketh an Estate of Freehold first, *contra.* And whether the Remainder be raised by way of Use, or by Act executed, it is all one. See *Crompt. Jurisd. in Courts of Wards, in toto. Co. 1. 104. & super Lit. 319.*

5. But in case where an Heir taketh any thing which might have vested in the Ancestor, although it do vest first in the Heir, and do never vest in the Ancestor, yet the Heir shall be said to be in in nature, course and degree of Descent, and not of Purchase; though not directly and to all purposes, as to take away the Entry of one that hath right, to have his Age, or be in Ward: As if a Fine be levied to *A.* in Fee, and he die before Execution, here his Heir shall be in by Descent. And therefore if there be an elder Son, and he die, his Wife with child, and the second Son enter, the Child of the eldest Son, after he is born, shall oust him and have the Land. So of a Recovery. So if one have a Seigniorship by Descent, and after the Tenancie escheat, and after a Son that is next Heir is born, he shall have the Tenancie, *Co. 1. 98. 106. Bro. Age 51. Co. lib. Inst. f. 22. 1 par. 37. 6.*

So if two exchange Land, and the one entreth, and the other dieth before his Entry, and then his Heir entreth (as he may) he is by way of Descent; and therefore if in that case a Son be born after, he shall oust the Daughter and Heir that entred before, *Perk* 57.

6. So if one do covenant with me, That when *J. S.* shall convey to him the Manor of *W.* he will stand seised of the Manor of *J. S.* to the use of me and my Heirs, and I die, and after *J. S.* convey to him the Manor of *W.* Now in this case my Heir shall be in this Land in nature of Descent, and not by Purchase, *Co. 1. 99.*

7. So if a Feme consent to a Ravisher, or a Remainder be limited to right Heirs as in the cases above: If he that should first enter die before Entry, and the younger Son enter, and after the Son of the elder Son is born, that Son shall enter for Heir, he shall be said to be in in nature of a Descent, *Co. 1. 99.*

8. Where the Estate is made by way of Limitation in the intent of the parties, there the Grantee shall never take it by way of Purchase; but rather then so, the Grant shall be void. As if one lease for life on Condition, that if the Lessor die without Heirs, the Lessee shall have the Land to him and his Heirs, and after the Lessee dieth, and then the Lessor dieth without Heir, the Lessee's Heir shall not have it, *Plow* 48.3.

9. Where an Ancestor by any Gift or Conveyance taketh an Estate of Franktenement to himself, and in the same Conveyance another Estate is limited mediately, or immediately to his Heirs in Fee or in Tail; in such cases [*his Heirs*] are words of Limitation, and he shall be in by Descent, not by Purchase.

Who is capable of a Purchase, and to be a Purchaser, and by what names, See *Disability and Grant.*

CHAP. CXXXII.

Of Purveyors.

Purveyors were such Officers as did take up and make provision for the Kings Household, Horses, Wars and Castles: And as touching what whom these things are briefly to be known.

1. That these Officers may take up that Provision for the Lord Protector's House and Horses, Wars, Castles, that is needful; within and without Liberties, and no more. *Stat. 27 H. 8. 24. 14 Ed. 3. 19. 9 H. 3. 19. 3 Ed. 1. 7. 14 Ed. 3. 19. 10 Ed. 3. 4.*

2. They must have, and shew their Commission, *Stat. 36 Ed. 3. 2. 28.*

3. They must not take without agreement with the Owners, *Stat. 28 Ed. 1. 2. 14 Ed. 3. 19.*

4. They must do this with all indifferencie and equality upon all men, and not spare some, *3 Ed. 1. 13. 28 H. 6. 2. 36 Ed. 3. 3.* But such persons as are excepted in the Statutes, *28 Ed. 3. 4. 3 Ed. 1. 14. 14 Ed. 3. 2. 1 R. 2. 3. 13 Eliz. 22. 2 & 3 P. & M. 15.*

5. They must measure Corn; and accept of reasonable measure, *4 Ed. 3. 3. 25 Ed. 3. 2. 36 Ed. 3. 3. 11 H. 7. 4. 1 H. 5. 10. 11 H. 6. 8.*

6. What they take, must be prized by the Constables; and four of the Town where they take up any thing, and set what price they please, *28 Ed. 3. 2. 5 Ed. 3. 2. 10 Ed. 3. 1. 25 Ed. 3. 2.*

7. They must make present payment for what they take, *9 H. 3. 19. 3 Ed. 3. 7. 3 Ed. 1. 31. 11 H. 7. 4. 1 H. 5. 10. 2 H. 4. 15. 20 H. 6. 8.*

8. They

8. They may not abuse any mans Goods, nor put any thing in their own purses, nor keep away their money, *Stat. 3 Ed. 3. 31. 25 Ed. 3. 6. 15. 9 H. 3. 11. 3 Ed. 1. 31. 28 H. 6. 2.*

9. If they take otherwise then their Commission is, it is Felony, *Stat. 36 Ed. 3. 2.* And how their Commissions must be, see *Stat. 2 & 3 P. & M. 6.*

10. If they abuse their authority, they may be resisted, *Stat. 14 Ed. 3. 19. 23 H. 6. 2.* Or sued by the parties grieved, *36 Ed. 3. 2.*

11. They cannot take Timber growing upon the Inheritance of a Subject, without his leave, no more then the Inheritance it self, *Co. 2 par. Inst. 35.*

CHAP. CXXXIII.

Of Quantity, Weights and Measures.

Quantity, what.

The kinds.

Self. 1.
Virgata terra
or *Yard-land*,
what.



Quantity is a certain measure, according to which any thing is said to be long, broad, or deep. And Measures (in consideration of Law) are either of Land, or of other things. And those things are either things which are measured by the Pint, Quart, &c. which are wet, as Oyl, Wine, and the like; or dry, as Whear, Apples, and the like: Or such as are measured by the Ell, Yard, &c.

A *Yard-land* (in Latine, *virgata terra*) is a quantity of Land called by this name; but no certain quantity: Nor is it all one in all places, (as some would have it) just twenty Acres in all Countries: For in some Countries it containeth twenty Acres, in some twenty four, in some thirty Acres, according to the estimation of the Country. And therefore it is, that a *Fine de Virgata terra* is void for incertainty, *Co. upon Lit. 69.*

Oxgang of Land
what.

An Oxgang of Land is not a certain quantity of Land, as fifteen Acres, whereof eight make a Plough-land; but it is a certain quantity of Land so called, and more or less according to the estimation of Countries, *Co. upon Lit. 69.*

Librata terra,
what.

Librata terra (as some say) containeth four Oxgangs, and every Oxgang thirteen Acres. Others say it is so much as is worth twenty shillings a year.

Hide of Land,
what.

A Hide of Land also is an uncertain quantity of Land by that name: Some men think it to be as much as may be plowed by one Plough in a year; others would have it a hundred Acres, and that eight Hides do make a Knights Fee. But it is to be reckoned according to the estimation of the Country.

Selson of Land,
what.

And so is a *Selson of Land* (in Latine, *Selioterra*) it sometimes signifieth an Acre, sometimes half an Acre, sometimes more, and sometimes less; and sometimes a Ridge, *Crompt. Jurisd. 222.* It cannot be demanded in a Fine, it is so uncertain.

Fardingdeal, or
Farrandel of
Land, what.
Obolata.

A *Fardingdeal of Land* seemeth to be the fourth part of an Acre, *Crompt. Jurisd. 220.*

Denariata.
Solidata.
Librata.

Furlong of
Land, what.

We read of *Obolata terre*, which some would have to be half an Acre. *Denariata*, an Acre. *Solidata*, twelve Acres: And *Librata* to be twelve score Acres, in proportion to the quantity of Money.

A *Furlong of Land* (called in Latine *Furlingus*) is a quantity of ground containing twenty, others say forty Lugs, Perches or Poles in length, and every Pole two hundred and seventeen Foot and a half; of which Furlongs, eight a mile. Others take it for the eight part of an Acre, *35 Ed. 2. 6.*

A Perch is used with us for a Rod or Pole of sixteen foot and a half in length, whereof forty in length and four in breadth make an Acre of ground: But by custom of some Countries it is eighteen in some, twenty one in some, twenty four, twenty five foot in some, and in some more, in some less, *Crompt. Jur.* 122. Some say it is a Rod of Land; and that a Rod of Land is ten Perches, the fourth part of an Acre, *Stat. 5 Eliz.* 5. 31 *Eliz.* 7.

The Acre of Land (as some say) is so much as may be plowed in one day with one Yoke of Oxen. But the ordinary Acre is forty Perches in length, and four in breadth; and according to this Measure must he lay his four Acres, that doth erect a Cottage, *Crompt. Jur.* 222.

Cark of Wooll, is a quantity thereof, whereof thirty make a Sarpler, 27 *H. 6.* 1. It is said by some, that a Load of Wooll is eighty Tods, each Tod two Stone, each Stone fourteen Pound: And that a Sack of Wooll in common account is equal with a Load, or twenty six Stone; and that a Sarpler or Pocket of Wooll is half a Sack; and that a Pack of Wooll is a Horse load, which consisteth of seventeen Stone two pounds: For a Stone of Wooll is fourteen pounds, but in some places it is more; and a Tod of Wooll is twenty eight pound in weight, or two Stone; and that a Sack of Wooll is twenty six Stone and fourteen pounds, *Stat. 11 H. 7.* ch. 4. 31 *Ed.* 3. 8.

It is said that all our *English* Measures are compounded of the Penny Sterling, which weigheth thirty two Corns of Wheat of the middle sort, and that two of those Pence make an Ounce, 12 Ounces a Pound in Weight, or sixty shillings in number; and that eight pound of Wheat maketh a (Jalon, or) Gallon, as it is now called, and eight Gallons a Bushel, four Bushels a Curnock, and eight Bushels a Quarter: And that fifteen Ounces of the quantity aforesaid do make a Merchants pound, and that twelve such Pounds and a half do make a Stone, and that fourteen Stone do make a Weight; and that two Weights, or twenty eight Stone make a Sack of Wooll, which ought to weigh a Quarter of Wheat; and that twelve Sacks make a Last of Wooll: So that a Weight and a Sarpler seemeth to be all one, and that a Load and a Sack is all one. But a Last of Herring is Ten thousand; a Last of Pitch or Tar, or Ashes, is fourteen Barrels; a Last of Hides or Skins, is twelve dozen of them; a Last of Corn is ten Quarters, *Stat. 31 Ed.* 3. *Stat.* 2. ch. 21. 31 *H. 8.* 14. 1 *Jac.* 33. 14 *Ed.* 3. ch. 22. *Flota.* l. 2. c. 12. *Crompt. Just. of Peace.* 83.

A Kintal or Quintal is a certain measure or weight of Wood, Iron, or such like thing or merchandise, to the value of a Hundred, or something under or over, according to the divers uses of sundry Nations.

A Clove is said to be the two and thirtieth part of a Weight of Cheese, (i.) eight pound, *Stat. 9 H.* 6. 8. And the weight of Cheese and Butter in some Countries is three hundred weight; after an hundred and twelve pound to the Hundred, which is three hundred thirty six pounds, or an hundred thirty six pounds of Averdepois weight.

Two Pints make a Quart, two Quarts make a Pottle, two Pottles make a Gallon; eight Gallons make a Firkin, sixteen Gallons make the Kilderkin, Half-barrel, or Rundle; four Firkins make a Barrel, two Barrels make a Hoghead, two Hogheads make a Pipe, wherein is a hundred twenty six Gallons; and two Pipes, which is two hundred fifty two Gallons, make a Tun. A Tersle or Tierse is but the sixth part of a Tun, or third part of a Pipe. But Honey hath in the Kilderkin sixteen, in the Barrel thirty two Wine-gallons: And some things are otherwise measured. See the Statutes for the things in particular.

Of Pounds are made Pecks, of Pecks Bushels, of Bushels Coombs or Curnocks, and four Pecks the Bushel, four Bushels the Coomb or Curnock, eight Bushels the Quarter, which is two Curnocks; the Quarter is eight Bushels: The Weight.

The Bushel must be eight Gallons, or sixty four pounds or pints of Wheat, *Stat. 1 R.* 3. ch. 13. Water-measure: Sold within Ship-board, must be five pecks. The Bushel doth differ in many places. The Rents and Farms of Lords must be as they have been.

As to all these things, this is to be known.

1. That

A Perch, what.
Rod.
Pole.

Road of Land,
what.

Acre of Land,
what.

Sett. 2.
Cark of Wooll,
what.
Tod of Wooll.
Sack of Wooll.
Stone of Wooll.
Sarpler or
Pocket of Wooll.

Ounce.
Pound.
Bushel.
Galon.
Curnock.

Sett. 3.
Kintal or
Quintal, what.
Clove, what.

Pint.
Quart.
Pottle.
Galon.
Firkin.
Kilderkin.
Barrel.
Hoghead.
Pipe.
Tun.
Tierse.
Pound.
Peck.
Bushel.
Curnock.
Quarter.
Weight.

Receipt seemeth to be an Admission of a Third person to plead his right in a Cause formerly commenced between two others. As for example: If a Tenant for Term of life or years bring an Action about the Land, and in this he in Reversion doth come in Court and prayeth to be revived, to defend the Land and to plead with the Demandant; this word is applied to an Admittance of a Plea, though the Controversie be but between two only. *Bro. Resc. 205. Dower 448.*

See for this the Statutes, *Stat. Glouc.* 11. *Stat. de Defensione Juris.* 13 R. 2. 17: 14 Ed. 1. 3.

CHAP. CXXXIV.

Of Records.

Records are authentical and uncontrollable Writings, which are of that high and sacred nature, credit and authority in the Judgment of Law, that they or any thing contained in them cannot be apparently or directly gainsaid or denied; neither have they need of any proof, for they prove themselves, and must be tryed only by themselves, and are the best Evidences to prove any thing for others, that can be; and it is a proof before the proof of Witnesses. And though they do contain apparent falshood, and tend to the mischief and overthrow of any person, yet they are not to be denied: And therefore no Averment lieth against them, as to say they were made at any other time then they bear date. And hence it is, that if one be certified in the *Exchequer* to be outlawed, he may not deny it, nor hath he any remedy but to reverse it. And hence it is, that to raise or impeach them is so great an offence, as Felony. (See *Crown*.)

If a man have occasion to use a Record, he may have a Copy or Transcript of it, or he may have it exemplified under the Great Seal. For if a man will plead a Record in another Court then that wherein it doth remain, and it be denied, and no such Record be pleaded to it where an Action is brought upon it, or it be pleaded in bar of an Action; there he that is against the Record, may demand Oyer, that is, sight of the Record; and then the other party shall have day to bring the same into the Court. And if then he bring it nor, this shall be said to be a Failer of the Record, and Judgment shall be given against him. It must therefore be exemplified under the Great Seal, and then it must be sent into the *Chancery* by *Certiorari*, and so brought into the Court where it is denied: And an Exemplification under the Seal of the same Court wherein it is, is not sufficient, if the Record it self be denied: But if something in it only be denied, it may be good enough to give in Evidence to a Jury. And so also a true Copy of it being proved by Witnesses, is sufficient to give in Evidence to a Jury.

For *Constat* and *Inspecimus*, see *Co.* 5. 52. And for all the rest, *Co.* upon *Lit.* 225. 453. 72. 10. 92. 5. 53. upon *Lit.* 218. 280. *Plow.* 434. 493. *Crompton* 79. 66. 21 *H.* 7. 9. 8 *H.* 6. 12. 13 *Eliz.* 6. 34. 34 *H.* 6. 14. 1 & 2 *P. & M.* 13. 8 *R.* 2. 4. See *Patent*. *Co.* upon *Lit.* 260. For the Removing, and Amendment of a Record, see *Remover* and *Amendment*. For Exemplification, see *Stat.* 3. 4 *Ed.* 6. 4. 13 *Eliz.* 6. *Vacat* of a Record, see *Crompton* 79. 31. Where to find a Record, see *Record*. *Stat.* 9 *Ed.* 3. 5.

Receipt, whar.

Sec. 1.
Records, what.

**Evidence.
Proof.**

Avertissement.

Refuse.
Imbefilling of
a Record.

Transcript of a
Record, what.
Exemplification
of a Record.
Nul tiel Record,
what.
Oyer de Record,
what.
Failer de Re-
cord, what.
Cenciary.

Evidence.

Conflict & in-
proximities.

Nnnnn

CHAP.

CHAP. CXXXV.

Of a Common-Recovery.

Sec. 1.
Common-
Recovery,
what.



Recovery in general, is the obtaining of any thing unjustly taken or detained by Judgment or Trial of Law. And it is either a Common-Recovery, which is such a Recovery as is used for a Common Assurance of Land; or other Recovery, which is not used as an Assurance of Land. And the Common-Recovery that is used for the Assurance of Land, is nothing else but *fictio juris*, or a certain form or course set down by Law to be observed, for the better assuring of Lands and Tenements to men. And this is somewhat after the example of the Recovery upon Title, which is without consent, and contrary to the will of him against whom the same is had: For there is in this a colourable Suit, wherein there is a Demandant, which is called the Recoverer; and a Tenant, which is called the Recoveree; and one that is called to warrant upon a supposed Warranty, which is called the Vouchee, *Co. on Lit. 154. 23 Eliz. ch. 3. Doff. & St. 41. W. 8. Syn. Recovery.*

Recoverer,
Recoveree,
Vouchee.

2. The kinds.

The Common-Recovery is sometimes with a single Voucher, which is when the Writ is brought against him that is to pass the Land immediately, and he doth vouch over the Common Vouchee. And sometimes it is with a double Voucher, which is when the Writ is brought against another to whom he that is to pass the Land hath aliened it, and he doth vouch him that is to make the Assurance, and he doth vouch over the Common Vouchee: And this is the surest way, and the safest kinde of Recovery.

3. The manner and order of suffering a Common-Recovery.

In this formality of a Common-Recovery, the course is, That by agreement of the parties, a real Action is begun by a Writ of Entry, brought by him that is to have the Land assured against him that is to make the same Assurance, if it be with a single Voucher, or if it be with a double Voucher, against him to whom he that is to make the Assurance hath aliened the Land. And in this Suit, the Recoverer that doth bring the Action, doth surmise that the Tenant against whom the Writ is brought hath no right to the Land, but that the Recoverer hath right thereunto, and the Tenant came to it from such a stranger whom the Demandant doth name. And to this the Tenant doth appear in person, or by an Attorney, and then doth enter into defence of the Land: But in pleading doth vouch to Warranty, (i.) doth alleadg that he bought the Land of *J. S.* a stranger, who in the Conveyance thereof bound himself and his Heirs to warrant and make good the Title to him or them to whom it is conveyed: And thereupon he prayeth that *J. S.* may be called in to defend the Title; and then he is allowed by the Court to call in *J. S.* to say what he can for the justifying of his right to the Land before he so conveyed it: And hereupon *J. S.* doth appear, and make shew as if he would defend the Title, but doth pray a further day may be assigned to him to make his defence; which being granted him by the Court, at the day appointed, he by agreement, Covin, and assent of the parties doth not come in, but make default: And thereupon the Land is to be recovered by him that brought the Writ against the Tenant, and he is left for his remedy to *J. S.* upon his Warranty; and accordingly Judgment is given by the Court, That the Demandant or Recoverer shall recover the Land demanded against the Tenant, and that the Tenant shall recover so much Land of *J. S.* of his own Land in recompence for the Land recovered from him, which he ought to have warranted and defended, but suffered to be lost. And this Recovery over, is called a Recovery in Value, or *pro rata*: But if the Recovery be with a double Voucher, or a treble Voucher, *J. S.* is upon his appearance to call or vouch to warrant *J. D.* and to alleadg in the same manner as the Tenant doth, and to pray that *J. D.* may come in, and thereupon *J. D.* doth come in and appear, and make default. And so if there be

Recovery in
value, or *pro
rata*, what.

more

more Vouchers; and then there must be several Recoveries over in value against every one of them: But he that is the last Vouchee, is always the Common Voucher, who is one of the Cryers of the Court of *Common-Pleas*; a man not worth any thing, and one that hath no Land to render in value upon the supposed Warranty. And by his Devise, grounded upon the strict Principles of Law, the first Tenant doth willingly let go the Land for the assurance of the Purchaser, and yet in truth hath no recompence over, because the Vouchee hath no Land to render in value. And by this means, if one hath an Estate-tail in Lands which he is desirous to sell, or to convert into an Estate in Fee-simple, the same is commonly done: For the Tenant in Tail doth cause the Purchaser, or some friend of his, to bring a Writ of Entry against him for this Land, and he appeareth to the Writ, and in pleading saith, That the Land came to him or his Ancestors from such a man or his Ancestors, who in the Conveyance bound themselves to warrant it: And thereupon that man is called in, who doth appear and make default, and thereupon Judgment is had against him in manner as aforesaid. Or if he would have the Recovery with a double Voucher, then doth he by Fine, Feoffment, or Deed of Bargain and Sale inrolled, discontinue the Land; and then cause the Recoverer that is to have the Land, to bring his Writ of Entry against the Discontinuee, and he doth vouch the Tenant in Tail, who doth vouch over the Common Vouchee; and so it is done: And by this the Estate-tail that the Tenant in Tail hath or had, is barred and bound, for that it appeareth now he had no power to entail the Land whereunto he had no just title; and besides he shall recover a recompence in value, and this is adjudged in Law to go in succession of Estate, as the Land should have done: Which is the reason why the Recovery is a Bar to all that are in Remainder and Reversion, as well as to the Issues in Tail. *Co. l. 94. 10. 43. 45. F.N.B. 1:4. Co. 9. 6.*

And in the suffering of these Recoveries, the Tenants and Vouches do appear most commonly in person in Court, and so the Recovery is finished in Court presently without more doing. But sometimes they will not, or cannot appear in person; and then they do use to appear and suffer the Recovery by Attorney: And in this case there must be a Consuance for a Warrant of Attorney taken, to authorize the Attorney or Attorneys in this manner, if it be for a treble Voucher.

Warrant of Attorney.

Glouc. ff. *Command A.S. and B his wife, that justly &c. they render to C. D. the Manor of N. with the appurtenances &c. which he claimeth to be his right and inheritance, and in which the same A.B. hath not ingress, unless after the Disseisin which H.H. unjustly and without Judgment made to the aforesaid C. within thirty years now last past, &c. as is said &c.*

Glouc. ff. *A. S. and B. put in their place W.W. and R.R. their Attornies jointly and severally against C. D. of a Plea of Land, &c.*

Glouc. ff. *M.M. Gent. whom A.S. and B. called to warrant, put in his place J.J. and L.L. his Attornies jointly and severally against C.D. of a Plea of Land.*

Glouc. ff. *G.W. Gent. whom M.M. called to warrant, put in his place R.G. and R.S. his Attornies jointly and severally against C.D. of a Plea of Land.*

And in these cases to make two Attornies at the least, and to give them an authority jointly and severally, that if one of them die before the Recovery be suffered, the other may have power to do and dispatch it. And these Warrants of Attorney for the suffering of Recoveries, are to be acknowledged and certified in the same manner as the Consuances of Fines acknowledged in the Country are; save only that Recognisances for Warrants of Attorney for Recoveries may be taken by any Judge of the Court of Common-Pleas, or any Serjeant at Law, without a *Dedimus potestatem*: But if any others take it, they use to do it by a special *Dedimus potestatem*; which is to command the Commissioners therein named, to come to such persons; and to take the names of their Attorney or Attornies in the Suit, and to certify the same into the Chancery under their Seals such a day. And if there be any Woman-covert that is to make the Consuance, it seems she is to be examined as in the case of the Consuance of a Fine. And when this is done, the Recovery may be suffered by the Attornies, without the personal appearance of the parties.

Dedimus potestatem.

Examination.

And this is as good a Recovery as the other which is suffered by the persons themselves appearing in Court, but that it will require longer time for the perfection of it: For in this case there must go forth a *Summons ad Warrant*, which must have nine Retorns ere the Recovery can be perfected, and by that time one of the parties may be dead.

*Habere facias
Seisinam.*

And when the Recovery is thus suffered by the parties in person, or by their Attornies, the same is to be entred by one of the Clerks of the Common-Pleas, upon the Rolls of the same Court, there to remain upon record. And herein there must go forth a Writ of Execution, called *Habere facias Seisinam*; which is sent to the Sheriff of the County where the Land doth lie, to put the Recoverer in possession of the Land, (except the Recovery be of a Reversion of Land after a Lease for years of it, in which case the Reversion shall be in the Recoverers by a Claim without any Writ.) And this Writ the Sheriff doth return as executed according to the Contents thereof, albeit in truth he never do any thing upon it. And after this, all the same Proceedings is to be exemplified by the Clerk of the same Court; *Co. 10. 43. Co. 1. 94.*

4. The use, nature, and operation of it.

*Forfeiture.
Averment.
Covin.*

A Recovery being matter of Record, is much of the nature of a Fine, and such a thing whereof the Law taketh notice: For it is now become a formal and orderly manner of Assurance of Lands, and one of the Common Assurances of the Kingdom, or a common way and means to pass Lands from one to another. And therefore if a Tenant for life suffer such a Recovery of his Land, it is a Forfeiture of his Estate; an Use may be averred upon it as well as upon a Fine, and it may be avoided for Covin as well as any kind of Conveyance else. But it is of special use, and hath a special vertue to bar and bind Estates in Tail, and all the Remainders and Reversions thereupon. And because many of the Inheritances of the Kingdom do depend upon this Assurance, and it is oft-times the greatest Assurance Purchasers have for their money, therefore it hath much favour from the Law at this day: And therefore the Law will not endure it shall be disputed against; for, *Communis Error facit Jus*. And hence it is that it shall not be avoided for small Errors: For it is another Rule of Law, *Consensus tollit Errorem*. And if a Recovery be suffered by a Tenant in Tail, hereby he hath not only discontinued, barred, and discharged the Estate-tail, and so defeated himself and his Issues the former owner of the Land, and all the Remainders and Reversions thereupon that should take place after the Estate-tail, whether they be in *esse*, or contingent only; but also all former Estates, Leases and Charges made by him in remainder or reversion. For as when the Estate-tail in possession is not barred by a Recovery, the Estates in reversion or remainder are not barred; for, *Quod non in magis propinquo, non in magis remoto valebit*: So it is *et converso*, where the Estate-tail in possession is barred by the Recovery, all the Remainder, and the Reversions, Conditions, Charges, Incumbrances, and Estates dependent upon it are barred also, except it be in some special cases where the Remainder or Reversion was in the King. And therefore if *A.* be Tenant in Tail, the Remainder to *B.* in Tail, the Remainder to *C.* in Fee; and *B.* or *C.* doth make a Lease for years of the Land, or grant a Rent-charge out of the Land, or enter into a Statute, or the like, or grant the Remainder or Reversion upon Condition, and after *A.* doth suffer a Common-recovery of the Land, and after dieth without issue; in this case the Recoverer shall hold the Lands discharged of all these Estates and Charges in Remainder. But otherwise it is if *A.* himself make a Lease, or enter into a Statute, and then suffer a Common-recovery of the Land; in this case this Recovery doth not avoid, but affirmeth the Lease or Charge: For whereas it was before voidable by the Issue in Tail, or him in Remainder or Reversion; now it is good against them all, and the Recoverer also shall hold it charged and subject to the Lease and Charge of the Tenant in Tail.

This kind of an Assurance therefore is in some respects better than a Fine: For, a Fine will bar the Heir in Tail, but not him that is in Remainder or Reversion; but a Recovery will bar them all. *Co. 5. 41. 10. 37. 39. 3. 5. 6. 41. 42. D. & S. 41. 49. 50. Stat. 13 Eliz. ch. 5. 23. ch. 3. St. 7 H. 8. ch. 4. Co. 1. 62. 25. 44 Ed. 3. ch. 22.*

In

In every good and binding Common-recovery, these things are requisite.

1. That there be a Demandant, a Tenant, and Vouchee, as the efficient causes thereof; for if either of these be wanting; it is not a compleat Recovery. And therefore if a Common-recovery be had against a Tenant in tail without a Voucher, this is void. And for this it is to be known, that such persons, and by such names may be Demandants, Tenants, and Vouchees in Recoveries, as may be Cognizors and Cognizees in Fines. And therefore a Recovery suffered by an Infant appearing by his Guardian, is good, and will bind him and all others. So also a Recovery had against a Woman that hath a Husband, being joyned with her Husband, will bind her and all others.

2. That there be Land demanded as the matter, and that the thing be demandable. And for this it is to be known, that of such things, and by such names as a Writ of Covenant for the levying of a Fine may be had, a Writ of Entry for the suffering of a Recovery may be had, save only it may not be of a Trench, of a standing Pool, one Load of Land, of Estovers, Homage, Fealty, Services to be done, of an Organge of Wood, of Felons Land, of a Garden, Cottage, Croft, a Yard-land, a Quar of Minerals, a Market, neither of an Upper-Cockloft. And yet of some of these also it may be by other names. Also a Recovery may be had of a Rent, Common, Advowson, Franchises, and the like, but not of an Annuity.

3. That it be had and suffered in that order and form as Law requireth, viz. That there be a Writ of Entry brought, an appearance of the Tenant in fact, a Voucher, and an appearance of the Tenant in Law, the Vouchee, Judgment and Execution, in manner as aforesaid: For if there be any substantial defect in these things, the Recovery may be thereby avoided by Writ of Error; but if it be only in form, it will not hurt.

4. That there be a lawful Tenant to the *Precipe*, (i.) That the Writ of Entry be brought against one that at the time of the Writ brought is Tenant of the Freehold, either by right, (i.) that hath an Estate for life, at least in the Land; or by wrong, (i.) that is a Disseisor of the Land demanded, and whereof the Recovery is had. And therefore in this case the course is, where the Land to be recovered is in possession, and a Fine and Recovery is had of it together, the Fine is sued out first; for this doth make the Cognisee Tenant of the Freehold of the Land, and the Recovery is had against him. And when the Recovery is to be had of a Reversion, and that there is an Estate for life in being of the Land whereof the Recovery is to be had, (For an Estate for years, or any such like Estate will not hinder the suffering of a Recovery) there the course is, to get a Conditional Surrender from the Tenant for life, of his Estate to him in Reversion or Remainder, to the end that he may be perfect Tenant of the Inheritance; and then the Writ of Entry may be brought, and the Recovery had against him: For if a Writ of Entry be brought against the stranger, and he vouch the Tenant in tail in possession of the Land, and so a Recovery is had; or if there be Tenant for life of Land, the Remainder or Reversion to another in tail or in fee, and a stranger doth bring a Writ of Entry against him in the Remainder or Reversion, or against a stranger who doth vouch him, and so a Recovery is had; these Recoveries are not good. And yet if the Writ be brought against the Tenant of the Land, and a stranger that hath nothing in the Land together, and so a Recovery be had; this Recovery is good enough. And if a Disseisor make a Gift in tail of the Land to another, and the Writ is brought against him, and he vouch the Disseisee, and he vouch the Common Vouchee; this is a good Recovery. *Dyer 252. Co. on Lit. 46. 3. 6. Co. 316. On Lit. 46. Lit. Br. fol. 519. Plow. 514. D. & S. 49. See infra.*

5. That it be in such a case as is not prohibited by some Statute-Law; for if the King give any of his own Land whereof he is seised, or cause or procure another in consideration of money or other Land, to give the Land whereof he is seised in tail to any of his Subjects or Servants, in recompence of their service, or the like, the Remainder to the King in Fee-simple or Fee-tail, such Estates in tail cannot be barred by a Common-recovery. And therefore if such a Tenant in tail shall suffer a Recovery of such Lands, it is void, and it will neither bar the Issues in Tail, nor any of them in Remainder, nor the King. *34 H. 8. 20. Co. on Lit. 371. 2. 5. 16. Co. 8. 77. 78.*

But

5. What shall be said a good Common-recovery, and who shall be barred and bound thereby, or not.

Self. 1.
Infant.
Woman-covey.

Self. 2.

Prerogative.

But if the King make such a Gift in Tail, keeping the Reversion to himself, and after doth grant the Reversion to another; in this case the Tenant in Tail may suffer a Recovery, and bar the Estate-tail, and the Reversion also. And where a Subject by the Kings provision doth make such a Gift in Tail, and then doth grant the Remainder to the King for life or years only; in this case the Estate-tail, Remainders, and Reversions also may be barred by a Common-Recovery. So in other cases where a Subject doth make a Gift in Tail, the Remainder to the King in Fee; this Estate-tail may be barred by a Common Recovery. And therefore if there be Tenant in Tail, the Remainder or Reversion in Fee to another, and he in Remainder or Reversion by Deed indented and enrolled doth bargain and sell his Remainder or Reversion in Fee to the King; or if one covenant to stand seised to divers Uses in Tail, the Remainder to the King in Fee; in these cases the Estates, and the Reversion and Remainders depending thereupon, may be barred by a Common-Recovery.

So if a man make a Gift in Tail, the Remainder in Fee, and he in the Remainder doth grant his Remainder to another for life, the Remainder in Fee to the King on Condition the Estate shall be void upon the tender of Twenty pounds; in this case the Estate-tail, and the Reversion also and Condition thereupon may be barred. So if the Duke of Lancaster had made a Gift in Tail, and the Reversion had descended to the King; this Estate-tail might have been barred by a Recovery. So if Prince Henry son of H. 7. had made a Gift in Tail, the Remainder to H. 7. in Fee, which Remainder by the death of H. 7. had descended to H. 8. in this case the Tenant in Tail might have barred the Estate-tail by a Recovery. And yet if the King had made a Gift in Tail, the Remainder in Tail, or grant the Reversion in Tail; in these cases a Common-Recovery might not have been suffered to bar the Estate-tail, Remainder, or Reversion.

And if the Husband, for the advancement of his wife in Jointure, and the preferment of the Heirs of their two bodies, make an Estate in Tail to him and his Wife, and the Heirs of their two bodies; and the Wife after her Husbonds death, alone by herself or any other Husband suffer a Common-Recovery of the Land whereof this Estate is made; this Recovery will not bar the Estate-tail, *Stat. 11 H. 7. c. 10. Co. 3. 58. 61. 59.* But if in this case the Recovery be suffered by the Heir in Tail, or by the Heir in Tail and his Mother together, it is a good Recovery. And therefore if A. be seised of Land in Fee, and he make a Feoffment in Fee to the intent that the Feoffee shall reconvey it to him and his wife, and the Heirs-males of his body; and this is done accordingly, and they have issue a Son, and she surrenders or make a Forfeiture; and he enter and suffer a Recovery; this is a good Recovery and Bar to the Estate-tail. Or if the Writ be brought against the Mother, and she vouch the Heir in Tail; and so a Recovery is had, this Recovery will bar the Estate-tail. And howsoever at the Common-Law, a Recovery against the Tenant for life, with a Voucher upon a lawful Warranty and a Recovery in value, was a Bar to him in Remainder or Reversion, and there was no remedy in this case; yet at this day it is otherwise, *Stat. 14 Edw. 2. ch. 8. Co. 15. 62. 10. 43. 45. 3. 6.*

Self. 2.

Forfeiture.

And therefore if Tenant in Tail after possibility of Issue extinct, Tenant by the Courtesie, or any other Tenant for life, do suffer their Lands to be recovered from them by Coxin and Agreement, either as immediate Tenants, or as Vouchers upon feigned Titles, without the consent and to the prejudice of him in Remainder or Reversion: such Recoveries are void, and will not bar the Remainders or Reversions, but are Forfeitures of the Estates of such Tenants for life. Inasmuch that if a Tenant for life be made Tenant in fact to the Writ, or Tenant in Law upon the Voucher, and so a Recovery be had; as if Tenant for life make a Lease for years, and the Lessor for years doth make a Feoffment in Fee, and the Feoffee doth suffer a Common-Recovery, in which the Tenant for life is vouched, and he vouch the Common Vouchee; these Recoveries will not bind the Reversions or Remainders. But there is no provision made at this day to preserve the Reversion or Remainder expectant upon an Estate-tail; nor to avoid a Recovery of a Tenant for life, where he in the next Remainder is agreeing and assenting to it.

And

And therefore if there be Tenant for life, the Remainder to *A.* in Tail to *B.* in Tail, &c. with divers Remainders over, and the Tenant for life doth suffer a Common Recovery, in which he doth vouch *A.* who doth vouch the Common Vouchée; in this case this is a good Recovery, and doth bar the Estate-tail, the Remainders, and Reversions also. And if one be seised of Land in Fee, and have two Sons, *A.* by his first wife, and *B.* and a Daughter by his second wife, and he devise the Land to his wife for her life, the Remainder to *B.* his Son in Tail, and the Reversion of the Fee descend to *A.* and the Writ of Entry is brought against the Tenant for life, and he vouch *B.* and he doth vouch the Common Vouchée, and so a Recovery is had without the consent of the Heir in Reversion, this is a good Recovery, and a Bar to all the Estates in possession, Remainder and Reversion. And if a Writ of Entry be brought against the Tenant for life, and he make default; after default, and the next in Remainder in Tail is received, or he pray in aid of him in Reversion or Remainder, and then they vouch over, and so a Recovery is had; this is a good Recovery, and a Bar to all the Estates in Remainder and Reversion. But if the Writ of Entry be brought against the Tenant for life, and him in the Remainder in Tail together, and they vouch the Common Vouchée, and so a Recovery is had; this will be no good Recovery to bar the Estate-tail. And if Spiritual persons, as Bishops, Deans, Parsons, and such like suffer a Recovery of their Ecclesiastical lands, such a Recovery is void, and will not bind the Successors.

Sed. 4.

But if it be not in some such prohibited case as before, and the Recovery be had by and between such persons, and of such things, and in such a manner as aforesaid, in such cases albeit there be in truth no Warranty made upon which the Vouchée is had, and albeit there be nothing to be recovered in value, for that the Vouchée hath no Land to recover over in recompence, and albeit that no Execution be done in the life-time of the party against whom the Recovery is had, yet is the same regularly a perpetual Bar to the parties against whom the same is had, and their Heirs, of all the Estates they have in Fee-simple, Fee-tail, or for life in them, and against them in Remainder or Reversion, and their Remainders and Reversions that are depending upon the Estates: with this difference. The Recovery with the single Vouchée doth not bar any Estate but such as the Tenant in Tail hath, at the time of the Recovery had, in possession: So that if the Tenant in Tail be in of any other Estate, as by Disseisin, or the Conveyance of the Disseisor, or the like, this Estate is not barred. But the Recovery with the double Vouchée doth bind and bar all Interests, Estates and Titles, that the Vouchée hath at the time of the Entry into the Warranty. All which is further illustrated by the Examples following:

Co. on Lit. 44.
Plow. Maxwells
Case.Co. 10. 372. 1.
94. Plow. 357.Co. 3. 59.
Lit. Br. jell. 38.
12 Ed. 4. 13.
13 Ed. 4. 1.

If the Writ of Entry be brought against the Tenant in tail, and he vouch the Common Vouchée, and so a Recovery is had; this Recovery with single Vouchée is a good Recovery, and Bar to the Estate-tail, if it be then in possession, and not put to a right, and to all the Remainders and Reversions depending thereupon.

Ca. 3. 10. 37.

So if Lands be given to *A.* in Tail, the Remainder to the right Heirs of *B.* (*B.* being then alive) and the Writ of Entry is brought against the Tenant in Tail, and he doth vouch over the Common Vouchée; this is a good Recovery, and a Bar to the Estate-tail, and the Remainder also. But if the Tenant in Tail be disseised, and then suffer a Recovery with a single Vouchée; or the Disseisor make a new Estate in Tail to the Tenant in Tail, and then the Tenant in Tail doth suffer a Recovery with a single Vouchée; or if the Tenant in Tail make a Feoffment in Fee of Land, and then take back a new Estate to himself from the Discontinuee in Tail or in Fee, and then doth suffer a Recovery with a single Vouchée: By this Recovery the Estate is not barred; but by a Recovery with a double Vouchée, in these cases, the Estate-tail is barred. And therefore as where the Tenant in Tail doth levy a Fine, make a Feoffment, or bargain and sell the Land by Deed indented and enrolled, and the Writ is brought against the Conuisee, Feoffee, or Bargainee, and he doth vouch the Tenant in Tail, and he doth vouch the Common Vouchée; this doth bar the Estate-tail, and the Remainders and Reversions depending thereupon.

Co. 1. 135. 136.
3. 59.
12 Ed. 4. 19.
13 Ed. 4.
Co. 10. 45.

So

Co. 3. 5. *Flow.*
in *Mauzels*
Case, 1. 8.

So if in these cases the Conusee, Feoffee or Bargainee doth make a new Estate in Tail to the Conusor, Feoffor or Bargainor, or he disseise the Conusee, Feoffee, or Bargainee, and then levy a Fine, make a Feoffment or Bargain, and sell to another against whom the Writ of Entry is brought, and he vouch the Tenant in Tail, and he doth vouch the Common Vouchee; by this Recovery the first and second Estate-tail, and all the Remainders and Reversions depending thereupon are barred. So if Lands be given to *J. S.* and the Heirs-males of the body of his wife engendered, and he hath issue a Son, and after his wife dieth, and he discontinue and take an Estate to him and the Heirs-females of the body of his second wife, and after discontinue again, and after take an Estate to him and the Heirs-females of his own body, and after discontinue again, and the Writ of Entry is brought against the last Discontinuee, and he doth vouch the Tenant in Tail, who doth enter into the Warranty generally, and voucheth the Common Vouchee; this is a good Recovery, and Bar to all the Estates in Tail, and to all the Remainders and Reversions also. And if *A.* before the Statute of Uses, had been Tenant in Tail, and had made a Feoffment in Fee to *B.* and he and *B.* had after made a Feoffment to *C.* to the use of *A.* and his wife, and the Heirs of their two bodies, and then she had died, and after *A.* had entered upon *C.* the Feoffee, and made a Feoffment to *W.* in Fee, against whom *J. S.* had brought a Writ of Entry, and he had vouched *A.* the Tenant in Tail; this had been a good Recovery, and a Bar to all the Estates. And if Lands be given to husband and wife, and the heirs of the body of the husband, with Remainders over to strangers, and the husband alone doth discontinue; the whole Land by Fine, Feoffment, or Bargain and sale, by Deed indented and enrolled, and the Writ of Entry is brought against the Discontinuee, and he doth vouch the husband alone without the wife, and the husband doth vouch the Common Vouchee, and so a Recovery is had; this is a good Recovery for the whole Land, and a Bar to all the Estates in Tail and Remainder, and Reversion, but not to the Estate of the wife for her life after the husband's death. But if Lands be given to the husband and wife, and the heirs of their two bodies, with Remainders over to strangers, and the husband alone discontinue, and the Recovery is suffered as in the last case; it seems this is no Bar to the Estates in Tail or Remainder, or Reversion for any part of the Land.

Co. 3. 5. 6. 32.

Husband and
Wife

Lit. Brown. 37.

And yet if Lands be given to *J. S.* and *J. D.* in Tail, and *J. S.* discontinue the whole, and the Writ of Entry is brought against the Discontinuee, and he vouch *J. S.* alone, this is a good Recovery for the one half of the Land, and a Bar to all the Estates. And if Lands be given as before unto husband and wife, and the heirs of their two bodies, and the Writ of Entry is brought against them both, and they vouch the Common Vouchee; or the husband alone doth discontinue, and he vouch the husband and wife both, and they enter into the Warranty, and vouch the Common Vouchee, and so the Recovery is had; these are good Recoveries for the whole, and a Bar to all the Estates in Tail, and to the Estate of the Woman, and to all other Estates. And where Lands are given to a man and his wife, and the heirs of the body of the wife, or to the wife and the heirs of her body, and the Writ of Entry is brought against the husband and wife, and they vouch the Common Vouchee; these are good Recoveries, and will bar the husbands and wives, and the Estates in Tail, Remainder and Reversion.

Sett. 3.
Flow. 514.

And where a man hath Land in which his wife hath a Jointure, or to which she will have title of Dower after his death; if the Writ of Entry in this case be brought against them both, and they vouch the Common Vouchee, and so a Recovery is had; this Recovery will bar them both; but the husband alone, without her, cannot bar her of any such Estate by a Recovery, for she may falsifie and avoid it after his death. And if Lands be given to husband and wife, and the heirs of the body of the husband, and the Writ of Entry be brought against the husband alone, and he vouch the Common Vouchee, and so a Recovery is had with a single Voucher; this is no good Recovery for any part of the Land, nor Bar to any of the Estates, albeit the husband do survive the wife.

Co. 3. 5. 1
12 Ed. 4. 14.
Co. 3. 6.

And

And yet if the Lands be given to two others, and the Heirs of the Body of one of them, the Remainder over to a stranger, and the Writ of Entry is brought against one of them; and he vouch the common Vouchee, and so a Recovery is had; this is a good Recovery, and a Bar to all the Estates for the one half of the Land.

If Land be given to *A.* in Tail, the Remainder to *B.* in Tail, the Remainder to *C.* in Tail, the Remainder to *D.* in Fee, and *A.* doth make a Feoffment in Fee, and the Writ of Entry is brought against the Feoffee, and he doth vouch *B.* (being him in the second Remainder in Tail) to Warranty, and he doth vouch the common Vouchee; this is a good Recovery, and a Bar to the second Estate-tail; and all the Remainders and Reversions depending thereupon; and yet it is no Bar of the first Estate-tail which *A.* hath.

If the Writ of Entry be brought against a Mortgagee, and he doth vouch the common Vouchee, and so a Recovery is had; this is no good Recovery to Bar, or bind the Mortgagor, but that he may enter upon the Condition broken. *Curia, Mich. 18 Jac. B.R.* So was it held by most of the Judges in the case between *Pell and Brown.*

So if one give Lands to *B.* and his Heirs, so long as *C.* shall have Heirs of his Body, and *B.* doth suffer a common Recovery, and vouch the common Vouchee; this is no good Recovery to Bar the Donor of the possibility: For in both these cases, he that is to be barred, hath no Remainder or Reversion, but an interest or possibility which cannot receive a recompence in value.

But if in these cases the Mortgagee vouch to Warranty the Mortgagor, or *B.* the Donee vouch the Donor, and so they Vouch over the common Vouchee, and so the Recovery is had; these will be good Recoveries to Bar both them, and their Heirs for ever.

And if one have an Estate in Fee-simple, determinable on a Limitation, or a Condition, As if Lands be given to *A.* and his Heirs, until *B.* pay him one hundred pound, and then that it shall remain to *B.* and his Heirs; and *A.* in this case doth suffer a common Recovery, and vouch the common Vouchee. It seems this is no Bar to *B.* and his Heirs, but that upon payment of the one hundred pound, he shall have the Land.

So if one by his Will Devise his Land thus, I give unto *A.* my Son, and his Heirs for ever, my Land in *W.* paying twenty pound to *B.* when *A.* shall come to one and twenty years of age, and then to *A.* and his Heirs for ever; and if *A.* shall die without Heirs of his Body, *C.* being then living, that then *C.* shall have it to him, and his Heirs for ever; and *A.* pay the twenty pound to *B.* at his full age, and then suffer a Recovery of the Land; this is no Bar to *C.* of his Estate. *Co. 3. 5.*

But here it must be noted, that in the cases before where it is said, That a Recovery is void, it is meant as to the Heirs, and them in Reversion, and Remainders; for as to the parties themselves, that do suffer the Recovery, the same is for the most part good, and bindeth them by way of Estoppel and Conclusion.

And it must be noted also, That a stranger that hath right to the Land at the time of the Recovery suffered, is not barred at all by the Recovery, or by his *Laches* of *Non-claim*, &c. as in the case of a *Fine*. See *Brownl. 1 part, 36. 193. 2 part. 171.*

The Recoverors in common Recoveries, their Heirs and Assigns, shall have the like Remedy against Lessees for lives and years of the Land recovered, their Executors or Assigns, by Distress, Avowry, Action of Debt, for the Rents and Services reserved upon their Leases, that shall be due after the same Recoveries had; and also like Actions of Waste done after the Recovery had; and like Remedy upon a disturbance in a Presentation to an Advowson, and in like manner and form, as the Lessor should, or might have had, if the same Recoveries had never been had, albeit the same Lessees do never Attorn to the same Recoverors. And if a man make a Lease for years to begin at *Michaelmas*, reserving Rent, and before *Michaelmas* he suffer a Recovery; in this case the Recoveror shall distrain for this Rent, which the Lessor before the Recovery, could not distrain for: But if the Recovery had not been had, he might have distrained. 7 H.8:4. *Dyer 31. Co. on Littl. 104.*

1. Sec. 6.

A Recovery may be defeated, frustrated, and avoided (which is called the falsifying of a Recovery) in part, or in all, for many causes; as for that, there is some gross and substantial Error in the manner of the proceedings. But the Recovery is not avoidable for False or Incongruous Latin, Rasure, Interlining, Misentring of any Warrant of Attorney, Misreturning or not Return of the Sheriff, or other want of Form in Words, and not in Matter of Substance, because it is done by the consent of the Parties. Or it may be avoided, for that he against whom the Writ of Entry is brought, is not Tenant of the Freehold, by right or wrong, at the time of the Writ brought. As when the Writ is brought against a stranger that hath nothing in the Land, and he doth vouch the Tenant in Tail in Possession of the Land. Or a Recovery may be avoided, for that he that hath the Estate, and the Right, is neither Party nor Privy to the Recovery. As when the Writ of Entry is brought against the Disseisor, and he vouch a stranger that hath nothing in the Land: Or a Recovery is had against the Husband alone of the Land, whereunto his Wife hath Title of Dower: Or a Recovery may be avoided, for that another hath some Estate, in the thing whereof the Recovery is had at the time of the Recovery suffered. As when there is a Recovery had of Land, whereof there is a Lease or Estate for years, by Statute, Elegit, or the like: Or it may be avoided, for that the Recovery is had by Coven, as when it is suffered by Tenant for life, to disinherit him in Reversion; or when it is gotten by some undue practise and sinister dealing, for in this case it is sometimes made void by a Vacat or Sentence of a Court.

And where a Recovery is avoidable or reversible, for any of these, or such other like causes, it must be avoided by him, whom it doth concern, that is barred and bound by the same Recovery that should have had the Land, if the same Recovery had not been, and not by any other whom it doth not concern. As if an Erroneous Recovery be suffered by Tenant in Tail; in this case his Issues, or if they fail, the next in Remainder or Reversion, shall defeat it:

So also if the Land be recovered against a stranger, the Tenant in Tail shall avoid it; and if, the Land be recovered against a Disseisor, the Disseisee shall avoid it: And if the Land be recovered against him in Reversion or Remainder, the Tenant for years, by Statute or Elegit, shall avoid it: But in these last cases, they shall falsify and avoid it, during their particular Estates onely.

So also the Wife shall falsify the Recovery suffered by her Husband alone, as to her Title of Dower onely, and no longer, or further. And he in the Reversion or Remainder, shall falsify and avoid the Recovery suffered by the Tenant for life, either in the life time of the Tenant, or afterwards. But neither he in Reversion or Remainder, or any one, by or under him, or any other, can falsify a Recovery suffered by the Tenant in Tail in Possession, except it be for some such causes as before. And the Recoveror himself cannot falsify a Recovery. So neither can a Guardian, or a Tenant of a Manor. As if one hold Land of a Manor, and a stranger recover the Manor by a feigned Title; a Tenant of the Manor cannot falsify this Recovery.

And in all these cases, where a Recovery is avoidable, and a man hath power given to falsify: He must do the same by Writ of Error sometimes, as in the case of Erroneous proceedings; and sometimes by pleading and the setting forth of the Special Matter, as in the case where Tenant is not Tenant of the Freehold, or when the Recovery is had by Coven; against the Tenant for life, or the like; and sometimes by the shewing and setting forth of the Practise to the Court, and a Motion made, that a Vacat may be had upon the Judgment for the causes alleaged. 33 Eliz. 3. Co. 5. 40. 21 H. 8. 15. Co. on Littl. 46. 104. Co. 3. 78. Dyer 249. Co. 3. 4. 1. 62. 5. 39. Plow. 515.

CHAP. CXXXVI.

Of Relation.



It is *filio juris* to make a nullity of a thing from the beginning, for a certain intent which had essence; or more plainly, A fiction of Law, whereby something is for Special Purpose, deemed never to have been, which in truth was; or as others define it, It is a Term of Law where in consideration of Law, two times, or other things are so considered, as if they were all one; and the thing subsequent is said to take his effect at the time preceding. As if one deliver a writing, to be delivered to one upon payment of money: Now when the money is paid, this De-

Sec. 1.
1. Relation, what.

Delivery of a Deed.

livery shall relate unto the first Delivery, and be of force from that time.

And this the Law doth most commonly make to help Acts in Law, and not the Acts of the Parties, and *propter necessitatem ut res magis valeat quam pereat*, (that is) for necessity to make the thing to take effect; and therefore it shall never work to any other collateral intent, but shall be restrained onely to the same thing, and to the same intent, and between the same parties onely, and shall not be strained to a third person, that is not party, nor privy to prejudice him; neither shall it make that *tortious*, that was lawful before; *nec operatur alicui damnum*, (that is) nor shall it enure to hurt any body: As in the cases beneath, Co. 1. 99. 7. 39. Plow. 488.

Relations are allowed in cases of Conditions, Judgments, Executions, and Actions, in cases of Offices, in cases of Inrollments, in cases of Acts of Parliament, in cases of Administration, Probate of Wills, in cases of Agreement, in cases of Forfeitures, in cases of Indentures, to guide a precedent Assurance: For which see the *Titles*, 10 H. 6. 6. Dyer 136: But it seems in cases of Attornment it doth not allow a Relation; and therefore if one Reversion be granted to two men, by two several Deeds: And he that hath the last grant get Attornment first, and after the other get Attornment also, the second Grantee that got the Attornment first shall have the Reversion. Co. 1. 99. 7. 39. 5. 16. Co. 2. 73, 78. 3. 83. 9. 9, 13. Littl. 552.

2. Where Relations are allowed, or not.

A Judgment against an Heir upon the Obligation of his Ancestor, shall have Relation to the time of the Writ first purchased, and from that time it will avoid all Alienations made by the Heir. See *Judgment*. Where a Judgment against any man doth binde his Lands he hath in Fee simple, and Execution shall relate for them to the time of the Judgment put for Goods and Chattels, *contra*.

Sec. 2.
3. Where Relation shall be of matter of Record, and how of a Judgment. Of an Office.

If an Office had intituled the King, by reason of a Seigniorie, it shall relate to the time of the Ancestors death, to this special intent, to give the King the Meffn profits of the Land: And if it intitule him *ratione prioris relli*, &c. by reason of his first Right or Title, it shall relate to the time of the Right or Title accrued, as to the time of the Condition broken, or Alienation in Mortmain, to give the King the Meffn profits. But where he was intituled to Land *jure protectionis sue Regie*, (that is) by his Regal Protection; as in case of an Idiot, a *nativitate*, or *nomine destructionis*, (that is) in the name of a Distress: As where his Tenant did alien, or his Widow marry without Licence, so where he was intituled by an Attainder of Felony. In these cases the Office shall have Relation, as to avoid all Alienations, and mean In- tumbances to the time of the Nativity of the Idiot, Alienation, or Marriage of his Tenant, and Felony committed, but as to the mean profits to the time of the Office found onely. And therefore if the Husband and Wife be Joyntenants of a Lease, and the Husband kill himself, and this was after found by Office; this shall relate to the time of the murder, and so intitule the King to the whole, Co. 8. 170. 4. 126: *Stamf. pl. cap. 13. Kelm. 71. Plow. 486. Co. 9. 131.*

Of an Inroll-
ment of a
Deed of Bar-
gain and Sale.

The Inrollment of a Deed of Bargain and Sale, when it is done within the six moneths, shall to most purposes relate to the time of the Delivery, or of the Date of the Deed. And it is given as a Rule, that it shall have relation to the time of the Delivery of the Deed, viz. To avoid all mean Estates and Charges made to a stranger by the Bargainor after the Delivery of the Deed before the Inrollment, but not to divest any estate lawfully settled in the interim in the Bargainee himself: And therefore if one bargain and sell his Land by Deed indented to one, and after before the Deed is inrolled, he enter into a Statute, or grant a Rent charge out of this Land, or make a Lease of the Land to another, and then the Deed is inrolled within the time; in this case the Relation shall avoid all the mean Charges and Estates: And if *A.* bargain and sell his Land by Deed indented to *B.* and afterwards doth sell the same Land by Deed indented to *C.* and the Deed made to *C.* is first inrolled, and then the Deed made to *B.* is inrolled also within the six moneths; in this case *B.* shall have the Land, and the Relation of his Inrollment shall make the Inrollment of the other Deed void. So if *A.* levy a Fine of the Land to *C.* yet *B.* shall have the Land. But if the first Deed made to *B.* be not inrolled within the six moneths, and the Deed to *C.* be inrolled within the six moneths, *contra*, *Dyer* 218. *Curia, Mich.* 3 Jac. *B. R.*

If *A.* bargain and sell Land to *B.* and after levy a Fine to *B.* of the same Land, and after within six moneths the Deed is inrolled; in this case *B.* shall take by the Fine, and not by the bargain and Sale. *Co.* 4. 71.

If one Joyntenant alien all his Lands in *Dale* to *A.* and before the Inrollment, the other Joyntenant die, and after the Deed is inrolled; in this case but a Moyety, and not the whole Land doth pass. *Bro. Fait Inroll.* 9.

If *A.* bargain and sell his Land to *B.* and after this *A.* doth become a Bankrupt, and the Commissioners sell the Land to *C.* and after the Deed is inrolled within six moneths; in this case *B.* and not *C.* the Purchaser shall have the Land. So held 4 *Car. B. R.*

Sett. 3. If *A.* bargain and sell his Land held in *Capite* to *B.* in Fee, and *B.* dieth before Inrollment, and then the Deed is inrolled; in this case the Heir of *B.* shall be in Ward for the Land. And so was it held by all the Justices in Sir *Walter Earls* case, *Pasche*, 15 Jac. *Curia, Ward.* And yet in this case the Wife of the Bargainee shall not have Dower, as was held by *Anderson* Chief Justice, and Justice *Walmesley*. 3 Jac. *Co. B.* And again in Sir *Robert Barkers* case, 6 Jac. And if one bargain and sell his Land to *J. S.* and after this the Rent incur; and then the Deed is inrolled; the Bargainee, and not the Bargainor, shall have the Rent. *Per Curiam B. R. Hill.* 11 *Car.*

Dower.

Rent.

If *A.* bargain and sell his Land to *B.* in Fee, and then marry *C.* and die, and *C.* is endowed, and after the Deed is inrolled; in this case the Dower of the Woman shall be taken away by Relation, as was held in Baron *Frevils* case. 22 *Eliz. Co. B.*

Release.

If *A.* bargain and sell Land to *B.* and *C.* in Fee, and *B.* release to *C.* before the Inrollment; this Release is void. 3 Jac. *Co. B.*

If *A.* Disseisor, bargain and sell the Land disseised to *B.* in Fee, and the Disseisee doth release to the Bargainor, and after the Deed is inrolled; in this case this Release shall avail *B.* So held in *Mockers* case. 10 *Eliz.*

If *A.* bargain and sell his Land to *B.* and *B.* before Inrollment doth bargain and sell the Land to *C.* the first Deed is inrolled, and then the second is inrolled; in this case the last bargain and sale is void, and shall not be made good by Relation, as was held by the Court in Sir *Robert Barkers* case. 6 Jac.

Condition.

If a Lease be made, rendring Rent on condition to re-enter for not payment, and the Lessor bargain and sell the Reversion by Deed indented; and after the Deed made the Rent is arrear, and then the Deed is inrolled; in this case it shall not relate to give re-entry for the Condition broken. So was it held in Sir *Christopher Hattons* case.

Lease.

If *A.* bargain and sell Land to *B.* in Tail, and *B.* before Inrollment of the Deed, doth make a Lease according to the Statute of 32 *H. 8.* and after the Deed is inrolled; this is a good Lease. So hath it been adjudged.

If *A.* acknowledge a Statute to *B.* and *B.* extend it, and after it, and before a *Statute* *Liberate*, *A.* become Bankrupt, and the Commissioners sell the Land, and after the *Liberate* is had; in this case the *Liberate* shall relate to the extent, and avoid the sale by the Commissioners. *B. R. 4 Car.*

If a Feme-sole deliver a Deed as an Escrow, to be afterwards delivered as her Deed, and before this delivery as her Deed, she die, or take a Husband; yet if this Deed be after delivered it shall be good by Relation, and said to take effect as *ab initio*, (i.) From the beginning. *Co. 3. 35. Plow. 344.* And for the Relation of a Deed made by a Woman-sole, or Infant, see *Deed*. Yet where an Obligation is delivered as an Escrow, and the Oblige before the second Delivery, release the debt or duty, this were no bar of the Debt, for to this collateral purpose, it shall not relate. So if an Infant or a Feme-covert deliver a Deed as an Escrow, and before the second Delivery she become Sole, or he become of Age; this Deed shall not be made good by Relation. *Perk. Sett. 139. Co. 3. 35. Goldsb. 163.*

Seff. 4.
4. Where a Relation shall be of Matter of Deed, or not.

So if a Disfeisor make a Lease for years, and deliver it as an Escrow to another, and command him to enter into the Land, and deliver it as his Deed to the Lessee; here it shall be said to take effect by the second Delivery, and shall not relate; for then the Lease would be void. So if a Feoffee on condition grant a Rent-charge out of the Land, and the Grantee bring an Annuity; this is a good Annuity between them two, but shall not relate to prejudice the Feoffor, if he re-enter on this condition. *Co. 3. 35. & Co. 3. 29.*

If one make a Feoffment of a Manor by Deed, or without Deed, and a long time after Livery, the Tenants do attorn to the Grantee: Now by this the Attornment shall relate to pass the Manor *ab initio*; but not to charge the Tenants for the Arrearages in the mean time. So if one Infeoff an Infant or Feme-covert, and after give, grant, or devise the Land, or any thing out of it, and after the Infant or Woman disagree to it; this shall relate to this purpose, to discharge the Husband or Infant from damages for the time; but not to make the Void Gift or Grant good. So if a Disfeisor make a Feoffment to *A.* and *B.* by Deed, and give Livery to *A.* in the name of both, and *A.* dies, and *B.* disagrees; this shall relate to charge him of the mean profits, but to no other purposes. *Co. 3. 29. Co. upon Littl. 310.*

5. Where a Relation shall be of other things.

When the Wife is indowed by the Heir of her Husband, she shall be in immediately from the Husband; and therefore if the Husband were a Disfeisor, and the Heir in by descent, yet the Disfeisor may enter upon the Wife: for things relating to a time long before, be as if they were done at that time. *36 H. 6. 7. Littl. 92.*

See more in *Grants, Testaments, Forfeitures, Attainders*, and in *Crompt. 7th 19. 15. 7. 12. New Book of Executors, 76, 77.*

CHAP. CXXXVII.

Of a Release.

1. Release,
what.



Releffor, Re-
lessee.

Release is the giving or discharging of the Right or Action which a man hath or may have, or claim against another man, or that which is his: Or it is the conveyance of a mans Interest or Right which he hath unto a thing, to another that hath the Possession thereof, or some Estate therein. And this albeit, it may be made by other words, as *Dedi, Concessi, or Renunciassse*, or such like; yet it is most commonly and properly made by these words, *Remississe, Relaxasse, & quietum clammisse*, all which are much to one purpose. He that makes the

Release is sometimes called the Releffor, and he to whom it is made, the Relessee. *Terms Ley. West. Symb. lib. 2. sect. 466.*

2. The kinds.

There are two kinds of Releases like unto those of Confirmation, *viz.* A Release Express, or in Deed, and that is a purposed Release, when the Act done, or Deed made, is intended a Release: And this is always done by writing; and then it is defined by some to be an Instrument, whereby Estates, Rights, Titles, Actions, and other things be sometimes extinguished, sometimes transferred, sometimes abridged, and sometimes enlarged, which is after this manner. *Noverint, &c. me A. de B. remississe, relaxasse & omnino de me [vel pro me] & hered meis quietum clammisse C. de D. totum jus, titulum & clameumque habui, habeo vel quovismodo in futuro habere potero de & in uno mesuagio cum pertin' in F. &c.* And a Release implied, or in Law, and that is when the Law by Intendment and Construction, and by way of consequent doth make a Release of an Act done to another purpose: And this is sometimes by writing, and sometimes without writing. These Releases also are sometimes of a bare and naked right, and sometimes of a right accompanied with some Estate or Interest; and sometimes they are of Actions real, or in Lands or Tenements, and sometimes of Actions personal, of, or in Goods or Chattels, and sometimes of Actions mixt, partly in the Realty, and partly in the Personalty. *Co. super Littl. 264, 265.*

3. The nature
and operation
of it in general.

A Release is much of the nature of a Confirmation, for in most things they agree and produce the like effects: This therefore is said sometimes to enure by way of *mitter le estate*, that is, by way of giving or transferring or enlargment of an Estate or Interest, and so doth give some new Interest or Estate to him to whom it is made: And sometimes it is said to enure by way of *mitter le droit* onely, that is, by way of giving, transferring, and discharging of a right Title or Entry unto him, to whom it is made: And so it doth sometimes perfect an Estate that was imperfect and defeasible before, and enure by way of Entry and Feoffment: And sometimes also it doth enure to make a Conditional estate absolute: And sometimes also it doth work and enure by way of extinguishment or discharge: And then also sometimes it doth enure by way of discharge or extinguishment, as against all persons, and so as that whereof all persons may take advantage: And sometimes it doth enure onely as a Discharge against some persons onely, and as to or against other persons by way of *Mitter le droit*: And some of these in Deed enure by way of Extinguishment, for that he to whom the Release is made, cannot have the thing released: And some of them have some quality of such Releases, and are said to enure by way of Extinguishment, but in truth do not, for that he to whom the Release is made, may receive and take the thing released. And in some cases also a Release like a Confirmation, doth enure by way of Abridgment. But a man cannot Bar himself hereby of a Right that shall come to him hereafter; and therefore it is held, that these words used in Releases, [*Qua quovismodo in futuro habere potero*] are to no purpose. *Co. super Littl. 193. 273, 277. Co. l. 147. Littl. sect. 6. 459. 465. 466. 446.*

Lands,

Lands, Tenements and hereditaments themselves may be given and transferred by way of release, and all rights and titles to lands may be given, barred and discharged, by release, and so also may rights and titles to goods and chattells. Also all actions real, personall and mixt, may be given, discharged or extinct by release; for howsoever rights and titles of entry cannot be granted by act of the party, nor any action may be granted from one man to another by act of the Law or the party, yet all these may be released to the terre-tenant, And a right to a freehold or Inheritance, seigniorie or rent *in presenti* or *futuro* may be released five manner of waies, and the first three waies without any privity at all. 1. To the Tenant of the free hold in deed or in Law. 2. To him in the remainder 3. To him in reversion. The other two waies in respect of privity without any estate or right, as by demandant to vouchee, Donor to Donee after the Donee hath discontinued. *Brownl. 1 part* 110. 116. 149. *Co. 10. 48 Super Litt.* 268: 269. 266.

4. What things may be released Or not. And how.

Also conditions annexed to estates, powers of revocation of Uses, Warranties, Covenants, Tenures, Services, Rents, Commons, and other profits to be taken out of Lands may be discharged, extinguished and determined by release to the Tenant of the land, &c. *Bro Release in toto.*

Also possibilities of Land &c. if they be neer and common possibilities albeit they be not grantable over to another person, yet may they be released to him that hath the present estate of the land. And therefore if a man possessed of a terme devise it to *A* for life, the remainder to *B* and his Heirs males during the terme; in this case albeit *B* may not grant his interest over yet he may release it to *A*. and if *A* devise to *B* twenty pound when he comes to the age of twenty four years, and die; in this case *B* after he is of the age of twenty one years may release this legacy. So a covenant to doe a future act may be released before it be broken.

And it seems also the donee of a Statute or recognisance may release to a feoffee of part of the Land, and so barr himself of Execution of that Land.

And if I grant to *I S* that if he doe such a thing he shall have an annuity of twenty pound for his life; in this case it seems *I S* may release this before the condition be performed. And if I make a Feoffment to *I S* to divers uses with power to revoke it; I may release this power to one that hath an estate of freehold in possession, reversion or remainder in the Land. And yet if I make a Feoffment to *I S* with proviso that if *B* revoke, that the uses shall cease; in this case *B* cannot release this power.

And a remote possibility that is altogether incertaine cannot be released. And therefore if the sonn of the Disseisee release to the disseisor in the life time of his father; this release is void. And so if the donee of a Statute release his right to the land of the donor before execution; this release is void. And so if a plaintiff release to a Bail in the Kings Bench before Judgement given, this release is void. *Co. 10. 47. 51. 52. 5. 70. 71. Super Litt.* 265. *Lit. Sect.* 446. *Co. 1. 111. 111. Dir. 57. Co. 1. 113. 174.*

So if one promise to pay me ten pound upon the surrender of my Land to him, and that if he shall sell it for above fifty pound that then he shall pay me tenn pound more, and I release this to him before he do sell it and before I do surrender, in this case this doth not releas the second promise because it is not releasable. *Adjudged Trin. 14. Jac. B. R.*

Also Debts, Legacies, and other duties may be released and discharged thereby before or after they become due. And therefore a rent or annuity may be released before the day of payment.

And so also may a debt due by obligation: Judgements, Executions, Recognisances and the like, by apt words be discharged by release. *See infra*

If the charge or duty grow by record, the discharge and release thereof must be by record also. And if it grow by writing, the discharge and release must be by writing also. *Nihil est magis rationi consentaneum quam eodem modo quodque dissolvere quo constatum est.* And therefore a duty growing by a verball agreement may in some cases be released by word without writing.

5. How and after what manner these things may be released.

But

Condition.
Defeasance.

But regularly lands and Tenements cannot be given, nor rights and titles to lands, and actions be discharged by release without a Deed in writing.

A release that doth enure by way of *mitter le estat, mitter le droit*, or extinguishment, may be made upon condition or with a defeasance, so as the condition or defeasance be contained in the release or delivered at the same time with it, for no defeasance made after can avoid the force of a release made before. *Co. super Litt. 274. Perk. Sell. 718. Lit. 467. Co. 1. 111. 21. H. 7. 24.*

And yet a release may be delivered as an escrow, and so the force of it may be suspended for a time.

But a release of a condition may not be made upon a condition.

Nor may a release of a chattell be upon a condition subsequent, but it may be upon a condition precedent.

And therefore if a man release a debt to another upon condition that the releasor may have such a debt owing from a third person to the releasee; this is a good condition. *Currin. B. R. Hill. 9 Car. Barkley & Perkes case.*

A release of all actions may be made untill a time past, as untill the first of May last, or untill the day of the date of the release; and this will discharge all actions till then and none after. *Dier 307. 21 H. 7. 24. Co. super Litt. 274. Sell. 467.*

But a release cannot be made of a right or action for a part of an estate, or for a time only, as for one year, or untill Michaelmas next, or the like: for a release of such a thing for one day or for one hour is a release of it for ever.

And yet a man may release his right in a part of the land. And therefore if a man be disseised of two acres, he may release his right in one of them and enter into the other acre.

Also a release in the nature of an acquittance may be of part of a debt.

And therefore if one be bound in an obligation of four hundred pound to pay two hundred pound at Michaelmas, and at Christmas after the Obligee by his Deed releaseth three hundred ninety pound parcell of the said four hundred pound; this is a good release for so much and no more. *Adjudged Barkley & Perkes case. Hil. 9 Car. B. R.*

In every good release in Deed, howsoever it enure, these things are requisite.

1 That there be a good Releasor, and a good Releasee, and a thing to be released.

2 That the deed be well sealed, delivered &c. And if it tend and enure by way of enlargement of estate, then these things are further required to make the release good.

1 He that doth make the release must have such an estate in himself as out of which such an estate may be derived and granted to the Releasee as is intended by the Release, as if he have the reversion in Fee of Lands, he may release to a Tenant for years and thereby encrease his estate to an estate for life or in tail, or he may pass his whole Fee-simple by the release. *Dyer. 251:*

But if there be Lessee for years rendering rent, and the reversion is granted for life the remainder over in Fee, and the Grantee of the reversion release all his right to him in remainder, and then he in the remainder grant the Reversion, and the Tenant for life release to the Grantee also; in this case it seems both these releases are void and cannot enure as releases, howbeit it may be if they have words of surrender in them they may enure as surrenders. *Per Justice Jones. 5 Car. Dividem:*

So if there be Lessee for years, the remainder in Tail, the remainder in Fee, and the Lessee for years being a woman doth marry with him in the remainder in Fee, and he in remainder in Tail release to him in remainder in Fee; this is a void release. *Adjudged Trin. 5. Jac. B. R. Butlers case.*

So if Tenant for life release to him in remainder in Fee or in Tail; it seems this is void and cannot enure as a release

So if there be Tenant for life, the remainder in Tail, the remainder in Fee, and he in remainder in Fee release to the Tenant for life; this will not increase his estate.

And if the Tenant in Tail in this case release to the Tenant for life, his estate shall be no longer increased hereby then for the life of the Tenant in Tail. *Lit. Sell. 598. Plow. 556. Co. super Litt. 345.*

6 What releases may be made of lands or Tenements. And what shall be said a good release in deed Or not. And by what words it may be made.
1. When it doth enure by way of enlargement or passing of an estate.
1. In respect of the estate of the releasor. Surrender.

2. He to whom the release is made must have some estate in possession in deed or in law, or in reversion in deed, in his own or another's right of the lands whereof the release is made to be as a foundation for the release to stand upon; for a release which must enure to enlarge an estate cannot work without a possession joined with an estate. And therefore the lessee must be lessee for life, years, or tenant by statute Merchant, Staple, Elegit, or as guardian in chivalry that doth hold the land over for the value, or at least he must be tenant at will: And therefore if a man let his land to another for term of years to begin presently, and after the lessor or his heir doth release to the lessee (after his entry and being in possession) all his right in the land; this is good to enlarge the estate according to the time set down in the release. But if the release be before the term begin, or after the term begin and before the lessee have entered; (howsoever if any rent be reserved on the lease it may enure and be good to extinguish that rent) yet it is not good to enlarge the estate. And yet if a tenant for 20 years in possession make a lease to B. for 10 years, and B. enter and he in the reversion release to the first lessee for years; this is a good release to enlarge the estate.

2. In respect of the estate of him to whom the release is made.

So if a man make a lease for years the remainder for life or years, and the first lessee doth enter; in this case a release to him in remainder is good to enlarge the estate.

So if I grant the reversion of my tenant for life to another for life, and after release to him and his heirs; this is a good release to enlarge the estate. *Co. super Litt. 270. 273. 265. Litt. Sett. 459. Plow. 423. Dier. 4. 15 H. 7. 14.*

So if a man make a lease for life or years to a feme sole, and she take a husband; and he in the reversion release to the husband and his heirs; this is a good release to enlarge the estate according to the words of the release. But if the case be so that a man had an estate in possession of land, and he be now out of the possession of it, and have but a right only to it; or if he have a possession only and no estate; or if he have neither estate nor possession; in these cases a release made to such a one will not avail to enlarge his estate. *Co. super Litt. 273.*

And therefore if a man make a lease for life the remainder for life, and the first lessee dieth, and the lessor release to him in remainder for life, before his entry; this is a good release to enlarge his estate, for he hath an estate of freehold in law capable of enlargement by release before entry. But if there be lessee for life, the remainder for life, the remainder in tail, the remainder in fee, and the lessee for life is disseised and during the possession of the disseisor he that hath right doth release to one of them in the remainder, this is void. So if lands be given in tail or leased for life, and the donee or lessee is disseised, and during the possession of the disseisor the donor or lessor doth release all his right to the donee or lessee, this is void and will not enlarge his estate, howbeit if there be any rent reserved on the estate it will extinguish the rent.

So if the tenant by the curtesie grant over his estate, and after he in reversion doth release to the tenant by the curtesie; in this case his release is void and will not enlarge his estate.

So if an Infant make a lease for life, and the lessee granteth the estate over with warranty, and the Infant at full age doth bring a *Dum fuit infra aetatem*, and the tenant doth vouch the grantor, who doth enter into the warranty, and the demandant being the Infant doth release to him and his heirs, this will not enlarge his estate, for in truth he had no estate before, and that which is not cannot be enlarged.

And if lessee for life or years, release to him in remainder or reversion, this cannot be good as a release, howbeit if there be apt words it may amount to a Surrender.

And if a man have only an occupation of land as tenant at sufferance, as when a lessee for years doth hold over his terme, or the like; no release to him can work any enlargement of estate, for albeit he have a possession yet hath he no estate, and besides in this case there is no privity: which is the third thing required in these releases, *Co. super Litt. 270. Litt. Sett. 451. Litt. Sett. 455, 456. Co. super Litt. 273. Dier. 251. Co. super Litt. 271. Litt. Sett. 461.*

3. In respect of
privy.

For as in all these releases that enure by way of increase or passing an estate, there must be some estate in the releffor and the releffee, so there must be some privy in estate between them at the time of the release made, for an estate without privy is not sufficient. And therefore it must be, between donor and donee, lessor and lessee, and the like, as in the cases before, between him in reversion and the lessee for life or years, tenant by statute Merchant or Staple, or by Elegit or Gardian in Chivalry that keepeth the land for the value. And if tenant for life lease for years, and he in the reversion and the tenant for life doe joine together and release to the lessee for years; this is a good release to enlarge the estate. So if he in reversion release to the husband that hath an estate in the right of his wife only for life or years, this is a good release. So if lessee for years make a lease of the land but for part of the terme, the privy continueth still, and therefore a release to him is good to enlarge the estate.

But if he assigne over all the terme then the privy is gone, and therefore a release made to him afterwards is void. And then a release made to the assignee of the terme is good to enlarge the estate. And if a disseisor make a lease for life or years, and after he and the disseisor joine together to make a release to the lessee for life or years this is a good release to enlarge the estate. But if the disseisor in this case make a lease for life or years, and the disseisee or he that hath right release to the tenant for life or years; in this case the release is void for want of privy. And if there be lessee for years the remainder for life, and he in reversion release to the lessee for years or him in remainder for life and his heirs all his right; this is a good release to work an enlargement of estate. So if one make a lease for life, and grant the reversion for life, and then the lessor doth release to the grantee of the reversion and his heirs; this is a good release to enlarge the estate of the grantee, and here is privy enough.

If *A.* be tenant for life, the remainder to *B.* in tail. the remainder to *C.* for life, the remainder to *A.* in fee, and *A.* die, and his heir doth release all his right to *B.* being in possession; this is a good release and gives the Fee-simple. See *Brownl.* 1 part. 207. *Co. super Litt.* 269. *Litt. Sect.* 461. *Plow.* 341. *Co. super Litt.* 273. *Dier.* 4. C. 3. 22. *Plow.* 540. 14 H. 7. 4. *Litt. Sect.* 518. *Co. super Litt.* 273. *Bro. Release.* 71.

But if *A.* make a lease to *B.* for life, and the lessee maketh a lease for years, and after *A.* in the life time of the tenant for life maketh a release to the lessee for years, this release is void and will not enlarge his estate for want of privy.

So if a man make a lease for twenty years, and the lessee make a lease for ten years, and the first lessor doth release to the second lessee and his heirs; this release is void.

So also if the donee in taile make a lease for his own life, and the donor release to the lessee and his heirs; this release is void.

So also if the donee in taile make a lease for his own life, and after the donor release to the donee and his heirs; it seems this is not a good release.

Also one Jointenant or coparcener may release to another and thereby transerre all his Estate and give the whole interest unto his companion; and this is a good release to pass all his or her part of the land.

And if there be three Jointenants in fee and they make a lease for life, and after two of them release all their right in the land to the third; this is a good release.

So if one make a lease for life to another, and after grant the reversion to seven, and the tenant for life doth attorn, and after four of the seven release all their right to the other three, and after one of the three release to the other two; these are good releases.

So if a lease for years be made to two, to begin at a day to come, a release by one of them to the other is good to give all the terme and all the land to the releffee.

But it seems one tenant in common cannot release to another tenant in common. *Co. super Litt.* 273. *Litt. Sect.* 516. *Bro. Release.* 77. *Perk.* Sect. 84. 10 Ed. 4. 3.

The

The fourth thing that is required in such a release is sufficient words in law not only to make a release, (which is required in all releases) but also to raise and create a new estate. For this therefore know that all releases (of what kind soever) are commonly made by these words, *Remisisse, Relaxasse, & quietum clamasse*, as being the most ancient and significant words for this purpose. And amongst these the word Release is the most effectually word, as that which doth include the other two, and as that which is the proper and peculiar word for this kind of conveyance. But there are other words also by which a release may be made, as *Renunciare, Acquietare, &c.*

And therefore it is held that if one have common in anothers land, and he by deed release it to him thus: *Renuncio Communiam meam &c.* this is a good release. And if the lessor doe but grant to his lessee for life that he shall be discharged of the rent, this is a good-release of the rent. And it is a rule, That by what words a debt or duty may be created, by words of a contrary signification it may be released. And therefore if one doe acknowledge himself to be satisfied and discharged a debt, this is a good release of the debt. And for words to raise the estate it is usuall and most safe to specify in the deed what estate he to whom the release is made shall have; and in most cases this is needfull: for it is generally true, that when a release doth enure by way of enlargement of estate no inheritance in fee simple or fee taile can pass without apt words of inheritance. And therefore if I make a lease of land to another for his life, and after I release to him all my right without more saying in the release; hereby his estate is not enlarged. But if I release to him and his heirs; by this he hath a fee simple. And if I release to him and the heirs of his body; by this he hath an estate taile. But where a release worketh by way of *mittere le estate* there in some cases there needs not any words of inheritance, as in cases where releases are made between jointenants or coparceners, as where a joint estate is made to the husband and wife and a third person and their heirs, and the third person doth release all his rights to the husband alone, or to the wife alone. So, if there be three jointenants, and one of them doth release to one of the other two, in all these and such like cases there needs not any limitation of the estate, for the release is good without it. *Co. super. Litt. 273. 264. 301. 9 H. 6. 35. Dier. 116 Litt. Sect. 544 Co. super. Litt. 264. Dier. 307. Co. 9. 52. Co. super. Litt. 273. Litt. Sect. 465. 468, 469.*

In every good release in deed that doth tend and enure to give discharge or extinguish any right or title of lands it is also further requisite, *Litt. Sect. 466. Co. super. Litt. 265. Co. 5. 70. 71. 1. 112. 8. 151.*

1. That he that doth make it hath at the time of the release made some right or title to release.

As where one doth disseise me of land, and I release to him all my right in the land this is a good release. So if one disseise my tenant for life, and I (being the next in remainder or reversion in fee) do release to him that did make the disseisin; this is a good release. So if the husband make a lease for life, and then take a wife and dieth, and the wife release her dower to him in reversion; this is a good release. And so also if after the marriage a man make a lease for life the remainder in fee, and she release all her right to him in remainder in fee, or to him in reversion; this is a good release and will bar her for ever.

And therefore if the Releasee have only a possibility of a right, or a right happen to come to him after the release, this is not sufficient to make the release good. And therefore if the father be disseised, and the son before the fathers death release all his right to the disseisor, and after the father dieth, so that the right doth descend; this is no good release to bar the Releasee of his right. So if there be Grandfather, father and son, and the father disseise the Grandfather, and make a feoffment, and the son release in the lifetime of his father, and after the father and grandfather die; this release in this case will not bar him. So if a lease be made for life, the remainder to the right heirs of J. S. and the lessee is disseised, and the eldest son of J. S. living, his father doth release to the disseisor; this release is void. So if the comftee of a statute &c. doe release to the comfutor all his right in the land; this is void, and he may sue execution after notwithstanding. *Litt. Sect. 446. Co. 10. 47. 42. super. Litt. 265. Co. 10. 57. Co. 5. 70.*

4. In respect of the words whereby it is made.

2. When it doth enure by way of passing & extinguishment of a right or title only.

3. In respect of the estate of the releasor.

Or if the Releffor have only a power, this is not sufficient to make the release good.

And therefore if a man by his will devise that his executors shall sell his land, and dieth, and the executors release all their right and title in the land to the heir, this release is void. *Litt. Sect. 446. Co. 10. 47. 42. super Litt. 265. Co. 10. 57. Co. 5. 70. Co. super Litt. 265.*

2. In respect of the estate of him to whom the release is made.

2. In all cases of a release of a base right of a Freehold in lands or tenements, he to whom the release is made must at the time of the making thereof in any case have the Freehold in deed or in law in possession or some state in remainder or reversion in deed (and not in right only) in fee-simple, fee-tail, or for life of the lands whereof the release is made; for rights of entry, and actions, and the like, are not to be transferred to strangers, but are thus to be released, and such releases are good. As if the disseisee release to the disseisor himself who hath the freehold in deed, or to the heir of the disseisor before his entry, who hath the freehold in law, or to the lessee for life of the disseisor, these releases are good. So if a disseisor make a lease to A, and his heirs during the life of B, and A die, and the disseisee release to his heir before his entry, this is a good release. So if a Fine *sur consauance de droit consau* &c. or *sur consauance de droit* only (which is a feoffment on record) be levied, or if tenant for life by agreement of him in the reversion surrender to him in the reversion, or if a man doe bargain and sell his land by deed indented and inrolled, or uses are raised by covenant on good considerations; in all these cases the consue him in reversion, bargainee, and *cistuy qui use*, have a freehold in law in them before entry.

And therefore a release to them (of the right of the land by him that hath it) is good and will bar the Releffor. But otherwise it is in cases of Exchange, Partition, or upon Livery within the view; for in these cases no release is good until an actual entry made, for till then they have neither freehold in right nor law. So if a disseisor make a gift in tail, or lease for life or years of the land, and keep the reversion, and then the disseisee or his heir release to the disseisor all his right, this is a good release to bar his right for ever. So if the heir of the disseisor be disseised, and the first disseisee doe after release to him all his right; this is a good release to bar him. So if a donee in tail discontinue in fee, and the donor release to the discontinuee and die; this is a good release against the donor. So if the donee in tail be disseised, and after the donor release to the donee all his right; this is good, but in this case nothing of the reversion will pass by the release, for the donee had then nothing but a right.

Extinguishment.

But if any rent be reserved on the estate tail, the rent is gone by the release. So if a lease be made to one for life rendering rent, and the lessee is disseised, and the lessor release to the lessee and his heirs all his right; in this case albeit the rent be extinct, yet nothing of the right of the reversion doth pass. And yet if a woman that hath right of dower release to the guardian in Chivalry: this is a good release, and her right or title of dower is gone. But if a disseisor make a lease for years, and the disseisee release to the lessee for years; this release is void because he hath no freehold. But if he make a lease for life, and the disseisee release to the lessee for life, this is a good release.

So also a release to the disseisor after the lease for years made is good: And if lessee for years be ousted, and he in the reversion disseised, and the disseisor make a lease for years, and the first lessee release to him, this is a good release. Also in some cases a release made to one that hath neither freehold indeed, nor freehold in law, is good when he hath an estate in reversion or remainder, as in the case before, where a release is made by the disseisee to the disseisor after he hath made an estate for life. So if the demandant in a real action release to the tenant that comes in by receipt upon a prayer of aid or voucher upon a warranty; this is good. And yet if it be before the receipt, or entry into the warranty, or it be by any other besides the demandant, it is void: So if the tenant in a real action alien hanging the *precipue quod reddat* against him, and after alienation the plaintiff release all his right in the land to him, this is a good release. So if a disseisor make a lease for life, the remainder

remainder to another for life, the remainder to a third in taile, the remainder to a fourth in fee, and the disseisee release to either of them in remainder; this is a good release. But if in this case tenant for life be disseised, and after he that hath right (the possession being in the disseisor) doth release to either of them in remainder; this is a void release. *Brownlows. 2 part. 254.* But in all the cases of a release of a bare right to him that hath an estate of a freehold in deed or in law, generally there needs no privity to make the release good: as in the case before of a release made to the tenant for life of the disseisor, and them that follow. For if tenant for life make a lease to another for life of the lessee, the remainder over in fee, and the first lessor release all his right to him to whom the tenant made the lease for life; this is a good release and a perpetuall bar, albeit the release be not to him and his heirs. And so it is in case of a reversion. *Co. super Litt. 267. Co. super Litt. 266 275. Litt. Sect. 448 1 H. 6. 4. Dier. 302. Litt. Sect. 449. Co. super Litt. 266: Litt. Sect. 455, 456, Co. super Litt. 265. Litt. Sect. 448, 449 450. 451. Co. 8. 151. Co. super. Litt. 275. Litt. Sect. 470. 471. Co. 10. 48.*

3. In respect of privity.

If lessee for years be ousted, and he in the reversion disseised, and the disseisor make a lease for years, and the lessee that is ousted doth release to the lessee of the disseisor; this is a good release. And yet if the disseisee doe release to the lessee for years of the disseisor; this is void.

If lessee for a thousand years be ousted by the lessor, and he make a lease for two years, and the lessee for a thousand years release unto him; this is a good release. But if a lessor disseise his lessee for life, and make a lease for a thousand years, and the lessee for life release to this lessee of a thousand years; this release is void.

If one be disseised, and after another doth disseise him, and the disseisee release to the last disseisor; this is a good release. So if *A.* disseise *B.* who infeoffeth *C.* with warranty, who infeoffeth *D.* with warranty, and *E.* disseiseth *D.* to whom *B.* the first disseisee releaseth; this is a good release, and doth defeat all the mean estates and warranties. So if my disseisor lease for life, and the lessee for life alien in fee, and I release to the alienee all my right, &c. this is a good release and will bar me of my entry: but if my entry be gone, as if I lease for life, and my lessee be disseised and that disseisor is disseised, and I release to the second disseisor; in this case the first disseisor may enter upon the second. So if my disseisor in the case aforesaid make a lease for life, and the lessee for life maketh a feoffment to two, and I release to one of the feoffees; this is a good release and will bar me and my disseisor also. So if tenant for life let the land to another for the life of the lessee, the remainder to another in fee, and the lessor release to his tenant for life; this is a good release. *Co. super Litt. 277. Litt. Sect. 473. 470, 471. 478.*

If one that hath a son within age be disseised and die, and the disseisor die seised, and the land descend to his heir, and a stranger abate, to whom the son when he comes of age doth release; this is a good release. So if one be disseised by an infant which doth alien in fee, and the alienee die seised, and his heir entreat, the disseisor being within age, and the disseisee release to the heir of the alienee; this is a good release. But where an inheritance or an estate for life is released to one that is but tenant for years, the release is not good without privity. And therefore if tenant for life or in fee release to the lessee for years of his disseisor; this is not good. But the release of a term of years to the lessee for years of him that doth eject him is good enough without privity, as in the case before. *9 H. 6. 43. Co. 10. 48.*

But here note that in cases of a void release of a right to an inheritance or freehold where there is a warranty contained in the deed, the warranty may be good, and be used by way of rebutter, albeit the release be void. As if the son of the disseisee release with warranty in the life time of his father, or there be grandfather, father and son, and the father disseise the grandfather, and make a lease with warranty and die, in both these cases albeit the son be not barred by the release, yet he is barred by the warranty. *Co. super. Litt. 265.*

Warranty.

4. Such words as will make a good release in the cases of releases that enure by way of enlargement of estate, will make a good release in these cases. And note that the kinde of release is good without any limitation or specifying of the estate, for

4. In respect of the words whereby it is made.

for by a release of all a mans right without saying To have and to hold to him and his Heirs, &c. in all the cases before, he that makes the release is barred of his right for ever, for if I be seised of an estate in Fee by wrong, and he that hath right release to me all his right, albeit it be but for one houre, yet this is a good release for ever. *Co. super Litt. sect. 467.*

7. What Releases may be made of other things. And what shall be said a good Release in Deed of such things. Or not. And by what words. Of a seigniorie, Rent-service, common, or the like.

If there be Lord and Tenant, and the Lord release to the Tenant all his right that he hath in the Seigniorie, or all his right that he hath in the Land, &c. this is a good release to extinguish the seigniorie. And in this case there need no words of inheritance or limitation, for by release of all the right in the seigniorie; the same is extinct for ever, without saying [to him and his heirs]. And yet in this case the Lord may by apt words release his Seigniorie to the Tenant only in Tail, or for life, and it shall be good so long.

But if a Lord grant to his Tenant that he shall doe his suit to another Manor of the Lords, or that the Tenant shall give him yearly twelve pence for his suit; this grant will not extinguish and determine the services or Tenure. *Lit. sect. 480. Co. super Lit. 280. 305. Perk. sect. 70.*

If there be Lord and Tenant, and the Tenant be disseised, and after the Lord release all his right, &c. to the Tenant; by this release the service or seigniorie is extinct, for albeit a right regularly cannot be released to him that hath but a bare right, yet a seigniorie may be released and extinct to him that hath but a bare right in the Land.

But if the Tenant make a Feoffment in Fee, and then the Lord release all his right, &c. to the Tenant; this is not good to extinguish the seigniorie or services, but it will discharge all the arrearages. *Lit. sect. 457. Co. 10. 48. super Lit. 268.*

If a rent-charge, common of pasture, or any other profit appender be issuing out of my Land, and he that hath it doth release it to me; this is a good release and will extinguish it. But if I be disseised of the Land; and have but a right at the time of the release made: the release is not good, as it is in the case of a rent-service and a seigniorie.

But if lands be given to me in Tail, or for life rendring rent, and I be disseised, and after the Donor release to me all his right in the Land; this is a good release and shall extinguish the rent. So if in this case where I am Tenant in Tail, and I make a Feoffment in Fee rendring rent, and after I release to the Feoffee: this is a good release and hereby the rent is extinct. And if two coparceners be of a rent, and one of them take the Terre. Tenant to husband, and after either of them release; these releases will be good. *Lit. sect. 480. 536. 537. Co. super Lit. 305. Lit. sect. 455. 456. Co. super Lit. 273.*

If one disseise me of land, and then grant a rent charge out of the Land, and I reciting the same grant release to the Grantee; this release it seems is good, and will bar me so as after my reentry I shall not be able to avoid it. *Lit. sect. 527. Co. super Lit. 300.*

Of an Advowson, &c.

If two have the grant of the next advowson or avoidance of a Church; before it be void one of them may release to the other, but afterwards they cannot. *Co. super Lit. 270.*

Of a Condition.

If A make a Feoffment in Fee, gift in Tail, lease for life or years to B on condition that upon such a contingent it shall be void; in this case A may before the condition broken release all his right in the Land, or release the condition to B; and this will be good to make the estate absolute and to discharge the condition. So if a Feoffee on condition make a gift in Tail or lease for life, and after the Feoffor release to the Donee or Lessee; this is a good release to discharge the condition. So if a copyholder surrender to the use of another on condition, and this is presented to be without condition, and after the surrendror doth release to him to whose use the surrender was made all his right, &c. this is a good release and doth extinguish the condition.

But if a Disseisor make a Feoffment on condition, and the Disseisee release to the Feoffee on condition; howsoever this doth bar the right of the Disseisee, yet it doth not discharge the condition. *Co. 1. 112. Perk. sect. 823. 764.*

Where

Where a power or authority is such that doth respect the benefit of the releffor, as in the usuall cases of power of revocation of uses, when the Feoffor, &c. hath power to alter, change, determine or revoke the uses being intended for his benefit, and he release to any one that hath a freehold in possession, reversion, or remainder, by the former limitation: this is a good release and doth extinguish the power, and make the estates that were before defeasible absolute, and it doth seclude him from any power of alteration or revocation. But if the power be collaterall, or the use of a stranger, and nothing to the benefit of him that makes the release: as if *A* make a Feoffment to *B* to divers uses; provided that *B* shall revoke the uses, and *B* release to any one of them that hath a use, this doth not extinguish the power, as in case where the power is given to *A*, and *A* doth release it. *Co. 1. 112. 113. 173. 174.*

Of a power of revocation.

If a Feoffment be made with warranty, and the Feoffee release the warranty; Of a warranty this doth extinct it. And so it is of other warranties. But if Tenant in Tail release the warranty annexed to his estate Tail, this doth not extinguish this warranty.

Any man may release any debt or duty due to himself. Also a man may discharge or release any thing due, or any wrong done to his wife before or after the marriage. And therefore if a Trespass were done, or a promise were made to my wife before the marriage; I may at any time during the marriage release this. So if any wrong be done, or obligation, statute, or promise made to her alone; or to her and me together at any time during the marriage; I alone may release and discharge this.

Of debts and other duties personall. In respect of the persons. Husband and wife.

And if my wife be an Executrix to any other man, I may release any debt or duty due to the testator. *See Brownlow's 1. part 15. 19. Bro. Release 88. 21 H. 7. 29. Co. 5. 27.*

And if a Legacy be given to a woman sole to be paid at *Michaelmas* next, and I marry with her, and I release the legacy before the day: it seems by this the legacy is gone. *Per. ch. Justice B. R. Mich. 17. 74.*

An Infant Executor may release a debt duly paid unto him of the testators debt. *Co. 5. 27.*

Infant.

But if he release that which he doth not receive, it is a void release. And regularly the release of an infant is void.

An Executor before probate of the Will may release a debt or duty due to the testator; and this release is good to bar him. *Co. 5. 27. 9. 39.*

a In respect of the time.

A future or contingent promise may be released and discharged before the contingent happen. A debt on an obligation, or rent may also be released before the day of payment as well as after, but not by the same words. And therefore if one promise to *IS* that upon the surrender of *I S* he will pay him an hundred and ten pound, and after the promise, and before the surrender he release this debt; this doth discharge the Debt. But if the promise be that if the surrenderee shall sell the land, and shall have five hundred pound, that then he shall pay to the surrendror an hundred pound more, and the surrendror before sale release this sum; this is no discharge of it; And yet a release of the promise is a discharge of it. And if *A* promise to me that if *I S* doe not pay to me an hundred pound 1 *Octobris*, that he doth owe me, that *A* will pay me the hundred pound, 10 *Novembris*, and I 10 *Septembris* release to him this debt, or all actions and demands; in this case this release is not good to discharge this promise. But by a release of the promise, the same is discharged. *Trin. 14. Jac. in Eltons case, Hil. 16 Jac. B. R. Briscoe versus Heirs.*

If a man release to another all actions, and doe not say further which he hath against him; this is as good a release as if these words were inserted. *Quod necessario sub intelligitur non deest.* *Bro. Release 19.*

Of actions.

And all these releases must be made by apt words, and such as law shall judge sufficient for that purpose. *Co. 9. 53.*

And in all cases care must be had there be no mistake, for mistakes will make releases and confirmations void as well as other grants

And

And therefore if *A* make a release to *B* in this manner: *Noveris, &c. me A de Bre-misse &c. B omnes actiones quas idem B habet versus, A, whereas it should be quas idem A habet versus B; this release is void. See more in Brownlows Rep. 2 part. 215. Bro. Release 36. 58.*

8. What shall
be said a Re-
lease in Law.
Or not. And
how.
Of a feignory
Of a right to
land.

If there be Lord and Tenant. and the Lord purchase the Tenancy; by this means the services are released and extinct in Law.

And if the Lord disseise his Tenant, and make a Feoffment in Fee by deed or without deed; this is a release in Law of the seigniorie. *Co. super Litt. 264.*

If a disseise disseise the heir of the disseisor, and make a Feoffment with or without a deed; this is a release in fee in Law of the right.

And if he make a lease for life, this is a release in Law of the right so long as the lease doth last. *Co. idem.*

Of a right of
action.
Executor.

If a creditor, as an Obligee, or the like, make a debtor, as the Obligor, &c., his Executor; by this means the action is released by act of Law, and yet the duty remains still, for the Executor may retain so much of the goods of the Testator. And if the creditor be a woman, and she marry with the debtor; by this the debt is released in Law. And if there be two Obligees or debtors, and one of them being a woman, is married to the Obligor; this is a release in Law of the debt, albeit the Creditor be an Infant. *See more in Brownlows Rep. 1 part 64. 73. Co. super Litt. 264. 8 E. 4. 3. 21 E. 4. 2.*

But if there be a woman Executrix to the debtor, and she take the debtor to husband; this is no release in Law. *M. 30. & 31. El. B. R. Adjudged.*

And if an Obligor be made Administrator of the goods and chattels of the Obligee; this is no release in Law. *Co. 8. 136.*

9 The force
and virtue of
it. And how
it shall enure
and be con-
firmed and
taken.
1 In respect of
the persons.
And where a
release made
by one shall
bind another.
And where
not. And
where a re-
lease made to
one shall enure
to others. Or
not.
Executors.

Where divers joyn in any suit or action to recover any personall thing of which they are to have the joynt benefit or interest when the law doth not compell them to joyn, there the release of one of them shall bar all the rest. And therefore if two men joyn in an action of Debt, Trespass, or the like, and one of them alone doth release to the defendant; this is a bar to the other plaintiffs also. So if a statute or an Obligation be made to two or more, and one of them release it to the Consulor or Obligor, this is a discharge of the whole duty, and a bar to the rest, so that they can make no use of the Statute or Obligation. But if divers be charged in any action and they for the discharge of themselves only joyn in a Suit or action, where also they can doe no otherwise being compelled by law to joyn: in this case the release of one of them shall not hurt the others. And therefore if divers joyn in a writ of Error, Attaint, or *Audita querela*, and one of them release to the defendant in the writ, this will not bar the rest of their remedy, but they may goe on in their suit notwithstanding. *Co. 6. 25. 5. 22. Bro. Release 84. 94. stat. 23 H. 8. ch. 3.*

If there be two or more Executors and one of them alone release a debt or duty to the testator before judgement had in a Suit had by all the Executors against the Debtor, this will bar all the rest. But otherwise it seems it is after judgement had. *16. H. 7. 4.*

If a writ of ward be brought by two, and one of them release, this shall not bar his companion, but shall enure to his benefit, for hereby he shall have the whole ward. *Co. super Litt. 205.*

A release made to the Tenant in Tail, or for life of the right to the land, shall avail and enure to him that hath a reversion or remainder in deed. And so *é converso*. A release made to him that hath a remainder or reversion will avail and enure to the benefit of him that hath the estate tail for life, or years precedent. As if a Disseisor make a lease for life, and the Disseisee release to the Tenant for life, this shall enure to the Disseisor. So if he or a Tenant for life make a lease for life, the remainder for life, the remainder in Tail, the remainder in Fee, and the Disseisee or first Lessor doth release all his right to any one of them in remainder, this shall enure unto, and benefit all the rest. And if the husband make a lease of his wives Land to one for life, the remainder to another in Fee, and the wife after his death doth release all her right in the land to him in remainder: this shall enure to the Lessee for life. *Lit. Sect. 452 470. Co. super Litt. 275. 290. 267. 268. Co. 8. 151.*

If a disseisor make a lease for life, and the disseisee release all his right to the tenant for life; this shall enure to the benefit of the disseisor. But if the disseisee release no more to the tenant for life but all actions; this release will not benefit him in remainder or reversion after the death of the tenant for life. *Co. super. Litt.*

275.

If a disseisor make a feoffment to two in fee, and the disseisee release to one of the feoffees, this shall enure to both. *Litt. Sect. 472.*

If tenant in tail be disseised by two, and he release to one of them; this shall enure to both.

But if the Kings tenant be disseised by two, and he release to one of them; this shall not enure to the other. So if two jointenants make a lease for life, and then disseise the tenant for life, and he release to one of them; in this case his companion shall have no benefit by it. *Co. super. Litt. 276.*

If tenant in fee simple be disseised by two, or two doe abate or intrude, and he doth release to one of them; the other shall have no benefit by this. But if tenant for life doe after a disseisin done to him release to one of the disseisors; this shall enure to both. *Litt. Sect. 472, 522.*

And if two disseisors be, and they make a lease for life or years, & after the disseisee doth release to one of the disseisors, this shall enure to them both, and to the benefit of the lessee for life also. *Co. super. Litt. 276.*

And if lessee for years be ousted, and he in reversion disseised; and the lessee release to the disseisor; the term of years is hereby extinct, and the disseisee may take advantage of it and enter presently.

But if two jointenants in fee be disseised by two disseisors, and one of the disseisees release to one of the disseisors all his right; this shall enure to the other, for this extendeth but to a moiety.

If a release be made by a woman of her dower to the guardian in Chivalry, this shall enure to the heir, and he may take advantage of it. *Co. super. Litt. 266.*

If tenant for life be disseised by two, and he in the reversion and the tenant for life join in a release to one of the disseisors; this shall not enure to the other. But if they doe severally release their severall rights, their severall releases shall enure to both the disseisors. *Co. super. Litt. 276.*

If mortgagee upon condition after the condition broken be disseised by two, and the mortgagor that hath the title of entry doth release to the one disseisor; this shall enure to both.

And like law is for an entry for mortmain, or a consent to ravishment *Co. idem.* &c.

If there be Lord and two jointenants, and the Lord release to one of them; this shall avail his companion. *Co. super. Litt. 269.*

If tenant in fee-simple make a feoffment in fee, and after the Lord release to the feoffor, this shall not enure to the feoffee to extinguish the seignior. But if he release to the feoffee, this shall enure to the feoffor to extinguish the seignior.

If there be lord and tenant, and the tenant make a lease for life, the remainder in fee, and the Lord release to the tenant for life; the rent is hereby wholly extinguished, and he in remainder shall take advantage of it; as when the heir of a disseisor is disseised, and the disseisor makes a lease for life, the remainder in fee, and the first disseisee doth release to the tenant for life; this shall enure by way of extinguishment to him in remainder, viz. to the lessee for life first, and after to him in remainder. *Co. super. Litt. 279.*

If two tenants in common of land grant a rent of forty shillings out of it, and the grantee release to one of them; this shall not enure to the other. But if one be tenant for life of lands the reversion in fee to another, and they join in the grant of a rent out of the lands, and the grantee release either to the tenant for life, or to him in reversion; this shall enure to the other and extinct the whole rent. *Co. super. Litt.*

267.

If two men gain an advowson by usurpation, and the right Patron release to one of them; this release shall enure to them both. *Co. super. Litt.* 276.

If two be bound jointly and severally in any obligation, or other especialty, and the obligee, &c. release to one of them; this shall enure to discharge the other also if it be a good release as to him that makes it.

But otherwise it is in case of a release made by the King. *Co.* 5. 59. *super. Litt.* 232. *Litt. Seff.* 376.

Prerogative.

And if two do a trespass to another together, and he to whom it is made doth release it to one of them; this shall enure to discharge the other.

To husband & wife.

If husband and wife, and *I. S.* purchase to them and the heirs of the husband, and after *I. S.* release all his right in the land to the husband; the wife shall have no benefit by this, but it shall enure to the husband alone. *Dier.* 319. *Co. super. Litt.* 273 276. 14 *H.* 8. 6.

And if there be two women joint disseisefesses, and the one take a husband, and the disseisee release to the other; in this case the husband and wife shall take no benefit by this.

And if the disseisee release to the husband; this shall enure to him and his wife and the other woman.

And if one that hath a rent out of my wives land release it to me and my heirs; this shall enure by way of extinguishment, and my wife will have advantage of it. And yet if the words be [grant and release] the rent to the husband and his heirs; in this case the husband may take as a grant if he will.

Note.

But here note in all these cases of releases, when one man will take advantage of a release made to another, he must have the release to shew and plead. *Co. super. Litt.* 231.

If I be disseised, and I release to the disseisor all actions I have or may have against him; this is but personall, and shall not be expounded to bar my heir after my death of his remedy, neither will it bar me of my remedy against his heir after his death. *Co.* 10. 51. 22 *H.* 6. 1.

So if I deliver goods to another, and afterwards I release to him all actions, and then he die; by this I am not barred so, but I may sue his executors.

See more in *Confirmation*, chap. 18. *Numb.* 7.

2. In respect of the thing released.
Of all actions.

A release of all actions without any more words, is better then a release of all actions real only, or a release of all actions personall onely, for by a release of actions, or a release of all manner of actions, without more words, are released and discharged all real, personall, and mixt actions then depending, and all causes of suit for any real or personall thing: as Appeals for the death of an ancestor, conspiracies, suits by *Scire facias* to have execution of a Judgement, detinue for charters; *Co.* 8. 153. 5. 28. 70. *Kelm.* 113, *Co. super. Litt.* 286. 290. 292. 289. *Litt. seff.* 492, 505, 506. 512, 513. *Broo. stat.* 39.

And if two conspire to indite me, and I release to them all actions, and after they goe on with their conspiracy; by this release I am barred to doe any thing against them.

By this release also of all actions, a debt due to be paid upon a statute or an obligation at a day to come, albeit the release be before the day is discharged, and by this also the statute it self if it be at any time before execution is discharged.

And if one be to pay forty pound at four days, and some of the days are past, and some to come, and the debtee make such a release, by this the whole debt is discharged. See more *Brownlow.* 1. *part.* 84. 80.

Also in a *Scire facias* upon a Fine or a Judgement, this release is a good plea in bar.

But this release of all actions will not discharge Executions, or bar a man of taking out of Executions, except it be where it most be done by *Scire facias*. Neither will it discharge or bar a man of suits by *Audita Querela*, or writ of Error to reverse an erroneous judgement; neither will it discharge covenants before they be broken, nor will it discharge any thing for which the releffor had no cause of action at the time of the release made, as if a woman have title

gick of dower; and doe release all actions to him that hath the reversion of the land after an estate for life; or a man is by an award to pay me ten pound at a day to come, and before the time I make such a release; or I make a lease-rendering rent, or an annuity is granted to me, and before the rent-day, I make the lessee or the grantor such a release; in these cases, and by a release in these words without more the dower debt, rent, or annuity, is not discharged.

If being made before the day of payment of an Annuity to the grantee of an Annuity, it will discharge the Arrearages before accrued, but not the payments after. *4 Ed. 4. 400.* for a release is not avoidable to any right or Action but what a man hath at the time of the release, *Goldsb. 163.* And therefore it is there held by *Gawdy* and *Popple* Justices. That where an Obligation is delivered as an Escrow, and the obligee release to the obligor all actions, and after the obligation is delivered as his deed; this release will not discharge it. *5 H. 7. 27.*

And if a man have two remedies or means to come by land; as action and entry, or by goods; as action and seizure, or the like; in this case by a release of all actions he doth not barr himself of the other remedy. *Et sic è converso. Litt. Sess. 496.*

And if a man doth covenant to build an house, or make an estate, and before the covenant broken the covenantee doth release unto him all actions; by this the covenant is self is not discharged. And yet after the covenant is broken, this release will discharge the action of covenant given upon that breach. *Co. super. Litt. 291.*

By a release of all a mans right into any lands or tenements without more words is released and discharged all manner of rights of action and entry the releffor hath to, in or against the land, for there is *ius recuperandi, prosequendi, invrandi, habendi, retinendi, percipiendi, possidendi*, and all these rights, whether they accrue by line, testament, descent, or otherwise, are extinct and discharged; so that if the lessee have gotten into the land of the releffor by wrong, by this release the wrong is discharged, and the releffor is in the land by good title. *C. 8. 251. Plow. 484. 6 H. 7. 2. Co. 3. 29. 6. 1. super. Litt. 345.*

Also by this release are discharged and released all titles of dower, and titles of entry upon a condition or alienation in mortmain.

And if a woman have title of dower after an estate for life, and make such a release to him in reversion, this doth barr her. By such a release also from the Lord to the tenant the services are extinct.

But this release will not bar a man of a possibility of a right that he hath at the time of the release, or of a right that shall descend to him afterwards. And therefore if the possessor of a statute before Execution release all his right into the land to the terretenant; or the heir of the disseisee in the life-time of his father doe release to the disseisor all his right; these releases doe not bar them. Nor will this release bar a man of an *Assisa Quarela*, and such like things. And yet if the tenant in a real action after the demandant hath recovered the land, release to him all his right in the land; this doth bar him of a writ of Error for any error in the proceeding in that suit. *Co. 10. 47. super. Litt. 289.*

And if these be Lord and tenant by fealty and rent, and the Lord by his deed reciting the tenure doth release all his right in the land saving his said rent; by this release the right of the seignory, save only of the seignory of the rent and fealty, is extinct.

And if the Lord release to his tenant all his right to the land and seignory, *salvo sibi dominio suo, &c.* hereby the services only, not the tenure is extinct. *Co. super. Litt. 150. Dier. 157.*

And if one have a rent-charge out of my land, and make such a release of all his right to the land to me that am the terretenant without excepting of the rent; hereby the rent is extinct and gone for ever. *Perk Sess. 644.*

By a release of all a mans title into lands or tenements, without more words is released and discharged as much as is released by the release of all a mans right; and both these releases have the like operation, for howsoever title strictly and properly

Of all right;

Of all title.

is where a man hath lawfull cause of entry into lands where of another is seised, for which he can have no action, yet it is commonly taken more largely, and doth include a right also.

And *Timlinus est justa causa possidendi quod nostrum est.* Kilo: 484. 6, 7, 8. Co. super. Litt. 285. 345.

Of entry or right of entry, By a release of all entries or rights of entry a man hath into lands, without more words a man is barred of all right or power of entry into those lands upon any right whatsoever.

And if a man have no other means to come by the land but by an entry, and he hath released that by these words, he is barred for ever. But if one have a double remedy, viz. a right of entry, and an action to recover his right by, and then release all entries, by this he is not barred of his action. *Co. 8. 151.*

Of actions real. By a release of all actions real without more words, are discharged all real and mixt actions then depending, and all causes of real and mixt actions not depending.

And therefore all causes of suing of assises, writs of entry; *Quare Impedit*, actions of *assise*, and the like, which the party hath at the time of the release made, are hereby discharged. But this release will not bar him that doth make it of any cause of action that shall arise and accrue afterwards. Neither will it bar him of an appeal of death or robbery, writ of Error, or any such like thing. Nor of anything which a release of all actions will not bar. And yet when land is to be restored or recovered by judgement in a writ of Error, this release is a bar to the writ of Error. So if a judgement be given upon a false verdict in a real action, a release of all actions real is a bar in an attaint. See more. 1. part. 65. Litt. Sect. 493. 495. *Co. 8. 151. Litt. Sect. 315. 500. Co. super. Litt. 288, 289.*

Of actions personal. By a release of all actions personal without more words are discharged all personal actions then depending, and all causes of personal actions wherein a personal thing only is to be recovered, and therefore hereby are discharged all causes of suing out of actions of debt, trespass, detinue, or the like. Also all mixt actions, as actions of waste, *Quare Impedit*, an assise of novel disseisin, writ of annuity, appeal of maim, and the like. Bro. Release: 47. Co. super. Litt. 285. 9 H. 6. 57. Litt. Sect. 302.

And if debt, &c. or damages be recovered in a personal action by false verdict, & the defendant bringeth a writ of attaint, or if a writ of *Audita Querela* be brought by the defendant in the former action to discharge him of execution; by this release the defendant in both cases is barred of his suit. *Co. super. Litt. 289.*

Also when by a writ of Error the plaintiff shall recover, or be restored to any personal thing only, as debt, damage, or the like: as if the plaintiff in a personal action recover any debt, &c. or damages, and be outlawed after judgement; in this case in a writ of Error brought by the defendant upon the principal judgement, this release will bar him.

But where by a writ of Error the plaintiff shall not be restored to any personal or real thing, this release is no bar: as if a man be outlawed in an action personal by process upon the originall, and bring a writ of Error, and then release; this is no barre to him: *Co. super. Litt. 288. Litt. Sect. 303.*

If a man by wrong take or find my goods, or they be delivered to him, and I release to him all actions personal; notwithstanding this release, I may in this case take my goods again, albeit I be barred of my action by this release.

Neither is this release a bar in an appeal of robbery or death.

Neither will it bar in any case where a release of all actions will not bar.

Neither is it any bar to an action of debt brought for an annuity granted for a term of years for any arrearages that shall grow due after the release.

Nor for any rent or sum of *nomine pene*, when the release is before the same day, or *nomine pene* happen.

Neither is it a bar in such real actions wherein damages are recoverable only by the statute, and not by the common law, as in a writ of Dower, entry, *disseisin*

diffinitio in le per Mordancefar, Aile, &c. See more Brownl. 1 part. 64: *Lit. Se ff.* 49
7. 498. 509. *Co. super Lit.* 291. 285.

By a release of all debts without more words, are discharged and released all
Debts then owing from the releasor to the releesee upon specialties, or otherwise, Of Debts,
all Debts due also upon Statutes. *Co. super Lit.* 76. 291. *Fitz. Audita Que-*

rela. 3. And therefore if the Comfor himself, or his Land, be in Execution for the Debt,
and he had such a release, he must be discharged: and so he cannot upon a release
of all actions.

By a release of all duties without more words is a releasor barred, and the releesee Of Duties.
discharged of all actions, Judgements, and Executions, also of all obligations. And
if the body of a man be in Execution, and the plaintiff make him such a release;
hereby he shall be discharged of Execution, because the duty in itself is dischar-

ged. And if there be rent or services behind to the Lord from his Tenant, and the Lord
make such a release to his Tenant; by this it seems the arrearages are released. *Co.*
8. 153. & *super Lit.* 291.

This word is of somewhat a more large extent than actions, for by a release of all
suits without more words is released and discharged as much as by a release of all
actions. Of Suits

And hereby also are discharged all executions in the case of a subject. But in the
case of the King it doth not release executions. Prerogative.

And this doth not release a Covenant before it be broken. *Co.* 8. 154, 157, 5:
70: *super Lit.* 291.

By a release of all quarrels without more words, all actions real and personal,
and all causes of such actions are released and discharged. So likewise by the release
of all controversies, or by the release of all debates: But this will not bar the releasor
of any causes of Suit that shall arise after, and was not at the time of the release:
as the breach of a Covenant which shall be after, albeit the Covenant be before, is
not discharged hereby. See more in Brownl. 1 part. 64. 65. 115. 80. *Co. super Lit.*
292. 8. 157. 5. 70. Of Debates,
quarrels, con-
troversies.

By a release of all covenants without more words, all covenants then broken and
all that shall be after broken that were then made, and in being, are discharged. *Qui*
destitit medium destruit finem *Co.* 1. 112. 10. 31. *super Lit.* 292.

But a release of all Actions, Suits, Quarrels, Debts, Executions and Trespasses
before any covenant broken, is no bar to the Action of Covenant: Of Covenants

So if one be baile for another and enter into a recognisance that if Judgement pass
against the principall, and he will not either pay the condemnation or yield his body
to prison that then he will pay it,

And the creditor before Judgement release to the Comfor as is before, and it
was adjudged to be no bar of the Execution against the baile. *Goldsb.* 162. *plen.* 66.
for it was not an absolute, but a contingent duty.

And therefore if a Lessee doe Covenant to leave a house leased to him at the end of
the terme as it was at the beginning of the terme, and the Lessor before the end of
the terme release to the Lessee all Covenants; this doth discharge the Covenant.

But this release doth discharge nothing else but Covenants. *Adjudged Hill.* 4:
74c. *B. R. Hancocks case.*

By a release of all Statutes, from the Conusee to the terre-tenant without more
words the Statute is discharged. Of Statutes,

And yet if he release all his right in the land of the Comfor; this will not discharge
the land of Execution. *Co.* 10. 47.

By a release of all errors, and writs of errors, and writs of error, and that before they
be brought, are extinct and discharged. *Co.* 2. 16. *Lit. Se ff.* 503. Of Errors,

And if a man be outlawed in a personall action by process upon original, and make
such a release; this will bar him. Of Warranties.

By a release of all Warranties or Covenants real, all Warranties then made and
being, are for ever discharged. *Litt. Sess.* 148.

By

Of Legacies.

By a release of all legacies without more words, a man doth bar himself of all the legacies given him *in presenti* or *futuro*, so that if he be to have a legacy at 24 years old, and at 21 years of age he release to the Executor all legacies or this legacy in particular; this is a bar to him of this legacy for ever. *Co. 10. 51. Dyer 56. Co. super Lit. 76.*

Of Rent.

And yet a release of all demands in this case is no discharge of this legacy.
By a release of Rent the Rent is extinct and discharged whether the day of payment be come or not. But a Release of all actions will not discharge a Rent before the day of payment come. *Co. super Lit. 292.*

Of promises.

By a Release of all promises or *Assumpsits* without more words a man may bar himself of a contingent or future thing that by other words could not be released, as if a man promise to me that if I do not pay me one hundred pound the tenth of *March* next, that he will pay it me the twentieth of that month, and before the time I release to him all actions and demands; this will not discharge the promise. But if I release to him all promises, this will bar mee. *Et sic de similibus. Adjudged Hil. 16. Jac. B. R. Briscoe vers. Heires. Co. 10. 51.*

Of Judgements.

By a Release of all Judgements without more words he that maketh it is barred of the effect, of any Judgement he hath against the Releasee, for if Execution be not taken out he is now barred of it.

Of Executions

And if the Releasee, or his land, &c. be in Execution he and it shall be discharged thereof by *Audita querela*.

And by a Release of all Executions without more words, a man is barred of taking or having out of any Execution upon any Judgement either before *Scirefaciam* or after.

Audita querela.

But if after Execution be made by *Capias ad Stat. Elegit*, or *fieri faciam* the plaintiff Release to the defendant all Executions, he cannot plead such a Release but he must have an *Audita querela*, and that he may have to discharge him of Execution. *Lit. Sect. 907. Co. 8. 151. super Lit. 290.*

Of Appeals.

By a Release of all appeals, are discharged all appeals of Felony, of Death, of Robbery, of Rape, of Burning, of Larceny depending, and all causes not yet moved also. *Co. super Lit. 287. 288.*

Of Advantages.

By this Release of all advantages, it seems actions of Debt upon account are discharged. *Co. 8. 150.*

Of Conspiracies.

By a Release of all conspiracies, all conspiracies past are discharged, and such also as are only begun and shall be prosecuted and perfected after the Release, are likewise hereby discharged. *Kelm. 113.*

Of forgeries.

By a Release of all forgeries before publication the forgery is discharged, but not the publication, and therefore the Releasee may take his remedy for that notwithstanding. *Co. 10. 48.*

Of demands or Claims.

A Release of all demands is the best Release of all, and this word is the most effectual word of all, and doth indeed include and comprehend within it most of all the Releases before. *Co. super Lit. 291 Co. 8. 54. Lit. sect. 501. 509. 510.*

By a release of all demands without more words are Released all rights and Titles to Land, Warranties, conditions annexed to estates before they be broken or performed, and after they be broken.

Also by this release are released and discharged all Statutes, Obligations, Contracts, Recognisances, Covenants, Rents, Commons, and the like.

Also all manner of actions real and personal, Appeals, Debts, Duties.

Also all manner of Judgements, Executions. Also all Annuities, and Arrarages of Annuities and Rents. And therefore if a man have a Title of entry by force of a condition, &c. or a right of entry into any Lands; by such a release the right and Title is gone. And if a man have a rent-service, rent-charge, Effovers, or other profit to be taken out of the Land; by such a release to the Tenant of the Land it is discharged and extinct. *See more Brownl. 1 pars. 80. 64. 65, 115. 116. 186.*

And therefore if a Termor for years grant the Land by indenture to A rendring rent, and at the end of the first yeare he release to the Grantee all demands; the rent is hereby extinct during all the time. *Adjudged B. R. pas. 17. Jac. Wottons case.*

A release of all demands will discharge a rent due. *Goldsb.* 168. a debt upon an Award to be paid at a day to come being made before the day. But if it be a duty that rests merely in possibility and contingencie, as if one be bound that if *A* deliver to him at a day *Hay* he will pay money; this cannot be released by this before the day, so a *nomine pene* waiting upon a rent, untill the rent be behind, so to pay 10l upon the birth of a child, or the like. *Brownlows* 1 part 1 c. 9. 115. And a release of all claimes it seems is much of the same nature.

But by a release of all demands or of all claimes is not released any such thing as wherof a release cannot be made, as a meer possibility, or the like. *Co.* 5. 70.

Neither will this release discharge a covenant or promise that is future and contingent before it be in being. Nor a covenant before it is broken: and therefore if the Lessee of a house covenant to leave it as well in the end of his terme as it was in the beginning of his terme, and before the end of the terme the lessor release to the Lessee all demands; this is no bar to an action brought for a breach of the covenant afterwards. *Hil.* 4. Jac. B. R. *Hancocks* case *Adjudged*.

And if a man in consideration of a sum of money given to him by a woman sole assent to her that if she marry one *M* that he will pay to her after the death of *M* one hundred pound by the year if she survive him, and she marry him, and the husband release all demands and then die; this is no bar to the duty.

So if one promise a woman that if she will marry him that he will leave her worth one hundred pound if she doe survive him, and before the marriage she release to him all actions and demands; this doth not discharge the promise. *Hil.* 6. Jac. B. R. *Belcher & Hudsons* case.

And note that all these words are of the same force when they are joyned with other words as when they are alone. Note.

If two Tenants in Common of land grant a rent-charge of forty shillings out of it to one in Fee, and the Grantee release to one of them; this shall extinguish but twenty shillings, for that the grant in judgement of law is severall. *Co. super Litt.* 267.

If one have severall causes of action against two, and make a joynt release to them; this shall be taken to be a release of all joynt and severall causes of action *19 H. 6. 4.*

So if an Exetutor have some cause of action for himself, and some for his Testator, and he release all actions, indefinitely; this release doth discharge both sorts of actions. *Bro. Release* 31. 29.

If the Tenancy be given to the Lord and a stranger, and to the heires of the stranger, and the Lord release to his companion all his right in the Land; this shall enure not only to pass his estate in the Tenancy-but also to extinguish his right in the Seigniorie. *Co. super Litt.* 280.

If there be Lord and Tenant of two acres, and the Lord release all his right in one of them to the Tenant; hereby the services are extinct for both. *Park, Stat.* 71. *Bro. Release* 85. 9 E. 3.

So if one have a rent-charge out of twenty acres, and release all his right in one acre; hereby all the rent is extinct.

And yet if *A* lease white acre to *B* for life rendering rent, and afterwards doth release part of the rent; this is good only for such part.

If I be seised of Land in Fee and I make a Lease of it to one for life, and after I release all my right in the Land for the life of the Tenant for life, so as neither I nor my Heirs shall have claim or challenge any thing or right in that Land for the life of the Tenant for life; by this release nothing is extinct or discharged but the causes of action of wast that were then, and not any cause that shall happen afterwards. *Bro. Release* 65.

If a Statute be entered into the twentieth of *Aprill*, and the Conusee by a release dated the nineteenth of *Aprill* (meaning to except the Statute) doth release all debts and demands till the making of the release; by this release the Statute is discharged. But if the words had been to the day of the date of the release *contra.* See more in *Brownlows Rep.* 2 part. 300.

If a promise be of two parts, and he to whom it is made doth release one part; it seems this is a release of both. *Per Justice Dedrige Trin. 14. Jac.*

If *A Jan. 1.* enter into an obligation of forty pound to *B.* and *B July 13* make a Deed thus, It is agreed between *B* on the one part and *A* on the other part, that upon good considerations *B* doth acknowledge himself fully satisfied and discharged of all bonds, debts or demands whatsoever from the beginning of the world to this day by the said *A*, and that he the said *B* is to deliver all such bonds as he hath yet undelivered to *A* except one bond of forty pound yet unforfeited which is for the payment of, &c. which was the obligation before; in this case it was adjudged a good release and discharged of all the bonds excepting that one, and that this exception shall goe to all the premisses, *Co. 9. 53.*

3 In respect of
the time or
estate.

A release of a right, or an action cannot be for a time but it will be for ever.

And therefore if a release be made to any one that hath a Fee-simple by wrong by him that hath the right for one houre, one yeare, for life, or yeares; this is a good release for ever *Litt. Sect. 467. 470. Co. super Litt. 273. 264. 280. Kelwarth 88. Co. super Litt 9.*

And if the Disfeisee release all his right in the land to the Disfeisor without naming his Heires or setting down any time how long the releesee shall have the land or the right of the Disfeisee therein; this is a good release for ever, and doth make the estate of the disfeisor good for ever, and to doth make a good estate in Fee-simple without these words [his Heirs, &c.] And if the Disfeisor or his Heire make a gift in Tail, or a lease for life, and the Disfeisee release all his right to the Donee or Lessee for life, To have and to hold for life only; this is a good release of his right for ever.

But if the Disfeisee do Disfeise the Heire of the Disfeisor, and make a lease for life (which is a release in Law ;) by this the right is released during that time only.

So if one Jointenant or parcener release to the other all his right in the Land, without the words [heires] or any more word; this release doth give to his companion his whole interest for ever.

And when the Lord, or Grantee of a rent release to the Tenant, or terre-tenant generally; by these releases a Fee-simple is transferred without any words of heires, &c. And yet the Lord may release his Seigniorie to his Tenant, to hold to him in Taile or for life, and this shall be taken and enjoyed accordingly. But if the Lord doth release the Seigniorie to his Tenant without any words of heires put in the Deed, the same is extinct.

And if I let land to a man for terme of yeares and after I release to him all my right which I have in the Land, without using any other words in the Deed; or release to him, To have and to hold for his life; in both these cases he hath an estate for his life only. *Litt. Sects. 545. 546. 565. Plow. 556. Dier 263.*

And if I lease land to a man for his own life, and after release to him To have and to hold for his own life; hereby he hath but an estate for his own life.

But if I make a lease to him for anothers life; and after release to him *Habendum* to him for his own life, by this he hath an estate for his own life.

But if I be seised of land in Fee-simple and let it to another for life or yeares, and then release all my right to him To have and to hold to him and his heirs, hereby he hath the Fee-simple.

And if I release all my right to him To have and to hold to him and the heires of his body, hereby he hath an estate Tail.

And if one be seised in Fee of a rent service or charge, and grant it first for life, and then release it to the Grantee To hold to him and his heirs, or to him and the heires of his body: this shall enure to an enlargement according to the agreement: *Litt. Sect. 549.*

But if one grant a rent-charge out of his land *de novo*, and after release to the Grantee all his right in the rent, To have and to hold to him in Fee-simple or Fee-tail: this doth not enlarge the estate.

And

And if Tenant in Tail, or for life make a Lease for years, and after by Deed doth Release all his right to the Lessee for years in possession, to hold to him and his Heirs for ever; this will not make the Estate of the Lessee good for longer time, then the life of the Releffor. *Littl. Sess. 606. 610. 24 Eliz. 3. 28.*

If one make a Lease for ten years, the Remainder for twenty years to another, and he in Remainder, Release all his right to the Lessee for ten years; in this case the Releffor hath an Estate for thirty years, and no less; for one Lease for years cannot drown in another. *Co. super Littl. 273.*

If I let Land to a Woman sole for her life, or for years, and she take a Husband, and after I Release to them two to hold for their lives; this shall enure no further then the intent, and in the first case he shall hold joyntly with his Wife, but in her right, whiles she doth live, and after for his own life, if he survive, and in the last case they shall have the Freehold joyntly. *Littl. Sess. 526. Co. super Littl. fol. 299. 300.*

If there be Lord and Tenant by Fealty and Rent, and the Lord granteth the Seigniority for years, and the Tenant attorneth, and the Lord Release his Seigniority to the Tenant for years, and to the Tenant of the Land generally; by this the Seigniority is extinct for ever, and the Estate of the Lessee also: But if the Release be to them and their Heirs; then the Lessee shall have the Inheritance of the one Moyety, and the other is extinct. *Co. super Littl. 280.*

It is a discharge in writing of a sum of money, or other duty which ought to be paid or done; As if one be bound to pay money on an Obligation, or Rent reserved upon a Lease, or the like, and the party to whom the money or duty should be paid or done upon the Receipt thereof, or upon some other Agreement between them, maketh a writing under his hand, witnessing that he is paid or otherwise contented, and therefore doth acquit and discharge him of the same. The which is such a discharge, and Bar in the Law, that he cannot demand and recover the same again contrary thereunto, if the acquittance be shewed. *Terms Ley.*

The Obligor is not bound to pay money upon a single Bond, unless the Obligee will make to him an Acquittance or Release; nor is he bound to pay it before he hath the Acquittance: And in this case the Obligor may compel the Obligee to make him an Acquittance. And so also it is in case of a Statute Merchant, one is not bound to pay the money thereupon, before he hath the Acquittance or Release of the Plaintiff. But otherwise it is in case of an Obligation with a Condition; for there a man may aver payment. *22 Ed. 4. 6. 41 Ed. 3. 25. 1 H. 7. 15. 22 Ed. 4. 6. Broo. Debi. 43. Oblig. 10.*

10. Acquittance, what.

11: Where a man is not bound to pay money without he hath an Acquittance.

CHAP. CXXXVIII.

Of a Remitter.

Sett. 1.
1. Remitter,
what.



Remitter is where a man is come to two Titles in Lands or Tenements, and his latter is defective, and not so good as the former; or when a Mans Entry is taken away by Discent or Discontinuance, and he hath the Frank-tenement cast upon him by a new Title; in this case he shall be, or at least may be (if he will) restored to his first Title, and then he shall be said to be in by that Title, and that shall be said to him a Remitter.

Election.

It is thus defined by some. Remitter is an operation of Law upon the meeting of an ancient Right, redmediable; and a latter state in one person where there is no folly in him, whereby the ancient Right is restored, and set up again, and the new defeasible Estate vanished away. *Quod primum est verum, Co. upon Litt. 347, 348.* As if a man be disseised, and the Disseisor makes a Feoffment to the Disseisee; in this case the Disseisee may (if he will) be remitted to his elder Title, or he may chuse: For in some cases where it is not to the prejudice of a stranger, he that hath the Titles, may chuse whether he will hold by the former, or the latter Title; and if he enter generally, where he hath two Titles, the Law will judge him in of his elder Title, until he have done some act to declare his Election. So that there are two things requisite in a Remitter; first, Ancient Right; secondly, A new Possession: And the reason of it, is the Ancient Right, which is, first, most sure; secondly, most worthy: And for the Possession, it ought to be where the party gets the Possession, and not by an act wherein is folly. Thirdly, the efficient cause is an act in Law: And for the ancient Right, it must be a Right not a Title, and it must be a Right of Entry, and in that case, however he come to the Possession, he shall be remitted, unless it be by Estoppel; and this Remitter by Right of Entry, is not waivable. *Crompt. Jur. 120. Litt. chap Remitter. F.N.B. 149. Dyer 68.*

Sett. 2.
2. In what case
a Remitter shall
be.
Election.

- For Answer hereunto, these things are to be known:
1. In all cases, when a man hath a lawful Right of Entry into Land, and the Possession be cast upon him by Act of Law, *volens volens*, he must be remitted; but if it come by his own act, it is in his Election, whether he will be remitted, or not: As if after he have one Title, he take any estate by any other way and means, then by Fine or Deed indented, (whereby he may be estopped) he shall be remitted. *Broo. cap. 252.*
 2. If one Lease for life to one, and he alien in Fee, and the Alienee make an Estate to the Lessor; in this case the Lessor is remitted. *Litt. Sett. 694. 695.*
 3. If Lands be given to a Tenant in Tail, the Remainder to another in Tail, the Remainder to another in Fee; and the Husband of the Wife discontinue, and the Husband and the Wife take back a new estate to them for their lives; this is a Remitter to them, and all them in the Remainder. *Litt. Sett. 673.*
 4. If an Estate be made to the Husband in Tail, the Remainder to his Wife for life, the Remainder to B. C. D in Fee: And after another Estate is executed to the Husband and Wife for life, the Remainder to another, and she enter generally after the Husbonds death, she shall be judged in, as in her Remitter, without special Claim made; for that is her best Estate. By three Judges. Where the party that is to be remitted, hath a Right of Entry, howsoever he come to the Possession, unless it be by Estoppel, he shall be remitted. By Justice *Dodridge. 16 Jac. B. R.*
 5. If a Tenant in Tail discontinue the Tail, and after disseise his Discontinuee, and die seised; the Issue in Tail that comes in now by discent, shall be remitted, and the Title of the Discontinuee is utterly defeated, though the Issue be an Infant, or Feme.

To a Tenant
in Tail, and
his Issue.

Feine-covert. *Littl. sect. 147.* If a Tenant in Tail infeoff his Issue in Tail within age, and after die, the Issue is remitted, though he be of full age before the death of the Ancestor. *Littl. sect. 660.* If one disseise the Discontinuee of a Tenant in Tail, and infeoff the Issue, the Issue after the Ancestors death, shall be remitted. *Plow. 48. 19 H.8. 12.*

6. If a Tenant in Tail discontinue in Fee, and then take back an Estate in Fee, and after devise the Land by will, and the Devisee wave the Devise; in this case the Issue shall be remitted, *contra*, if he had not waved it. *Dyer 121. Kelw. 4.*

7. If Lands be intailed to a man and his wife, and the Heirs of their two Bodies engendred, and they have a daughter, and the wife die, and the husband marry another, and have another daughter by her, and discontinue the Tail; and after doth disseise the Discontinuee, and die seised, and the Land descend to the daughters; the eldest is remitted for one moyety, but the youngest is not for the other moyety. *Littl. sect. 661.*

8. If a Tenant in Tail infeoff his Heir Apparent in the Tail, and another, the Issue is remitted for the one moyety, but not the other for the other moyety. *Litt. sect. 663.*

9. If a Tenant in Tail infeoff his Issue in Tail, and another of the Intail Land, and Livery of Seisin is made to the other, according to the Deed, and the son not knowing of it, doth not agree to the Feoffment, and after the other die, and the son never meddle with the profits of the Land, during his Fathers life, and then the Father die; now the son is remitted. *Littl. sect. 684.* If a Tenant in Tail infeoff his Issue, being within age, and his wife in Fee, and dieth; this is a Remitter to the Issue presently by the death of the Tenant in Tail. *Co. super Littl. 351.*

10. If the Husband alien the Lands he hath in the right of his wife, and after take back an Estate again to them for their lives, or otherwise; now in this case, if the wife do survive the Husband, she shall be remitted; and that though this second Estate to the husband and wife be by Fine: But if the wife die first, the Heir of the wife shall not be remitted, if the second Estate were a Fee-simple. *Littl. sect. 666, 667.*

11. If the husband discontinue his wifes Land, and the Discontinuee is disseised, and the Disseisor doth make a Feoffment in Fee or Lease for life to the wife; in this case she shall be remitted; but if it were by Covin between the Disseisor and the wife, *contra*: *Co. 3. 78. Littl. sect. 678.* If the Tenant in Tail discontinue the Tail, and have issue a daughter of full age; and she take a Husband, and the Discontinuee makes a Release of it to the Baron and wife, for their lives; this is a Remitter to her, and she is in of the Estate-tail. *Littl. 671.*

12. If Lands be given to a man and his wife, and the heirs of their two bodies, and after the husband alien the Land in Fee; and take back an estate to him and his wife for their lives; in this case they shall be both remitted. *Littl. sect. 671.*

13. If the Husband discontinue his wifes Land, and take back an Estate to him and his wife, and a third person; this is a Remitter for their Wives moyety, not for the other. *Littl. sect. 676.* And if the Husband in this case take back an Estate to him, and his wife, during the life of the Husband; this is a Remitter to his wife presently. *Littl. sect. 676.*

14. If one disseise me, and after make a Feoffment to me with Warranty, now I may be remitted, if I will, or I may make use of the Feoffment, with Warranty at my Election. *11 H.7. 20.*

15. If a Disseisor make a Lease for years or life, or any other Estate to the Disseisee by Deed, or without Deed; this is a Remitter, *contra*, if it were by Fine. *Litt. sect. 693. 12 H.7. 20.*

16. If my Father disseise me, and after die seised, and the Land descend to me, I am and must be remitted. *Kelw. 41. 12 H.7. 20.*

R r r r r 2

17. If

Infant.

Se. 3.
To a Wife that
hath a Hus-
band.

To the Dis-
seisee or his
Heir.
Election.

- Señ. 4.* 17. If the Heir of the Disseisor, that is in by descent, make a Lease for life to 7. S. the Remainder for life, or in Fee to the Dissee; in this case, after the death of 7. S. the Dissee shall be remitted; for when two Titles meet, the best shall be preferred: 11 Ed. 4. 1. *Littl. sect. 685.*
- To an Infant.* 18. If one discontinue the Land of an Infant, and after one disseise the Discontinuee, and infeoff the Infant, the Infant shall be remitted; but if there were any Covin between the Infant and Disseisor, *contra.* Co. 3. 78.
- Covin.* 19. If a Tenant in Tail infeoff a Feme-sole, and the Issue in the Tail, being within age, take her to wife after the death of the Ancestor; in this case he is remitted, and his wife hath nothing in the Land, but if he had been of age when he had married her, *contra.* *Littl. sect. 665.*
20. If two Joyntenants be, one of full age, and the other within age, and they be disseised, and the Disseisor die seised, and his Heir enter (the other Joyntenant still within age) and the Heir of the Disseisor make a Lease to them; this is a Remitter for the moyety of him within age, but for the other moyety, *contra.* *Littl. sect. 696.*
- To a Parson of a Church.* 21. If I be seised of an Advowson in gross, and an usurpation be had against me, and at the next avoidance I usurp again; in this case I shall be remitted.
3. In what case no Remitter shall be.
- No Remitter shall be in these cases.
- First, When the party doth come to the second Title, by Act of Parliament.
- Secondly, When he comes to it by Fine or other Record.
- Thirdly, When there is not both an Action and a Right, with a descent come to the party to be remitted; for if the Right and the Possession of the Land be in several persons, and he that hath the Right, hath one against whom to bring his action, there shall be no Remitter.
- Fourthly, When the party comes to the last Title by his own wrong.
- Fifthly, When a man hath but a Title of Entry onely, as for Mortmain, Elchen, Condition broken, or the like. Co. upon *Littl.* 348.
- Sixthly, When two Rights onely descend, there must be an Ancient Right, and a new Estate; for one Right cannot work a Remitter to another Right.
- Seventhly, No Remitter shall be to a Right remediless; for the which, one can have no Action. *Dyer* 54. Co. 3. 3. *Plow.* 207. *Kelw.* 44. *Littl. sect. 347.*
- Señ. 5.* For the illustrating of which, take these cases.
- To a Tenant in Tail, or his Issue.* 1. If a Tenant in Tail infeoff the Issue in Tail, after he is of full age, and die, the Issue shall not be remitted to his elder Title. *Littl. sect. 664.*
2. If a Tenant in Tail since the Statute of Uses, make a Feoffment in Fee to the use of the Issue in Tail, and die; in this case the Issue shall not be remitted, but in this case, if any Entry be given to the Issue by Law, he may take it. But if the Issue in this case waive the Possession, and bring a Formedon in the Descender, and recover against the Feoffees, he shall be remitted. *Broo. Remitter* 149. *Plow.* 114: *Dyer* 23:
3. If a Tenant in Tail suffer a Common Recovery, and after disseise the Recoveror, and die; his Issue shall not be remitted, though the Recovery be erroneous, as long as it stands in force, and is not reversed; for neither an Action without a Right, nor a Right without an Action can make a Remitter. Co. upon *Littl.* 349.
4. If the Issue in Tail disseise the Discontinuee of his Father, and then infeoff his Father, and he die, and the Land descend to him; in this case he shall not be remitted. *Perk. sect. 397.*
5. If a Tenant in Tail have Issue two sons of full age, and he Lease the Land intailed to his elder son for life, the Remainder to his younger son for life; this is no Remitter to the eldest; but if he die without Issue of his body, this is a Remitter to the youngest. *Littl. sect. 682.*
6. If the Tenant in Tail, and his Issue, disseise the Discontinuee of the Tenant in Tail,

Tail, and the Tenant in Tail die, whereby the Lands descend to the Issue; now though he shall be remitted against all strangers, yet not against the Discontinuee.

11 Ed. 4. 2.

7. If the Husband and Wife alien the Land of the Wife by Fine, and after take back any Estate to them again; in this case the Wife shall not be remitted.

To a Wife
that hath a
Husband:

8. If the Husband discontinue the Tenements of his Wife, and take back an Estate to him for term of his life, the Remainder to his Wife, during the Husband's life; this is no Remitter, but after if she survive him, it is a Remitter, *Littl. sect. 680.*

9. If the Husband make a Feoffment in Fee of the Land, he hath in the right of his Wife, and then take back an Estate in Fee to him, and his Wife, and she die, and he over-live her; now her heir shall not be remitted.

10. If the younger Brother disseise the elder, and the elder bring an Assise, and is barred, and after the younger die without Issue, and the Land descend to the elder; in this case the elder is not remitted. *Dyer 5.*

To the Dissei-
see, or his Heir.

11. A man shall never be remitted to an Advowson Appendant, though he have right, till he have recontinued the Manor, to which it is Appendant. So if one purchase an Advowson in Fee, and suffer usurpation, and six moneths, and it be after cast upon him, by descent or other Act in Law, he shall not be remitted. So if the Usurper grant the Advowson, to the Purchaser and his Heirs, and he dieth, his Heir is not remitted. If a Tenant in Tail of a Manor, to which an Advowson is Appendant, make a Discontinuance, the Discontinuee granteth the Advowson to Tenant in Tail, and his Heirs, the Tenant in Tail dieth, the Issue is not remitted: But *contra*, if one be remitted to the principal, he shall be remitted to the Accessary, though severed by the Discontinuee. *Co. upon Littl. 349.*

4. For the
thing, to
which a man
is to be remit-
ted.

If the Feoffee of the Tenant in Tail charge the Land, or make Leases, or the like, and after the Issue is remitted; these charges and acts of the Feoffee, are avoided; so in all like cases. *Littl. sect. 659.*

5. What Acts
shall be avoid-
ed by the Re-
mitter, or not.

If the Tenant in Tail infeoff his Issue in Tail, within age, and after being of full age, and then charge the Land, and after the Tenant in Tail die; now the Issue being remitted, the charge is avoided: *Littl. sect. 660.*

If the Husband discontinue the Wives Land, and the Discontinuee make an Estate to the Husband and Wife, on Condition, and after the Husband die, and the Wife is remitted, here the Condition is avoided. *Littl. sect. 660.*

CHAP. CXXXIX.

Of Remover of Records, Causes, and Persons, out of one County into another.

Señ. 1.
1. Remover.



Remover is where a Sute or Cause is removed out of one Court into another; and for this purpose there are divers Writs and Means. Some of these are to remove the Cause onely, and some of them are to remove the Person and his Cause both. Co. 11. 41. Some of the first sort are to remove Causes out of Courts of Record, and some to remove Causes out of Courts that are not Courts of Record. *Corpus cum Causa*, *Habeas Corpus*, is to remove the person, being a prisoner about the Cause, and his Cause; the *Habeas Corpus*, also Writs of Privilege, Prohibition, *Cerciorari*, Recordary, and others, are to remove the Causes onely. Writs of Error and Attaint also do remove Sutes. 21 Jac. chap. 23.

2. Recordo & processu mittendis, what.
Corpus cum causa, what.

There is an old Writ called *Recordo & processu mittendis*, by which this was done.

Corpus cum causa, is a Writ issuing out of the *Chancery*, to remove both the Body and the Record, touching the Cause of any man lying in Execution, upon a Judgment for Debt into the *Upper Bench*, &c. there to lie until he have satisfied the Judgment. *F.N.B.* 251. *Dyer* 61.

3. *Habeas Corpus*, what.

Habeas Corpus, is a Writ lying where a man is indicted of Trespass before Justices of Peace, or in a Court of any Franchise, and upon his apprehension being laid in prison for the same, he may have out of the *Upper Bench*, thereby to remove himself thither at his own costs, and to answer the cause there, &c. And the order in this cause is first to procure a *Cerciorari* out of the *Chancery*, directed to the Justices for the removing of the Indictment into the *Upper Bench*, and upon that to procure this Writ to the Sheriff, for the causing of his Body to be brought at a day. *F.N.B.* 250.

Cerciorari.

This Writ is used also for the removing of other Causes in other cases, from one Court to another: *F.N.B.* 7. 250. 78. 110. *Crompt. Jur.* 46.

Señ. 2.
4. *Cerciorari*, what.

A *Cerciorari*, is a Writ that lieth where one is impleaded in a base or inferior Court, that is a Court of Record, and one of the parties contending, supposing he may not have Justice there upon a Bill in *Chancery*, comprising some matter of Conscience, as that he hath not had, or is not like to have Justice there, he shall have this Writ to remove the Record into the *Chancery*, that the cause may be there determined. And if he do not prove the matter of his Bill, there the other party shall have a Writ of *Procedendo* to send back the Record thither again, there to be ended.

Procedendo.

And by this other Records, as Indictments, Recognisances, and the like, may be removed, and sent up; and the course is to send the Record first into the *Chancery*, and not first to certify it into the *Upper Bench* or *Common Pleas*, but out of the *Chancery*, to send it thither by a *Mittimus*, which is the sending of a Record into another Court. And a Writ of Error is a *Cerciorari* in it self. 2 *H. 5. 2. F.N.B.* 242. 11 *Ed. 4. 11.*

Mittimus.

This lieth in many other cases. *March. 196. pl. 241.*

The Remanding of a Cause, is the sending it back into the same Court, out of which, it was called and sent for.

Señ. 3.
5. *Procedendo*, what.
Procedendo is a Writ whereby a Plea or Cause, formerly called from a base or inferior Court to the *Chancery*, *Upper Bench*, or *Common Pleas*, by Writ of Privilege or

or *Cerciorari*, is released and sent down again into the same Court, to be proceeded in there, after it appeareth, That the Defendant hath no cause of Privilege, or that the matter comprised in the Bill, is not well proved. *Co. 6 63. 21 R 2. 11.*

Now as touching all these things, the removing of Persons and Causes; these things are to be known.

1. The Judges of the *Upper Bench*, may send prisoners from thence in the Country to be tried, if they please. *6 H. 8. 6.*

2. No *Habeas Corpus* or *Cerciorari*, is to be granted to remove any prisoner out of any Gaol, or to remove any Recognisance, except the Writ be signed by the Chief Justice, or in his absence by one of the other Judges own hands, under pain of five pound forfeit by him that makes the Writ: But the Writ is good (as it seems) and to be obeyed, though his name be not to it. *1, 2 Phil. & Ma. 13.*

3. No Writ to remove a Sute begun in an Inferior Court of Record is to be obeyed, unless it be delivered to the Steward of the same Court, before Issue or Demurrer joyned, so as the Issue or Demurrer were not joyned within six weeks, next after the Arrest, or Appearance of the Defendant. *21 Jac. 23.*

4. No Writ to remove a Cause, is to be received and allowed, unless it be delivered to the Judge of the Cause, before the Jury hath appeared, and one of them sworn to try the cause; for then it is too late. *43 Eliz. 5.*

5. No Writ to remove any Cause out of an Inferior Court of Record shall be allowed, if the cause be not five pound, or above, and do not concern Freehold, or Inheritance, Title of Land, Lease, or Rent, where an Utter Barester of three years standing, is Steward or Assistant to him. *21 Jac. 23.*

6. But if there be a Fore gn, or other Plea pleaded, that is not tryable there, then it is removable. *Idem.*

7. Writs of Error and Attaint are allowable, as formerly. *Idem.*

8. A Sluce being once remanded by *Procedendo*, shall never after be removed again. *Idem.*

9. No *Cerciorari* to remove any Indictment of Riot, Forcible Entry, Assault and Battery, is to be allowed, unless it be delivered at the Quarter Sessions in open Court: And that the parties indicted, do there put in Bond of ten pound to the prosecutor, to pay him such Costs and Damages as the Justices of Peace shall set down. *21 Jac. 8.*

10. No Writ of *Cerciorari* shall be allowed to remove any Information or Indictment against any man, or proceedings for any thing within the new Ordinance for High-ways, made *March. 1654.*

11. No *Cerciorari* or *Habeas Corpus*, shall be allowed to remove any Indictment for any offence about Corn, Wine, Beer, Ale, Fish, Flesh, Salt, Butter, Cheese, or other dead victual whatsoever. *Aff. 23 October, 1650.*

12. No *Cerciorari* shall be allowed to remove an Indictment for making, or taking of Challenges. *Ord. 29 June. 1654.*

13. *Cercioraries* shall not be allowed to remove Bills of Indictment of Riot, Forcible Entry, or of Assault and Battery, unless the party indicted will become bound with sufficient Sureties, such as the Justices of Peace in Sessions shall like of, to pay to the Prosecutor within a moneth after Conviction, such Costs and Damages as the Justices shall assess. *21 Jac. 8.* But other Indictments may be removed without this Caution.

14. Two men and their wives were indicted for a Forcible Entry, who brought a *Cerciorari*, and some of them refused to be bound according to the Statute of *21 Jac.* yet the Cause is to be removed, *March. f. 27. pl. 63.*

15. If the Sureties tendred, be worth ten pound a peece, the Justices must accept them for the ten pound Bond, upon the Statute of *21 Jac.* the same.

16. After tender of sufficient Sureties, according to the Statute, all the proceedings of the Justices, are *Coram non iudice*, (i. e.) as before no Judge. *March 27.*

17. Upon a *Cerciorari* to remove an Indictment against a man, he is to be bound to prosecute with effect (that is) to traverse the Indictment, or quash it for defect. And if he do appear, an Attachment shall go out against him. *March 76. pl. 118.*

of

Of a Recordary, &c.

6. Recordary,
what.

Suitors.

7. Pone, what.

Tolt, what.

Self. 4.
8. Accedat ad
Curiam, what.

A Recordary is a Writ issuing out of the *Upper Bench* or *Common Pleas* to the Sheriff, to command him to send a Plaintiff that is before him, without Writ in his County Court, into that Court, from whence the Recordary is, to the end, that the cause may be there determined: And this the Sheriff is to send up and certify under his own, and the Seals of four of the Suitors that are Judges of the same Court. And he is withal to warn the other party to be in the Court there at a time certain.

And a Pone doth nothing differ from this, but that it is to remove a Sute that is there before the Sheriff, by Writ and not by Plaintiff: And if this be sued out by the Plaintiff in the first Sute, it may be had without shewing any cause at all for it: But if it be sued out by the Defendant, he must shew cause for it. As if it be to remove a Plea in a Replevin by Plaintiff, to shew that the Defendant doth avow for Damage-feasant, that the Plaintiff doth justify for Common of Pasture, which is a Plea touching Freehold, and therefore should not be without Writ. *F. N. B.* 119. 47. 70. 18. 71. 3 *Hen.* 6. 30. 12 *Edw.* 4. 11. 21 *Jac.* 23. 13 *Edw.* 1. 3. 43 *Eliz.* 5.

A Tolt is a Writ whereby a cause depending in a Court-Baron, is removed into the County-Court.

Accedat ad curiam is a Writ issuing out of the *Upper Bench* or *Common Pleas*, directed to the Sheriff, to command him to go to such a Court of such a Lord or Franchise, as County-Court or Court-Baron; or other Court that is not a Court of Record.

Where a Plaintiff is sued for taking of Beasts as a Distress, or some false Judgment, is supposed to be given in a Sute there; and that there he do make Record of the same Sute, in the presence of the Suitors of the same Court, and four Knights of the County; and the same certify into the Court, from whence the Writ came, at the day limited in the Writ. But this cannot be had of either side, without shewing of some cause.

And the causes for which these Sutes are used to be removed, are because they question Freehold there, or some thing is pleaded that is Foreign, and not triable in the Court.

And the Recordary, Pone, and this Writ, are to no other purpose but to remove a Sute into a Superior Court, and are in the nature of a *Cessumari*. And upon the Removal, the Sute is at an end in the Inferior Court: And if the other party, or any of the Judges, or other Officers of the Court, do proceed after the Removal of the cause, the party that removed the Sute, may have an Attachment against them: And after it is once sent away, it can never be sent back again, but must be tried there. See *F. N. B.* 70. *Plow.* 74. *Finches* Ley 444.

See *Superfetas*, *Prohibition*, *Error*, *Attaint*.

CHAP. CXL.

Of a Rent.



Rent is a Sum of money, or other Consideration, issuing yearly out of Lands or manual Tenements. *Redditus à redendo, quia retroit; vel à reddere, i. retro dari.* This differeth essentially from an Annuity: For a Rent doth always issue out of Lands or Tenements, and the Land also is the debtor. Otherwise it is of an Annuity, which is chargeable upon the person of a man only, and he alone is the

Debtor for this. *Co. super Lit. 141, 142; Plow. 132, 138, 139.* And of Rents there are said to be three kinds.

1. Rent-service; which is, where a man doth hold his land of his Lord by Fealty and certain Rent, or to render and yield Hens, Capons, Roses, Spurs, Bows, Arrows, Horses, Wheat, or the like; or to perform any office, or yield any attendance, or the like: And to this Rent, Distress is incident of common right. The kind of it.

2. Rent-charge; which is where an Estate is made of Lands or Tenements to another in Fee-simple, Fee-tail, for life or years, rendering a Sum of money or other thing to be paid yearly to him that made it and his Heirs; and there is a Clause in the Deed, That if the Rent be behind, it shall be lawful for the Feoffor, Lessor or Donor to distrain for it upon the Land. Or where one doth grant a Rent out of his Lands or Tenements to another in Fee for life or years, with such a power to distrain for the Rent if it be behind: And to this no Distress is incident of common right, but by the agreement of the parties the Land is charged with the Distress; and hence it is called a Rent-charge.

3. Rent-seck is where a Rent is reserved or granted (as in the case before) without any clause of Distress, or power to distrain: And this is called *Redditus siccu*, dry Rent; because he that is to have it, till he hath gotten Seisin of it, hath no remedy to recover it, if it be denied to him; and then he hath no other remedy but an Assize for the recovery of it: *Terms of the Law, Rent. Co. super Lit. 142. Lit. c. 131. Fines ley, 155. D. & S. c. 30.* And regularly a man cannot have, or challenge, or make a title to any kind of Rent, unless it be a Rent-service, or a Rent charge in the case of Prescription, or for equality of Partition, unless he have a Deed to shew for it. *Co. 63. Lit. 40. Co. super Lit. 142, 146.* Title to it.

If one be seised of Land in Fee, and make a Gift of it in tail, or make a Gift in tail to one, the Remainder in tail to another, or a Lease for life or for years, keeping the Reversion in him, without any Clause in the Deed enabling him to distrain for it; this is a Rent-service still. But if the Reversion be gone, it doth continue no longer a Rent-service, for there can be no Rent-service but where there is a Reversion, *Lit. 214, 215, 218, 229. Plow. 132, 142. Co. on Lit. 162.* And therefore if one by Deed indented make a Feoffment in fee to one, or a Gift in tail, or a Lease for life or years to one, with the Remainder over to another in Fee, and reserve a Rent upon any such Estate without any clause of Distress for not payment; this is a Rent-seck, not a Rent-service. So if one seised in Fee of Land by Deed-poll or Indenture, grant a Rent issuing out of his Land, without any clause of Distress for not payment; this is a Rent-seck. *Lit. sect. 214, 215, 217. Co. 638. sup. Lit. 150, 151.* If there be Lord and Tenant, and the Lord grant the Rent (except Fealty, which is incident to every Rent-service) this is a Rent-seck, *Perk. sect. 113.* So if one hold his Land by Homage, Fealty, and other Services, yielding a Rent, and the Lord grant away the Rent reserving the Services, or grant the Services saving the Rent; in these cases the Rent is a Rent-seck, *Lit. sect. 216, 227. Co. sup. Lit. 151.* If one lease Land to another for life rendering Rent, and after he in Reversion grant away this Rent to another; this during the life is a Rent-seck, *Lit. sect. 218.* If one devise a Rent by Will in Fee-simple, Fee-tail for life or for years, without any clause of Distress, this is a Rent-seck; but if it be with a clause of Distress, it is a Rent-charge, *Co. 636. Dyer 348.* a. What kind of Rent it is. Rent service.

S f f f f

If

If one make a Feoffment in Fee, Gift in Tail, Lease for life or years of Land to one; or a Gift in Tail, Lease for life or years, with the Remainder over to another in Fee, and upon any such Estate reserve a Rent, and in the Deed there is a power to distrain in the Feoffor, Donor, or Lessor, if the Rent be behind; this is a Rent-charge, *Co. super Lit.* 143. *Plow.* 131. *Lit. fect.* 217.

So if one by Indenture or Deed-poll grant a yearly Rent to be issuing out of his Lands to another in Fee-simple, Fee-tail for life or years, with such a power in the Deed, 13 *Ed.* 4. 6. 5 *H.* 6. 6. *Lit. fect.* 218.

So if the Tenant of a Land chargeable with a Rent-secck, grant a power to distrain upon the Land for the Rent to him that hath it; this is now become a Rent-charge, *Dyer* 348.

So if one Coparcener upon a partition to make an equality, agree that the other shall have a Rent out of his part of the Land; this is a Rent-charge for which the other may distrain, though there be no Deed for the Rent, nor clause of Distress in a Deed, 15 *H.* 5. 5.

If one by Will in writing devise a Rent out of his Land, with a clause of Distress; this is a Rent-charge, *Co.* 5. 18.

If the Tenant of the Land grant a Distress to him that only hath a Rent-secck, this now is become a Rent-charge, *Co.* 5. 118. *Dyer* 328. *Co. super Lit.* 13.

Rent-secck.

If one by Deed indented make a Gift in Tail, or Lease for life or years, with a Remainder over in Fee, or a Feoffment in Fee, and reserve a Rent upon any such Estate, without any clause of Distress for non-payment; this is a Rent-secck. *Lit. fect.* 216. 217. 218.

So if one seised in Fee of Land by Deed-poll or Indenture, grant a Rent issuing out of his Land, without any clause of Distress in the Deed; this is a Rent-secck. *Co.* 6. 4. 8. *Co. super Lit.* 150.

If there be Lord and Tenant, and the Lord grant the Rent, (except the Fealty which is incident to every Rent-service) this is Rent-secck. *Perk. fect.* 113.

If one hold his Land by Homage, Fealty, and other services, yielding a Rent, and the Lord grant away the Rent reserving the Services; this is a Rent-secck. *Co. super Lit.* 151. *Lit. fect.* 226. 227.

If one devise a Rent by Will in Fee, Fee-tail, for life or years, without any clause of Distress; this is a Rent-secck. *Co.* 6. 46.

If a Lord have two Daughters and dieth, and upon partition one hath the Rent, the other the Fealty; this is Rent-secck. *Co. super Lit.* 150. *Dyer* 384.

If one lease Land to another for life rendring Rent, and after he in Reversion grant away this Rent to another, during the Reversion, this is a Rent-secck. *Lit. fect.* 228. So if he grant the Services, saving the Rent. *Co. super Lit.* 151.

For Answer to this, take these Cases.

3 What shall be said a good Rent by Grant or Reservation, or not: And how taken.

In respect of the thing out of which it doth issue.

1. If a Lease be made of a Manor, Lands, Meadows, Pastures, Mill, or the like, rendring a Rent, or a Rent be granted issuing out of such things; this is a good Rent: for these things are chargeable with a Rent. So if one be seised of a Reversion or Remainder of Land after an Estate for life, years, or in tail, and grant or reserve a Rent-charge out of it; this is a good Grant and Reservation, and the Land shall be charged when it comes in possession. *Co.* 7. 27. *Plow.* 157. 100. *Co.* 4. 49. *Plow.* 198. *Co. super Lit.* 144.

2. If one that hath but a Lease for years of Land, lease the Land rendring Rent, or grant a Rent out of the Land; this Grant or Reservation is good during the Term: And if he had granted for a longer time, yet it is good for the time of the Lease. But if one be possessed of a Term of White-acre, and seised in Fee of Black-acre, and grant a Rent out of both these Acres for life; the Rent shall issue out of Black-acre only. *Co.* 2. 36. 14 *H.* 7. 2. *Co.* 7. 25.

3. If one make a Lease for years of Land, and after grant a Rent-charge out of the said Land; this is a good Rent: And if the Lessee surrender, the Rent shall begin presently. So if one grant a Reversion or Remainder rendring a Rent, it is good. *Co. super Lit.* 47. *Plow.* 198.

4. If

4. If one make a Lease of the Vesture or Herbage of his Land, reserving a Rent; this is a good Rent. *Co. 7. 38.*

5. If one grant a Mefnalty reserving a Rent, it is good; for the Tenancie may eschear, and then the Donee may distrain for all the Arrearages, *1 H. 4. 1.*

6. A Rent issuing out of a Rectory, is good.

7. But if one grant a Rent out of anothers Land, this is void as to charge the Land; and though he after purchase the same Land, yet this will not make the Land chargeable, but it will be a good Annuity to the person. *Brownlow, 1 par. 30.*

If one grant or reserve any Rent out of a thing that is not manorable, or that is *Hereditamentum incorporatum*, it is void. And therefore if one grant or reserve a Rent out of a Fair, Market, Tythes, or Hundred, Offices, Corrody, Grinding at a Mill, Liberties, Priviledges, Pischary, Common, Advowson, or the next Avoidance of a Church, or the right of Land only, or the like; such Grants and Reservations are void.

So if one grant a Rent issuing out of another Rent, or reserve a Rent upon the Grant of another Rent; such Grants or Reservations are void. So if one recite that he hath a Rent, and grant it over, reserving a Rent out of it, this is void. But yet these Grants of Rent may be good to charge the person in an Annuity. And yet if one have a Rent-service, he may grant it, or part of it away; and if the Tenant attorn, this is a good Grant: But if it were a Rent-charge, it seems contrary. See for this, *Co. super Lit. 142, 144. Co. 7. 27. Plow. 132. Co. 10. 60. 93. Co. 1. 59. Kelw. 161. 3 H. 6. 20.*

8. If one be disseised, and after grant a Rent out of the Land, this is void: But if it be by Fine or Indenture, it may be good by way of Estoppel. *Co. 2. 53.*

9. No Rent granted out of, or reserved upon any incorporeal thing, as Commons, Offices, and the things before named, is good: And yet in case of the King, such a Grant or Reservation may be good; for it is a rule, That a Rent must always be reserved out of such a thing whereunto the Lessor may resort for Distress. And yet in the case of a common person also, if a Lease for years be made of any such incorporeal thing rendring a Rent, the Reservation may be good by way of Contract to give an Action. But in case of a Lease for life of such thing, it is void to all purposes. *Co. super Lit. 47.*

One may have or grant a Rent by Fine, or Fine and Render. See *Fine. Br. Ref. 2. Co. 2. 72. St. 27 H. 8. c. 10.*

The Tenant by Grant may give the Lord power to distrain for his Rent or Services in any other place, as well as that which is held of him. *9 H. 6. 9.*

If one grant Twenty shillings *Annui redditus de 7. S. Annuatim percipit*. it seems this is a good Grant to charge both the Person and Land. *Kelw. ibid.*

If one grant a Rent, *percipiendum apud Manerium de S.* it seems this is a good Grant to charge the Person and Land. *41 Ed. 2. 15.*

If one say, *Obligo me 7. S. & heredibus suis in annuali redditu de decem lib: quem percipio de Manerio meo de S. & oblige Manerium predictum ad distringendum*; it seems this is a good Rent-charge, to charge both person and Land. *46 Ed. 3. 48.*

So if one grant Rent *extra White-acre, or de White-acre, or percipiendum in vel ad White-acre*; all Grants of Rent made with these or such like words, may be good: See *46 Ed. 3. 48. 22 Aff. 66. 21 H. 7. 4. 41 Aff. pl. 3.*

If a Lease be made rendring Rent, and it say not to whom; yet this is a good Reservation. See more *infra* in *Reserv. 27 H. 8. 19.*

One may reserve a Rent upon a Bargain and Sale, and this will be good by the Saving in the Statute of Uses. Adjudged, *Wykes Case, M. 40 Eliz. B. R. Dyer 45.* A Rent-charge may be claimed and had against another by Prescription; That a man and his Ancestors, whose Heir he is, time out of of minde have been seised of it, and used to distrain from it, when it

hath been arrear. And thus a man may make a good Title to this Rent without Deed. But one cannot prescribe in him, and those whose Estate he hath; for that he cannot have their Estate but by Writing. *Co. super Lit. f. 144. Lit. 46. Co. 6. 63.*

If one grant a Rent-charge out of his Land, Provided that the Grant shall not extend to charge the person of the Grantor in an Annuity; this is a good Rent-charge, but the person of the Grantor shall not be charged in an Annuity. And yet if such a Grant were of Rent out of his Land without clause of Distress with such a Proviso, this Proviso were void, unless the Grantor do give the Grantee Seisin of the Rent at the time of the Grant. *Co. 6. 58. Co. super Lit. f. 146: Co. 7: 23.*

If one grant a Rent out of his Coffers, or out of all his Lands in general, with a clause in the Deed, That if the Rent be not paid, the Grantee shall distrain for it in the Manor of *S.* this is a good Rent to charge both the person and Manor of *S.* but not any other Lands.

So if one possessed of Black-acre for years, and seised of White-acre in Fee, grant a Rent out of both for life, with a clause of Distress in both; the Rent doth issue out of White-acre only: But yet both the person and the two Acres are to be charged for the Rent. And so in all like cases.

But if one grant a Rent for life out of his Term, the Land is charged during the Term, if the Grantee live so long. *Stat. 26 H. 8. chap. 5. Co. 7: 23. Co. super Lit. f. 146.*

If one grant to another, that he shall distrain for a Rent of Forty shillings a year in his Manor of *S.* if it be not paid him yearly at Michaelmas; this is a good Rent-charge to charge the Manor, but not the person of the Grantor. *Plow. 139. Co. 7: 24. Lit. 219, 220.*

If the Father be seised of Land, and he and his eldest Son join in a Lease for years to begin after the Fathers death, and say, Rendering Rent to the Heir of the Father; this were a good Reservation: But if the Reservation be to the Son by name, it is void, for he is but as a stranger. *Adjdg. Trin. 12 Jac. B. R. Oms and Frith.*

One may grant a Rent by Will, and a clause of Distress also by the Will; and this is good. *Co. 8. 84. Dyer 348.*

As if one by Will devise Ten pounds to be paid out of his Land quarterly at the most usual Feasts, and for non-payment to distrain, and the Distress to keep till payment of Arrearages; this is a good Rent by Will, for life of the Devisee. *Co. super Lit. 144.*

One may reserve a Rent upon a Deed of Bargain and Sale. *Co. super Lit. f. 144.*

If one seised of Land in Fee, bindeth his Goods and Chattels to the payment of a yearly Rent; or, *Obligo Manerium meum de C. & omnia bona in dicto Manerio existent. A. de B. in annuo redditu de vigint. sol. ad distringendum per Ballivum Dom. Regis pro redditu predicto*: These be good Grants of Rent to charge the Land. *Co. super Lit. 147:*

If one grant a Rent of Forty shillings out of his Manor of *D.* and grant over by the same or another Deed, That if the Rent be behind, the Grantee shall distrain in the Manor of *S.* the Rent doth issue out of one Manor; but this is a good Grant to charge both Manors with the Rent. *Co. super Lit. 147. 7: 23.*

Sec. 3:

If a man be seised of twenty Acres of Land, and grant a Rent of twenty pounds *percipiendum de qualibet acra terra mea*; this is a good Grant, and several out of every Acre; so that in all it is twenty pounds a year. *21 H. 6. 10. Co. super Lit. f. 147.*

If one by Deed grant a Rent-charge to a man out of his Land for life, and granteth further by the same Deed, that he had his Heirs may distrain in the Land for the same Rent; this is a good new Grant of a new Rent in Fee-simple. *Co. super Lit. 147. 148.*

Upon

Upon a Release that doth enure to create or enlarge an Estate, or by way of *Mitter le State*, a Rent may be reserved; but not upon a Release that works by way of *Mitter le Droit*, or by way of Extinguishment. *Co. super Littleton*, f. 193.

If a Company in *London* grant an Annuity out of their cleer gain; that Annuity is good, and those words void. *Trin. 17 Jac. Co. B.*

If one grant a Rent-charge without the words, [*For me and my heirs*] this is good to charge both the person and Land during the Grantors life; but after it will charge the Land only. *Dyer 344.*

If one by his Will dated the nineteenth day of *October*, devise to *J. S.* a yearly Rent of Ten pounds to be issuing out of his Land, with clause of Distress, and doth not say when it shall be paid, or what day; yet this is a good Rent, and shall be paid that time twelvemonth the nineteenth of *October*. *Co. 6. 56.*

A Rent may be granted upon Condition, and it may be granted for life, years, or in Tail or in Fee, or for life and years with Remainder over; and these manner of Grants of Rents are good. *Plow. 30. See Remainder.*

A Rent may be had or reserved without Deed for of partition, or upon a Lease for life or years, or Gift in tail, or to a woman out of the Land for which she is endowed: But a Rent for inequality of Exchange cannot be without Deed. *Co. super Lit. 169.*

A Rent *de novo* cannot be granted without Deed; and if it be, it is void: But one may have a Rent by Prescription, (*vide supra.*) *Doll. & Stu. vide Faits. Bro. Reservat. 18.*

If one seised of a Rent in Fee, grant it after the death of *J. S.* it seems this is a void Grant. *8 H. 7. 3.*

If a Lease be made rendring Rent to a stranger, this Reservation is void. *Br. Refer: 15. 22. Plow. 155.*

So if it be rendring a Rent to the Lessor, and another that is a stranger; it is void as to the stranger, unless the stranger be party to the Deed. *Trin. 12 Jac. Co. B. Co. super Lit. 113.*

So if a Father and eldest Son join in a Lease, rendring Rent to the Son after the death of the Father; this is void as to the Son. *Trin. 12 Jac. Co. B. Oats Case.*

If Lands be given in Frankmarriage, reserving a Rent; the Reservation is void till the fourth degree past, and afterwards good. *26 Aff. 66.*

If the Estate be void on which the Reservation is made, the Reservation is void also, *14 Jac. B. R.*

A Rent cannot be reserved on a Parol-Fooffment; but on a Fooffment by Deed-poll it may. *14 Car. B. R.*

For Answer to this, how a Reservation shall be expounded, take these Cases: How it shall be taken.

1. If a Rent be reserved on a Lease, and it is not said how long it shall continue, or to whom it shall go; in this case it shall continue as long as the Estate doth continue, and shall go to the Heir, or him that hath the Reversion. *Dyer 45. Kilm. 88.*

2. If one by Deed indented demise to *A.* for life, with divers Remainders over, *Reddend. inde* to the Lessor and his Heirs a Rent; this Rent shall extend to all the Estates, if he in Remainder after the Estate for life will agree to it. *Co. 5. 111. 10. 107.*

3. If one lease for a year with these words, [*And if the parties shall agree for a new Lease for longer time then for three years, yielding during the Term aforesaid*] in this case the Reservation shall extend as well to the first year, as to the three last years. *Co. 10. 106. 107. 5. 111. Brownlow, Rep. 2 par. 30. See more in Chap.*

If one lease for life or years, and the Lessee do covenant to pay Ten pounds by the year Rent, and so it is set down in the Deed, not in the nature of a Reservation, with

with rendring, yielding or paying such a sum, or any such like words; this is not a Rent, but a Sum of money in gross, for which the party cannot have the same remedy as he may for a Rent, but an Action of Debt or Covenant. *Dyer* 361. *Plow.* 133. *Browning and Bestons Case.*

4. What payment shall be said to be a sum in gross, and not a Rent.
If one seised of Lands, and possessed of divers Implements and Chattels, make a Lease for years of it, and the Lessee covenant and grant that he will pay during the Term an hundred pounds at such days; this is no Rent, nor in the nature of a Rent, but a Sum of money in gross. *Dyer* 276.

If one grant to do a thing, & *toties quoties defectum fuerit*, he shall forfeit Ten pounds; this is no Rent, but a Sum in gross, for which Debt only lieth, *Dyer* 24.

5. What payment shall be said an Annuity, and not a Rent.
An Annuity is a yearly sum of money, or other thing to be had from the person of the Grantor. Sometimes this word also is taken for the Writ of Annuity, which is provided for the recovery of this yearly payment, if it be behind. And to this a man may make to himself a Title by Prescription or Grant. And this by Grant a man may have in Fee-simple, Fee-tail, for life or years, to be received of the person of the Grantor, or of him and his heirs. And by this the Grantee or his heirs, or either of their Grantees may take advantage. *Lit.* f. 41. *Plow.* 13. 27. *Co. Super Lit.*

f. 144.

Sec. 4. If one grant a Rent, Annuity, or Sum of money out of his Coffers, or out of his Land, and say not what Land, nor where; this is an Annuity, not a Rent. *Lit.* f. 48.

If one grant a Rent-charge out of anothers Land; this shall be an Annuity, and shall charge the person of the Grantor. *Co.* 6. 58.

If one grant a Rent out of such a thing as is not chargeable with a Rent; there this shall be an Annuity to charge the person. *Co.* 6. 58. 10. 93.

If the King had given a Sum of money to one newly dignified, or another man grant an Annuity *pro consilio impenso & impendendo*, or for exercising an Office: And so in all such like cases where no Land is chargeable with the sum or payment, and the sum be yearly, it shall be reputed an Annuity.

A Company in London granted an Annuity of Twenty pounds *per annum*, and to give Counsel, out of their cleer gains in the Trade; this is a good Annuity, and those last words are void. *Co.* B. *Smiths Case*, 17 Jac.

A Rent-charge also is sometimes converted into an Annuity; and for this see *Suspension*.

6. The Remedy for Recovery of an Annuity.
As no Freehold is chargeable with an Annuity, so no Distress can be taken for it, neither can the party have any remedy for the recovery of it but a Writ of Annuity, in which he shall recover all the arrearages behind of the Annuity; and when once he hath a Judgment upon this Writ, so long as this is of force, he shall never have any other Writ of Annuity, nor new Action against the party, but a *Scire facias* out of that Judgment. But after an Annuity is determined, the party unto whom any Arrearages be behind, may bring an Action of Debt for them.

But for such a Rent as may be granted without Deed, a Writ of Annuity doth not lie, though it be granted by Deed. And for a Writ granted for owelty of partition, no Writ of Annuity doth lie. And where a Rent is apportioned by Act in Law, this Writ of Annuity faileth. *Co.* 7. 9. *F. N. B.* 152. *Dyer* 26. 373. *Co.* 6. 45. upon *Lit.* pl. 144. 145. 150.

7. The Remedy for Recovery of a Rent.
If one be once seised, and hath a Freehold of any Rent, and be after disseised of it, he may have an Assize to recover it. And note that the Disseison of a Rent is, when the party is disturbed in the means of Recovery of his Rent, which for a Rent-charge may be by five causes or means. As,

1. By Rescue, which is when the party hath distrained one, and the Distress is rescued, or being upon the Land to distrain, cannot be suffered. *Lit.* f. 236. 237. 240. 239. *Br. Disseis.* 69.

2. Replevin, which is where an Action of Replevin is brought upon the Distress taken.

3. Denier,

3. Denier, which is the denying or not payment of the Rent on the Land when it is required.

4. Inclosure, which is when the party doth come to the place whence the Rent doth issue, or where he hath power to distrain, and it is inclosed by walls or the like, that he cannot come at it: But if the place were not newly, but anciently inclosed, then it were no Disseisor.

5. Forestalling; which is when the party is going to distrain for the Rent, and the Tenant hearing of it doth forestall the way with force and arms, or threaten to kill or wound, so that he dare not go to distrain.

And for a Rent-service this may be by three causes, as by Rescous, Replevin, and Inclosure. And for a Rent-seck by three causes, Denying, Inclosing, and Forestalling. But this Assise lieth not until an Actual Seisin of the Rent, *Co. super Lit.* 153. 160, 161. 99 *Ed. 3.* 15.

In an Assise for the Rent, the Plaintiff shall recover the Rent and Damages: But in a Rescous he shall recover the Damages only, and the thing distrained shall be taken again as a Distress.

For an Annual Rent due from a Freeholder, the Lord may distrain; but he cannot have Debt for Rent or Corporal service as long as the same doth continue, but after it is ended he may. *Co. of Copiholds*, 50.

If a Lessee for twenty years of Land, grant it to a stranger for part of the years rendring Rent; in this case the Grantor may distrain, or have an Action of Debt for the Rent. *Park. fell.* 693. *Co.* 1. 97.

If one were never seised of a Rent-charge, and distrain, and a Rescous is made, he cannot have an Assise, but must have a Rescous. *Co.* 1. 97.

In case where one may distrain for a Rent, he may not distrain in any other place but such out of which the Rent doth issue, unless it be where the Distress is given in another place (as above) but in any other part of the Land where he will be may distrain. See *Distress. Br. Rent*, 2. *Lit.* 48. *Plow.* 239.

If one at Michaelmas make a Lease for years, rendring Rent at Michaelmas or ten days after; the Lessor may bring an Action of Debt for the last years Rent, and suppose it to be due at Michaelmas. *Barwick's Case*, *Tr. 9 Jac.*

If a Lease be made rendring Rent, on Condition of Re-entry for non-payment, and the Lessor re-enter for non-payment, yet he may bring an Action of Debt for the Rent. So it seems where a Re-entry is given, and the Lessor hath made a legal demand, though he received the Rent after, yet he may re-enter notwithstanding. *Kelw.* 153. 112.

Recoverors upon Common-recoveries shall have the same remedy for their Rents by Distress, or an Action of Debt against Lessees for years before Attornment, as the Recoverees had. *St. 7 H. 8.* 4. 21 *H. 8.* 15. *Co. super Lit.* 104. See more, *Co. super Lit.* 323. & *Debt*.

For every Rent-charge, if it be unpaid, the party to whom it is due hath this remedy: Either he may distrain upon the Land charged with it, or he may bring an Annuity against the Grantor at his election; unless it be in case where by the original agreement one of these remedies are debarred, as the case above; *Grant of Rent-charge*. Proviso it shall not charge the person, &c.

3. The remedy for Recovery of a Rent-charge.

But where the party hath this double means of remedy, he may not make use of both: For if once he bring a Writ of Annuity (in case where the person is chargeable, and the Writ doth well lie) and declare; by this the Land is discharged for ever. And if he once distrain and avow for the Rent in a Court of Record; by this the person of the Grantor is discharged for ever, *Co. super Lit.* 143. So if the Grantee bring an Assise and make his plaint; but the purchase of the Writ of Annuity or Assise doth not determine his Election, *Dyer* 344. *Lit. fell.* 219. *Co.* 724. *Plow.* 13. 5 *H. 7* 33. *Dyer* 362. *F. N. B.* 152.

If a Rent-charge be granted with a Proviso it shall not charge the person of the Grantor, and after the Rent is determined, and there are arrears behind; in this case notwithstanding the Proviso, the party may have an Action of Debt for the arrears, *Co.* 739. *Dyer* 217.

And

And though a Deed that is with a clause of Distress for Rent, do grant further that he shall keep the Goods distrained against Gages and Pledges, yet they are subject to Replevin, *Co. super Lis.* 145. 282. For else by a new invention all Replevins shall be taken away.

If one have a Rent-charge for years, and the Term expire; in this case he may not distrain for the Rent, by the opinion of Justice *Crook & Barclay. Pasch. 10 Car. Crawley contra.* But he must have an Action of Debt, as he must whiles the Lease doth continue.

But in all cases where the Land charged is discharged by the act of the party, as purchase of part, or the like, the Grantee cannot have an Annuity; but if it be determined by the act of God, or Law, there he shall have an Annuity, as of a Rent granted for anothers life. *Co. upon Lis.* 148.

If one be seised of Land for the life of *J. S.* grant a Rent out of it for twenty one years, and *J. S.* die; in this case the Rent shall continue for the years, but the Land is discharged. *Co. super Lis.* 148.

Of recovery of
Rent-service.

For a Rent-service reserved on a Lease for years, if it be unpaid, the party to whom it is due may either distrain for it, or else he may bring an Action of Debt and recover it. *Lit. sect.* 213. 331. But for Rent-service in other cases, it seems he hath no means of Recovery of it, but by Distress and Assise. (See *supra*, & *Distress.*) *Perk. sect.* 693. So upon a Gift in tail or Lease for life. *Littleton, sect.* 213.

If one that hath but a Lease for years, make a Lease of the Land for part of the time, rendring the Rent, and the Rent is behind, the Lessor may have an Action of Debt for this Rent; by which it seems this Rent is a Rent-service. *Plow.* 521; 9 *H.* 5. 8.

Executors.

Executors shall have the like remedy for Rent-charge and Rent-service due to their Testator, as their Testator had, and they may distrain for the arrearages due in their Testators time: And so also shall the Tenant of the Land, whether he be Heir or Feoffee to him that should have paid it, Heir or Feoffee of the Heir or Feoffee, & sic in infinitum; Issues in tail, or he to whose use, or any other that come into the Land from or under him that should have paid it. As for example, if one make a Lease for years rendring Rent, and the Rent be arrear, and the Lessor make his Executor and die, and the Land descend to his heir; the Executor may bring an Action of Debt for this Rent. *Co. super Lis.* 162. *St. 32 H. 8. c. 37.* *Ch. 40. 50. Dyer* 373.

So if one grant a Rent for life out of his Land, and the Rent is arrear in divers Feoffees time of the Land one after another, and the Grantee die, his Executors may bring an Action of Debt against every one of the Feoffees, and recover the arrearages of him for his own time. *Qui sentit commodum, sentire debet & onus.* But if a Tenant in tail make a Feoffment, and the Discontinuee charge the Land, and after enfeof the Issue in tail and die; the Issue is remitted to his first Estate, and shall not be charged with this Rent.

So if one have a Rent-charge or Rent-service for life or in fee, and it be arrear, and after he grant away the Rent to another, and the Tenant attorn, and then he die; his Executor shall never recover these arrearages by this Statute, but they are lost. *Co. 7. 37.*

If one have such a Rent for the life of *J. S.* and *J. S.* die, yet the party may have his remedy against the Occupier of the Land by Distress. As if one devise a Rent out of the Land by Will, with clause of Distress to *B.* for the life of *C.* and the Heir to whom the Land charged doth descend doth lease it to *D.* the Remainder to *E.* in Fee, and the Rent is behind in the life of *D.* and *D.* die, and after *C.* die; Now in this case the Lands in the hands of him in Remainder shall be charged with these Arrearages, and the party may distrain for them. *Stat. 32 H. 8. ch. 37. Co. 6. 118.*

Husband and
Wife.

If any such Rents be arrear to Femer-sole that after marry, or Femer-covert during the Coverture; the Husband, his Executors or Administrators shall have the same remedy for it the Wife had by Action of Debt or Distress. As if a Femer-sole

sole have a Rent-charge granted to her for life, and the Rent be behind, and after she take a Husband, and the Rent be behind again, and she die; the Husband may recover both these Rents by this Statute. See the Statute at large, and *Co. super Lit. f. 162. Co. 4. 50. F.N.B. 121.*

Corporal services, as Work-days, and *Nomine pœna*, and the like, are not within this Statute; but all others are. *Co. super Lit. f. 162.*

In these three special Cases, one may distrain for a Rent-seck.

1. Where a Woman hath it for part of her Dower, *in favorem dotis*;
2. When the King is to have it by his Prerogative.
3. When a Parcener is to have it for equality of partition.

Of Recovery
of a Rent-
seck,

But in all other cases there is no remedy for a Rent-seck, but by an Assise; and that a man cannot have neither, until he have got Seison of the Rent, (See *Seison*) after this manner as followeth. See also some cases before, where one may distrain. *Co. super Litt. f. 147. Kelw. 104. Co. 7. 28. Litt. f. 235. Co. 6. 56. 58.*

After this Rent is due, and Seison had thereof, he must demand it at the last part of the day of payment: But if no Tender be made of it at the day of payment, though no Demand be then made, then the party may at any time after the day come on the Land, and demand the Rent; and if the Tenant or some other for him be not there ready to pay it, this is a Denial in Law, upon which he may have an Assise, and therein he shall recover the Rent, Arrearages, and Costs and Damages.

Se. 8. Demand.

But if there were a Tender by the Tenant on the very day, the last moment thereof (as it must) and no man ready to receive it; in this case he hath no such remedy, unless he can after meet with the Tenant upon some part of the Land, and there demand it.

And therefore then in that case, the best way is to be on the Land the next day of payment, and there demand the Rent and Arrearages thereof the last part of the day: And if no body tender it, this is a Denial upon which he may have an Assise. See more in *Demand. Lit. 235. Co. 7. 28. Lit. 233. Co. super Lit. f. 153.*

And here note that a man may have such a Condition, or Conditional Clause *Note.* in the Deed, that by it the Lessor upon Non-payment of the Rent may enter and keep the Land as a Pledg till the Rent be paid. For which see *Co. sup. Lit. 202, 203.* But not that he shall hold the Distress against Gages and Pledges, *Co. sup. Lit. 283.* if it be a Distress for Rent. *Lit. sect. 327. Plow. 524.*

It is the calling upon any man for any thing that is due; and this sometimes is called Request.

8. Demand or
Request, what.
Where it is
needful,

Demand for Rent must be made, though the Tenant or any for him be not there to pay it: *Co. super Lit. 153.*

In most cases when a man will enter into Land upon a Condition for Non-payment of Rent, or will have a Penalty or *Nomine pœna* of a greater Sum for Non-payment of a less; he must first make a Demand or Request for it, and that in that manner for time, place and order, as is set down here; else his Entry is unlawful, and he shall not have the *Nomine pœna*, and that though there be no words in the Deed between them that it shall be first demanded, and though no man be upon the Land to pay it or tender it.

To have a
Re-entry, or
Nomine pœna.

But perhaps if the words of the Condition be, That he shall enter, or the Estate shall cease without Demand; there Demand may not be necessary. *2 H. 7. 14. Br. Tend. 41.*

As if one lease for life, Lease, Tail, or in Fee, rendring Rent at Michaelmas, Provided that if it be behind and unpaid after the day, the Lessor, Feoffor, or Donor shall re-enter: In this case he must demand it first.

So if there be a Covenant or Condition, that if the Rent be not paid the day, the Lessee shall forfeit Twenty shillings *Nomine pena*, or in any such like manner; he must demand it ere this Forfeiture shall be lost. *Co. super Lit.* 153. 201, 202. *Co.* 432. *Noy* 97. *Dyer* 329. 13. 79. 51. *Plow.* 172. 70. *Co.* 6. 56. *Perk. sess.* 836. *Co.* 10. 129. 14 *Ed.* 4. 4.

If a Lease be made of Land in *Bucks*, rendring Rent at the Exchange in London on Condition to re-enter; here Demand must be made before Re entry. *Adjudy Trin.* 37 *Eliz.* *B.R.*

If Lessee be bound by Obligation to pay the Rent reserved, it must be demanded. *Resolv. B.R. Hobard Rep.* 12.

To have a Distress or an Affise:

If one devise Land to one by Will, and a Rent to another issuing out of it; and that if the Rent shall be arrear, the Devisee of the Rent after demand shall distrain; it seems in this case he cannot distrain till he have demanded it. *B. R. Symonds Case, Hil.* 4. *Jac.* And so in like case, *Co.* upon *Littleton*, 144. 202. *mutatis mutandis*.

So if a Rent be reserved by Deed, and that if the Rent be behind and lawfully demanded at the house, that the Lessor shall distrain; he cannot distrain till demand, *March* 147. unto 218.

One must demand a Rent-seck and Arrearages after it is due, before he can have an Affise for it. And this Demand must be made also upon the Land in some overt place, the last day of payment.

But for a Demand to enable one to distrain, that must be made, if the agreement be so, before Distress. *Co. super Lit.* 202.

Sess. 7.
To have another Debt or Duty.

An Annuity (it seems) must be demanded, before any can recover any Damages for withholding it: And if one be bound to another he shall quietly enjoy an Annuity, it seems this Obligation is not forfeit, till he hath demanded the Annuity.

But of a Sum of money one is bound to pay by Covenant or Obligation yearly, *contra*.

So if one be bound to pay money on a single Obligation, or by a Contract, and no day is set forth; the party may choose whether he will pay till Request or Demand be made for it by Suit or otherwise; and if he do not demand it otherwise before he sue for it, he shall recover no Damages notwithstanding, but his bare money.

But if there be an Obligation of a greater Sum, with Condition to pay a Lessee, or one be bound in another Obligation, *contra*. To pay the money in that Obligation, it is otherwise; *Bro. Tender*, 22. *Condition*, 153. 173. 16 *H.* 7. 14. 14 *H.* 8. 19.

So if one be bound to pay money on an Award, *Brownl.* 1 par. 46. 49. 23. 53. 56. 65.

If one be bound to pay Twenty pounds by a Bill upon Demand, or to do any other duty, if it be by Especialty, there needs no Request to be made or laid in the Declaration for the duty: But if it be without Especialty, there it must be made and set forth in the Court for the duty, especially if it be in case of Collateral *Assumpsit*; as if one promise to pay Ten pounds Rent to another at a years end, being demanded, if it be not paid before. *Pasch.* 17 *Ja.* *B.R. Bassports Case*.

If one say to another, Lend *J. S.* Ten pounds, and if he pay you not by the years end, then that he will pay it upon request; in this case a Request is necessary, and it must be after the year. *Hil.* 17 *Jac.* *B. R. Basspoles Case, Hill and Wades Case*, 16 *Jac.* *B. R.*

And

And in all cases where Demand makes the duty, or is parcel of the duty; there it is necessary, otherwise not.

If one devise Lands by his Will to another, on Condition he shall pay Twenty pounds a year out of it at two Feasts to *J. S.* in this case neither *J. S.* nor the heir of the Devisor need to Demand the Rent. But the Devisee of the Land at his peril must pay it to save the Condition, and that without Request. *Dyer* 348. 74.

9. Where Demand is not necessary of a Rent.

But if one devise a Rent by Will; and willet that if default of payment be, the Executor or Devisee shall have the Land; in this case the Devisee of the Rent must demand Rent before any Forfeiture shall be of the Land. *Dyer* 348.

If a Rent be granted with Condition, and that if it be arrear, that the Grantee may distrain; here the Grantee need not demand it before he distrain, but may distrain the first day after it is due. *Plow.* 70.

If the King be to enter or have a *Nomine pena* for Non-payment of Rent, he is not bound to demand it, but his Patentee must demand it as another man. *Kelsw.* 153. Co. 7. 28.

If one be bound by Obligation or Covenant to pay the Rent reserved on such a Lease; in this case to make a Forfeiture of the Obligation, or Breach of the Covenant, there needs no Demand. But if it were to perform the Covenant, *contra*, there it must be demanded. *Brownlow*, 2 par. 176. Stat. 22 H. 6. ch. 57. Bro. Tind. 20.

If one be bound to pay Twenty pounds by a Bill upon Demand, an actual Demand in this case is not necessary. *Adjdg. Hil. 39 Eliz.* 11 H. 4. 18. In other cases.

If one deliver Goods to deliver back again upon Request; here needs no actual Request before a Suit. So in a Detinue.

But if one be bound to deliver Goods upon Request, an actual Request must be made before a Suit can be had. *Brownl.* 1 par. 10.

Where Demand is requisite for to gain a Re-entry into Land, or a *Nomine pena*, there it must be made in the place subscribed, here the last day given to the Lessee for the payment of his Rent, and the last part of the day, so long time before the Sun-set as wherein the money to be paid and received may be conveniently told and numbred by day-light, or before Sun-set. And when the Lessee hath two times given to him for payment, as when the Lease is rendring Rent at Michaelmas, or within twelve days after, or in like manner; here demand must be made the last part of the first day, (i) Michaelmas day, and the last part of the last of the twelve days.

10. When and how Demand must be made. The Time.

But if the longer time had been put into the Condition only, as rendring Rent at Michaelmas, Provided that if it be behind twelve days after, the Lessor shall re-enter; in this case he need not demand it at Michaelmas, but the last part of the twelve days only, and that is sufficient; and when he doth come to demand, it is good to continue his Demand till night, and the Lessor is not bound to make any other Demand at any other time, neither is a Demand any other time good. *Co. super Lit.* f. 102. Co. 4. 72. 51. *Dyer* 379. 130. 79. 51. *Plow.* 172. 76. Co. 6. 56. *Perk. self.* 836. *Br. Tend.* 41. 2 H. 7. 7. 14. Co. 10. 129. Co. 7. 28. *Barnwick's Case.*

Sec. 8.

If one have a Rent-seck to be paid at a day arrear, he need not demand it with the Arrearages, the last part of the day when it ought to be paid; but he may demand it at any time afterwards. *Co. super Lisleston*, fol. 154. Co. 7. 28.

If one be to demand a Rent only before he distrain, he is not bound to that point of time as before, but there he may demand it at any time after the day of payment of it. *Co. super Lit.* f. 144. 153. Co. 7. 28.

But a Demand to enable a Distress only, may be at any time after the day, and it is good enough. *Mich.* 40, 41 *Eliz.* between *Stanley* and *Read*. Co. 7. 28.

The Place.

It must be made the time aforesaid upon some part of the Land whence the Rent doth issue, and upon that part that is most eminent and notorious: As a Capital Messuage and great Porch in that house, and at the Fore-door, and not at the Back-door; and though the Fore-door be open, yet the Lessor or Feoffor need not go in, though he see the Lessee or Feoffee within to tender it; but if he do it at the Fore-door, it is sufficient: And if there be no House, some Gate or stile upon some High-way going through the Lands charged. And if there be two places of payment, as if it be, [Yielding and paying the Rent at such a Stile, or in the Dwelling-house, or the like] there Demand must be made at both places, for the Lessee hath election to pay it at either. So if it be, [Yielding or paying at or in a place], the Demand must be made at and in the place.

And if the Rent be to be paid at any place out of the Land charged with it, then the Demand must be made at that place, and need not to be made upon the Land charged, and there in the most notorious place. *Co. super Lis.* 201. *Case* 326, 46. *Dyer* 329, 73, 130, 5. *Plow.* 172, 30. *Park* 836. 2 *H.* 7, 14. *Co.* 10, 129. *Ca.* 7, 28. *Lit.* sect. 341. *Co.* 4, 72.

If no other place be appointed, the Demand shall be made upon the Land always by the Lessor, or his sufficient Attorney. *Noy* 98. *Brownl.* 1 par. 138.

If the King make a Lease rendring Rent at the Receipt of the Exchequer, and he grant the Reversion, his Patentee must demand it upon the Land, and need not demand it at the Exchequer. But if no place were mentioned in the Kings case, the party is bound to pay it at the Kings Receipt. *Co. super Lis.* 201.

A. mortgaged Land to B. on Condition, that if he pay B. money, he shall re-enter: After, before the day of payment, A. is attainted; in this case B. is to demand the money at the Exchequer, and not upon the Land, nor is the King bound to tender it. *Goldsb.* 137. pl. 41.

And the Lessor is not bound to make any Demand at any other place; neither is a Demand at any other place good. *Co. super Lis.* 153.

But if there be a House and Land, a Demand at the House is needful to have a Reentry on a Condition; but a Demand on the Land to have an Assise, is good enough for a Rent-seck. *Co. super Lis.* 153.

If the Feoffment were of a Wood only, there Demand must be made at the Gate, or in the High-way that leads through it; and if one place be as notorious as the other, the Feoffor may demand it at either: And therefore in that case it is good for the Feoffee to tender it at both, for else it will not avail if the Lessor be not there. *Co. super Lis.* 202.

The manner of doing it.

The Lessor himself, or some body for him, must come upon the place at the time when the Demand must be made; (as is shewed you before) and there he must make an actual or verbal Demand of the Rent; and it is good to set forth how much it is, and to shew his readiness there to receive it; in this manner: *Here I demand of J.S. Twenty pounds due to me at the Feast of &c. for a Messuage &c. which he holdeth of me in Lease by Indenture, &c.* And there let him remain until it be dark, that he cannot see to tell the money. And all this must be before substantial Witnesses. And if it be to be paid on the Land, it seems the Lessor must do the first act, (i.) demand it, before the other is bound to pay it; and the other is not bound to tender till he demand it. But if it were paid at a place out of the Land, then the Lessee is bound to do the first act, (i.) tender it at his peril. But it is safe for both to do their parts. *Abundans cautela non nocet.* *Dyer* 329. 130. 79. 51. *Plow.* 70.

As for an Example to all this: If one make a Lease of a House, divers Lands and Woods to another for years, rendring an Hundred pounds Rent at Michaelmas, Provided that if the Rent be behind ten days after Michaelmas, the Lessor shall re-enter, or the Lessee shall forfeit Ten pounds *Nomine pena*: In this case if the Lessor will take advantage of this Forfeiture of Land or Money, he or some body for him must come the last part of the last of the ten days, (time enough before Sun-set to tell an Hundred pounds) to the same House, and there demand the Rent, and
continue

continue there till Sun-set; and if at that time the Rent be not tendered by the Lessee, or some body for him, or if it be denied, this is a Disseison of the Rent for which he may have an Assise; and for this also the Lessor may re-enter, and recover the *Nomine pena*. See the Books above. *Bro. Disseis.* 69.

If a Feoffment be with Condition to re-lease the Feoffor, and no time set, so that he hath time for life, if request hasten it not: If the Feoffor or any other party make request, it must be to the Feoffee, that he will be at a certain time on the Land, and make the Seate. *Co. super Lit.* 219. Sed. 9.

Every good Demand and Request for Rent, must be made as before; and if it fail in any of those circumstances, it is not good. But if the Lessor and Lessee agree and be contented to have it otherwise, there it may be good enough: For, *Modus conveniens vincunt legem; & volenti non fit injuria.* *Co.* 7. 23. *Co.* 3. 40. *Dyer* 78. 11. What shall be said a good Demand, or not.

If one lease for years rendring Rent, on Condition that if it be arrear forty days after the day, the Lessor and his Heir shall re-enter; and the Lessor demand it, and after die; this is a good Demand to give Re-entry to his Heir: But if the Lessor die after the day, and then the Heir demand it, this is not a good Demand to give a Re-entry. *13 H. 4. 17. D. & S.* 35.

A Demand of more then the Rent is, is a good Demand notwithstanding for the Rent to gain a Re-entry, or *Nomine pena*.

If two make a Lease rendring Rent, on Condition that if it be behind and unpaid by them, they shall re-enter, and one of them die, and the Survivor demand it, it is a good Demand. So if the Lease were made to two, and one of them die, and the Rent is demanded of the Survivor of them. *Dr.* 107. 4. *Ed.* 3. 16. See *Tender infra*, for more.

If a Rent-lease be to be paid at *Easter*, and the day be past, and the Rent not paid nor demanded at the day, and he demand it after the day, this is not a good demand, unless he meet with the Tenant upon some part of the Land, and there demand it. See *Co.* 10. 129. *Co.* 7. 18.

If the Lessor demand the Rent before he die, his Heir may enter. *Noy* 97. See for Demand of Rent, *Goldsb.* 129. pl. 25; 124. pl. 9.

It is a careful Offer of a thing that ought to be paid or done, at the time and place it ought to be paid and done. And this word, as it is applied to Rent, seems to be a Relative to Demand, and both of them to look one to another: For in most cases, then and there a man is bound to tender a thing to another, where and when that other is bound to demand; and there and then that other may and must demand, where he hath liberty to tender. And the Law will not make the Lessor to attend then or there to demand, where and when it doth not enjoin the Lessee to tender: Neither shall the Lessee have liberty to tender any where or time, but when or where the Lessor is bound to wait to demand it: And therefore most of the Questions for *Tender*, are answered in *Demand*. *Br. Tend.* 23. *Co. super Lit.* 211. 12. Tender or payment, what.

See *Obligation*. And note, that in all cases where *Tender* is requisite, and it be made legally, though the party refuse, yet it shall give him as much advantage as if the other had accepted it; and the other in most cases is without remedy for his money. And in case of *Tender* of money, *Tender* in purses or bags, without shewing or telling of it, is sufficient. *Co. super Lit.* 107. 206. 209. *Noy* 94, 95.

In all cases where by Demand of the Rent the Lessor &c. must name a Re-entry, or *Nomine pena*, there the Lessee &c. by *Tender* of the Rent must save the Forfeiture; and *Tender* is necessary therefore. *2 H. 7. 6.* 13. Where it is necessary, and not.

But the King, if he be to pay a Rent, is not bound to tender it.

If one tender Rent at the day, and be after sued for it, he need not tender it again in Court. *Br. Tend.* 6.

So for money tendred on a Condition of Obligation, according to the Condition.

If one enfeoff another on Condition, that he and his heir shall render to a stranger and

14. How it
must be made.
For the time.

and his heir twenty shillings, &c. and if he fail, that the Feoffor shall re-enter; this is no Rent, and therefore here needs no Demand, but the other is bound to pay it at his peril. *Co. super Lit. f. 213.*

If the Lessee &c. will tender to save the penalty or Forfeiture of Land or money, he must do in that manner for time and place, as the Lessor must demand it; and he need not do it at any other time, in any other place, or in any other manner. *Plow. 172. Dyer 109. Plow. 70. Dyer 79. 6 H. 7. 2. Lit. 341.* (See the particulars above.) As if a Lease be made rendring Rent at Michaelmas, and the Lessee bind himself by a collateral Covenant or Obligation to pay it at the day; here he must tender it at the very day to save the Covenant or Obligation. *Bro. Tend. 41.*

Scilicet. 10.

Note for the time of payment of Rent there are four times. 1. Voluntary, but not satisfactory, and yet good to some purpose: As if a Lessee, Donee, &c. pay the Rent before the day; this is good to give Seison for to enable him that hath the Rent to bring an Assise. The second time is voluntary and satisfactory in some cases: As if it be paid the morning of the last day, and the Lessor die before the end of the day; this is good against the Heirs and Executors, but not against the King, if he were to have it. The third is the legal and absolute satisfactory time, which is a convenient time before the last instant of the last day; and then it must be paid or rendred. The fourth is satisfactory, but not voluntary, but coercive when it is done by Suit. *Co. 10. 127. Lit. f. 127. Plow. 172.*

If the Lease be rendring Rent at Michaelmas, or twelve days after, or in that manner, he may tender it the last part of either of the days, and good: And if he tender it the first, and the Lessor be not there, and he tender it not the last day, and then the Lessor demand it, he cannot re-enter. *Co. 10. 129. & Curia, B. Rom. 100.*

For the place.

If the Lessee will make a Tender of his Rent; it must be done and made in the most notorious place of the Land, unless the Rent be to be paid at a place out of the Land, then there it must be tendered. See in Demand. *Plow. 711. Lit. f. 341. Co. 471. Bro. Tend. 23. Co. super Lit. f. 105. 201.*

If the King lease Land rendring Rent at the Receipt of Exchequer, and after grant the Réversion to a Subject: Now after this Grant, Tender of the Rent upon the most notorious place of the Land is sufficient. *Ro. 4. 72.*

If there be a time and place certain set down for the tender of a sum in gross upon a Condition, the tender must be there and then, and neither of the parties are bound to any other place. *Co. super Lit. 211, 112.*

If one will tender money due on a Condition, (which is not Rent) it must be to the person of the party wheresoever he is. *Co. super Lit. 210.*

If Land be mortgaged for money; at the day the Heir, Executor, Administrator, Ordinary, Gardein in Socage or Chivalry, or any one, if the Heir be an Infant, may tender the money. *Co. super Lit. 206, 207.*

If Land be mortgaged, and a Condition is to pay money on a day; it seems the Tender must be (as in the cases of Rent before) a convenient time before Sun-set: But if the Feoffor tender it to the person of the Mortgagee at any time of the day of payment, it is sufficient. *Co. super Lit. 206. 208.*

15. What shall
be said a good
Tender or
payment, or
not; and how
it shall be
taken.

That is a good Tender, that is made with all the circumstance and regard of time and place, as before. If a Rent be to be paid at one of two days, the Lessee hath election which of them; and if he pay it either of the days, it is sufficient, as in the cases in the last Division. So if it be in one of two places, as rendring Rent in the Church of A. or in the Church of B. Tender in either of them is sufficient; but Demand must be made in both places. So if a Rent be to be paid at or in any place, Tender in either is sufficient. *Co. super Lit. 202.*

When a Rent is to be paid to Jointenants or Coparceners, (it seems) Tender to one of them is good and sufficient. So also Tender by one Jointenant (it seems) is good for all the rest. *Bro. Tend. 16. 19.*

If a Lessor distrain for Rent, and the Lessee tender him all the Arrearages, and the

the Lessor refuse, he cannot distrain after; for this is a good Tender to bar him in Avowry, and it seems he can have no remedy for his Rent after. So if two days Rent be behind, and he tender him one days Rent, this is good for one day: *Contra* where he tender him but part of a days Rent only. *Stat. 7 H. 4. chap. 18. Bro. Tender 2.*

Tender of money in Farthings is no good payment in *Curia Manches*, nor *&c.* Sometimes payment, or Tender and acceptance of one thing for another, or of a in another place, is good for . See *Acceptance and Condition.*

If the Feoffee cometh to the Feoffor to any place upon any part of the ground the day of payment, and offer the Rent, albeit it be not the most notorious place, nor at the last instant of the day, yet the Feoffor is bound to receive it, or else shall he not take any advantage by Demand. *Co. upon Lit. f. 202.*

If Rent be payable at Michaelmas, on Condition that if he pay not in a week, &c. Here if the Feoffee meet the Feoffor on the Land within that week, and tender it, it seems good. *Co. upon Lit. f. 202.*

But a Tender out of the Land to the person of the Lessor, when the Rent is to be paid upon the Land, is not good. So a Tender after the days of payment be past, is not good. So a Tender in a Wood or other secret corner, where there be more notorious places amongst the Lands out of which the Rent doth issue, is not good: But if the Lessor will accept it at any other place before the last day of payment, it seems then it is good enough.

So Tender in word only, or a Talk of Rent, when he doth not shew it, is not good; for he must prove he had, and tendered so much money as the Rent is.

A Tender of a Sum in gross on a Condition, is not good on the Land, unless the party be there to receive it. *Bro. Tend. 11. Perk. sect. 83. 22 H. 6. 65. Perk. sect. 837, 838. Co. super Lit. 210.*

If a Feoffment be on Condition that the Feoffor shall pay to the Feoffee twenty pounds, and set no time, and the Feoffor die: Now his Heir, Executor or Administrator cannot tender the money: for Tender by them is not good to perform the Condition. *Co. super Lit. 207, 208.*

If one owe me ten pounds by Obligation, and ten pounds otherwise, and he pay me ten pounds generally, it shall be intended the ten pounds upon the Obligation, *Brownl. 2 par. 108.*

Payment of money to the Wife due to the Husband, is not a good payment, *Co. 7. 28.*

See much of this Question in *Conditions*, What is a good performance, and what not, in *fol.* See *Goldsb. 129. pl. 25. 124. pl. 9.*

If there be Lessee for life, or for years determinable upon life, and this Lessee make a Lease for years, reserving Rent to be paid at the four Quarter-Feasts, and the life die, so that the primitive estate end before the Quarter-day; now by this the Rent of this Quarter is gone, *Co. 10. 127.* *Se. 11. 16. Where a Rent shall be said to be gone or not.*

If all the Land be evicted before the last day of payment by one that hath an eigne title, the whole Rent is gone. *Contra*, if it be but part of the Land; for then the Rent shall be apportioned. See *Apportionment. Co. 10. 127. Plow. 71. 134.* As if there were a Judgment against the Lessor before the Lease, and after the Lease an *Elegit* is sued forth, and the Lessee evicted; and this Plea will bar the Rent. *Days Case, Trin. 37. Eliz.*

If a Rent be granted to one in Fee, or to a Corporation, and the Grantee die without Heir, or the Corporation be dissolved; it seems in this case the Rent is determined. See more in *Co. 3. 17. 27 H. 8. 10.*

If there be Lessee for life rendering Rent, and the Lessor grant and confirm the Land to the Lessee and his heirs; by this the Rent is determined. *Co. super Lit. 278. 301. 307. 308.*

If Lessee for life make a Lease for years rendring Rent, and after surrender; now he hath no remedy for his Rent. *Justice Bridge.*

If a Disfeisor charge the Land, and after the Disfeisee recover the Land in an Assise, the Rent is determined: But if one that hath Land rightfully charge the Land, and another that hath none recover it in a fained Action, *contra.* See *Brownlows Rep.* 2 par. 76.

If one make a Lease at Will rendring Rent, and after the Lessor determine the Will; now the Rent is determined also.

If two Jointenants be, and one of them grant a Rent-charge and die; now the Rent is determined, and the Survivor shall hold it discharged: But if the Survivor had accepted a Release of the Right of his Companion, *contra.* See more in *Extinguishment.* See *Perk. fect.* 392, 393, &c. *Co.* 6. 16.

If a Rent or an Annuity be granted in respect of an Office, and the Office be determined, the Rent shall determine also: *Plow.* 381.

If a Disfeisor grant a Rent-charge out of the Land, and after accepteth a Release of the Disfeisee; the Rent is not gone, no more then a Condition added to an Estate made by the Disfeisor, to whom the Disfeisee releaseth: But if the Disfeisee enter and make a Feoffment, *contra.* *Co. super Lit.* 277.

If one make a Lease for years rendring Rent, and after grant this Rent to *J. S.* and the Tenant attorn, and after the Lessee for years surrender; yet the Rent doth continue, and it seems he may have an Action of Debt to recover it: So if Lessee for years grant a Rent-charge, and after surrender his Estate, yet the Rent is not determined. *Co.* 8. 144. 20 *Ed.* 4. 13. *Plow.* 198.

If a Tenant in tail grant a Rent-charge out of his Land, and after suffer a Common-Recovery; this doth not avoid, but affirm and make good the Charge. See *Womans Lawyer*, f. 169. *Co.* 2.

If *A.* lease Copihold and Freehold Terre and License, rendring Rent, this is an entire Rent; and if he in Reversion grant the Reversion of both, that which doth pass by Surrender shall relate to make the entire Recovery to pass, and the Rents shall continue entire. *Capels Case.* See *Extinguishment*.

17. Who shall have a Rent, and the Arrears of it.

The Rent in most cases doth follow the Reversion, if there be any, as the Accellary doth the Principal. *Co.* 3. 55. *Lit. fect.* 390. *Dyer* 5.

If one seised in Fee of Land make a Lease of it rendring Rent, and say not to whom, and it be behind, the Executors shall have the Arrearages, but for the time to come it shall go with the Reversion. So if the Reservation had been to the Lessor, then the Executors should have had the Arrearages after his death, the Heir the Rent to come.

So if a Husband possessed of a Term of Land in the right of his Wife, lease part of the Land rendring Rent, and die; the Wife shall not have this Rent, but the Executor of the Husband. 26 *H.* 8. 7.

If one seised of Land in Fee, lease it for years, rendring Rent to him and his heirs at Michaelmas, or within twenty days after, and after Michaelmas before the twenty days ended the Lessor die or grant away the Reversion, and the Tenant attorn; in the first case the Heir, not the Executor shall have the Rent; in the last the Grantee shall have it. *Dyer* 287. 204. *Co.* 10.

If one seised in Fee of a House make a Lease thereof, and of certain Implements therein for years, rendring Rent to him, his Heirs and Assigns, and the Lessor die; now this Rent shall go to the Heir during the Lease, and not to the Executor. But if the Lessee had covenanted to pay so much money by the year to the Lessor, his Heirs and Assigns; in this case the Executors, not the Heir should have had this Sum during the Lease. *Dyer* 361. 275.

If a man seised of a Term for twenty years in the right of his wife, lease the same for ten years to a stranger rendring Rent, and the Rent is arrear, and the husband die; it seems the wife shall have this Rent, not the Executor. But the contrary adjudged, *B.R. inter Bloxton & Heath.* *Perk. fect.* 834.

If

If a woman and her second husband lease the Land she was endowed of by her first husband, rendering Rent, and the Rent be arrear, and she die; the second husband, not the heirs of the first husband shall have these Arrearages. See more for this in *Chastols. Bro. Rent* 10.

If one seised of Land *ex parte matris*, make a Feoffment in Fee rendering Rent to him and his heirs; this Rent shall go to the heirs *ex parte matris*: But if it had been a Lease for life, or Gift in tail, *contra*; there the Rent had gone to the heirs *ex parte matris*.

If A. Lessee for years die, and make B. his Executor, and B. lease part of the Term to C. rendering Rent, and die intestate, and D. gets Administration; D. shall not have the Rent, as it seems, because he comes in Paramount.

A. Tenant in tail discontinues to B. B. lease it to C. for years rendering Rent, Arrearages of Rent incur; A. dies, his Issue doth recover against B. in a *Formedon*, yet the Lessee shall pay the Arrearages to B. for B. shall pay Damages. *Justice Houghton, Hil. 18 Jac. B. R.* See more in *Baron and Feme*.

It is that Rent or Service which the Grantor in any Grant tieth the Grantee to perform to him, or the Lord Paramount; for which see *Fais*. And this is considerable at Common-Law, or by Custom of Manors; for which see *Co. 10. 128. 11. 18. Plow. 134.*

The word *Render* also is used in Fines, when the Fine is double, and containeth a Grant or Render back again of some Rent, Common, or other thing out of the Land it self to the Cognizor. Also there be certain things that lie in Prender, which may be taken by the Lord or his Officer when they chance, without any offer made by the Tenant; as the Ward of Lands, the Body of the Heir, and the like. And other things that lie in Render must be delivered or answered, as Rent, Reliefs, Herriots, and the like. And if a man make a Gift in tail without any Reservation, the Law makes a Reservation of the same Services to the Donor, by which he doth hold, *Co. super Lis. f. 143.* And upon a Lease for life or years, there the Law reserveth Fealty only, *Perk. sect. 696.*

If a Lease be made rendering Rent, without any more saying how long it shall continue, or to whom the Rent shall go; in this case the Rent shall continue as long as the Estate, and shall go to the Heir or him that hath the Reversion, *Dyer 451. Kelw. 88:*

If one by Deed indented demise to A. for life, with divers Remainders over, *Reddend. inde* to the Lessor and his heirs a Rent; this Reservation shall extend to all the Estate, if he in Remainder agree to it after the Estate for life. *Co. 10. 107. Bro. Reserv. 7.*

If one lease for a year, with these words, [And if the parties shall agree for a new Lease for longer time then for three years, *Reddend. durante Termino praedicto*;] this Reservation shall extend to the first year, as well as to the three last *Co. 11. 106.*

It is a greater Sum of money, or Penalty appointed to be paid in default of payment of a lesser, or of doing some other thing.

Note, that for the Arrearages of a *Nomine pana* there is no remedy given by the Statute of 32 H. 8. 37. and yet the same as an Incident to the Rent shall descend to the Heir: For the Grantee himself during his life, and his Executors or Administrators after his death may have an Action of Debt for it. *Co. super Lis. 162.*

It is the keeping back and stopping of something which is due, to satisfy another duty to the party which is to pay the first. As for example, where I have a Rent-charge issuing out of Land, and I disseise the Tenant of the Land, and recover the Land and Twenty pounds Damages against me; now I may recoup and keep back out of that Damages as much of the Rent as is due to me in the title: Or if there were a Rent-charge issuing out of the Land to another, and I had paid it, I shall be allowed it. *Co. 6. 31. Dyer 2.*

Seff. 12.

*Seff. 13.
Reservation of
Render, what.*

Prender.

*How it shall
be taken.*

*Nomine pana,
what.*

Recouer, what.

Uuuuu

Arrearages

Arrearages,
what.

Arrearages are Duties behind and unpaid after the days and times in which they are due, as Rent or other thing reserved. And for these, if a man have any due to him of a Rent-service or a Rent-charge, and after he accept the Rent at one of the days whereon it ought to be paid, and give an Acquittance for it; by this he is barred of all the Arrearages, though the Acceptance and Release were made by the Husband, and the Rent were due to the Wife whiles she was sole: And no proof shall be admitted to the contrary. *Plow. 133. Co. 3. 65: Dyer 171. Co. super Lit. 373.*

Denier, what.
Note.

Denier is properly the denying of a thing due where it is required; and every Non-payment of a Rent upon demand, is a Denial in Law. And note that where-soever there is a lawful Demand of a Rent, and the same is not paid, whether the Tenant be present or absent, there is a Denial in Law, albeit there be no words of Denial. And where there is no Demand made, there is no Denial. *Noy 34. Co. 8. 146. Co. super Lit. 153.*

CHAP. CXLI.

Of Rescous, Reseifer, Restitution, and Retorn.

Sec. 1.
Rescous, what.



Rescous doth signifie an act of Resistance against lawful Authority. And it is either of a Distress, for which see in *Chap.* Or it is of the person of a man, and that is in divers cases: As where a Bailiff or other Officer doth arrest a man upon a Writ, and he himself doth violently get away, or some others do violently take him away and procure his escape from the Arrest; in this case when the Sheriff hath returned this Rescue, as he must upon the

Fine.

Writ when the Retorn thereof is called for, then the parties that made the Rescue must answer to it; and if it be found against them, they will be fined for it, or the party grieved by it may have a Writ of Rescous against them.

Felony.

Or it is where an offender after Arrest is rescued by others. In this case if the Arrest be for Treason, the Rescue is Treason; if for Felony, the Rescue is Felony, and the Rescuer a Felon. And if the Sheriff arrest a man by a *Capias* for Felony, and he be rescued, it is Felony, although the party be innocent. And yet if the Sheriff or any other man arrest a man without authority of Law, in this case he may rescue himself, or another man may rescue him, and this is no offence. *Co. super Lit. 161. F.N.B. 101.*

Reseifer and
Resumption,
what.

Reseifer was the taking again of Land into the Kings hand, whereof a general Livery or Ousterlemain was formerly sued amiss, and not according to Law. And Resumption was the taking again into the Kings hands such Lands, as before upon a false suggestion or other error he had delivered to the Heir, or granted to any man by his Letters-Patents.

Restitution,
what.

Restitution is the yielding up again of any thing unlawfully taken from another: And it is used for the putting of him in possession of Land, that is put out by a Forcible Entry: For which see *Forcible Entry*. It is also taken for a Writ by which the Goods of a man stollen from him are restored, upon the Statute of 21 H. 8. 1. And as to the Restitution of Goods, these things must be known.

Felon.

1. Where a man doth make fresh suit after the Felon, and overtake him with his Goods, then he may take them again. Or if he do not so, yet if he prosecute the Felon, and cause him to be indicted and found guilty, though he be not executed,

cuted; in these cases he may have this Writ of Restitution from the Judge. But otherwise it is if the Thief be outlawed for the Felony, and where he is condemned or outlawed for another Felony, and where the Goods are come to the Crown as forfeit; for here the Owner is without remedy, *Crompt. Jur.* 98. *Co.* 3 *par. Inst.* 242, 243. *Stat.* 31 *Eliz.* ch. 11. 21 *H. 8.* 11. *Addition to Just. Dodd.* f. 41.

2. There was a Restitution to Bishops and Spiritual persons, of the Temporalities belonging to their Bishopricks and Spiritual Livings, now out of use. See *Regist.* 294.

3. If upon an Erroneous Judgment, and a *Fieri facias*, a mans Goods be sold, or a Term is sold, the Owner cannot have it again, but he shall be restored to the money made of it. But upon an *Elegit*, if a Term be extended and delivered to the Plaintiff, he shall be restored to the Term it self.

4. If one Lease or Goods be sold by the Sheriff upon a special *Cap. utlagatum*, and it be reversed for Error; in this case he shall be restored to the thing in kinde, *Co.* 8. 142, 143 6. 74, 75.

5. If a stolen Horse be well sold in a Fair, the right Owner or his Executors, if they come within six moneths after the stealing at the Parish or Corporation where he shall find him, and make proof by two sufficient Witnesses to the next Justice of Peace or Head-Officer of the Corporation, that the Horse was his, and repay the Buyer so much as he upon his own oath before such Justice will say he gave for him, he shall have him again. *Stat.* 31 *Eliz.* 12. See *Co.* 3. *par. Inst.* c. 108.

This word *Retorn* is taken three ways. Sometimes it is applied to the Case of a *Replevin*, where it is called a *Retorno habendo*. See it in *Chap.* Sometimes it is applied to the days of Apparence in every Term: And in this sense, *Hilary-Term* hath four; *Easter-Term*, five; *Trinity-Term*, four; and *Michaelmas-Term*, six *Retorns*. But it is taken in a third sense, and applied to Officers, Sheriffs, Bailiffs, and the like: And so it is nothing else but a Certificate made by an Officer to the Court from whence a Writ or a Warrant doth come, of what he hath done touching the serving of the same Writ or Warrant, *Westm.* 2. ch. 39. And as to it in this sense, these things are to be known.

1. The Writs that are to do things in Franchises, are to be directed to the Sheriff, and he must send to the Bailiff of the Franchise, who must make his *Retorn* to the Sheriff, and the Sheriff must *retorn* to the Court from whence the Writ came, 7 *Ed.* 4. 14. 12 *Ed.* 4. 15.

2. Most Original and Judicial Proceſs must be *retorned* into the Courts from whence they came, after they be executed. But for this see *Co.* 5. 90. 2 *H.* 6. 7. and see in *Execution*.

3. If the Officer do refuse or delay to make *Retorn* where it is necessary, in some cases the Court will fine him, and in some cases amerce him or set issues upon him, and in some cases send out Proceſs of Contempt against him to compel him to make his *Retorn*. *Contempt.*

4. And in all cases where Officers do make a *Retorn*, they must be sure to make a true, and see they do not make a false *Retorn*; for so the party hurt thereby may have an *Action* of the Case against him; for which see *Action of the Case*.

5. Also in their *Retorns* they must take care, especially in such *Retorns* as do stand for a kind of Declaration, and for an Accuſation, as in the *Retorn* of *Rescous*, and the like, they must be sure to make their *Retorn* certain and perfect, and they must put their names to them when they have done, *Co.* 11. 40. 4. 67. *Plow.* 63. 117. 129: *Kelw.* 165. *Bro. Proceſs* 14. 62. 64. 127, 128.

See for *Retorn* of Sheriffs and Bailiffs, *Stat. Westm.* 2. 39. 12 *Ed.* 2. 5. 2 *Ed.* 3. 5.

CHAP. CXLII.

Of a Reversion and Remainder.

Sec. 1.
1. Reversion,
what.



Reversion signifieth in our Law, a Possibility reserved to a mans self and his heirs to have again Lands or Tenements made conditionally over to others; upon the defect or failing of such Condition. Or as others define it, It is a certain Estate remaining in the Lessor or Donor, after the particular Estate conveyed or granted to another by Lease for years, life, or Gift in tail.

And the difference between a Remainder and a Reversion, is, That a Remainder is general, and may be to any man else as well as to him that doth grant or convey the Land, &c. for life or otherwise: A Reversion is to himself from whom the Conveyance of the Land &c. proceeded, and is commonly perpetual as to him and his heirs also; Also a Remainder is appointed over at the same time, but the Reversion is not so, *Cal. lib. Inst. f. 22. 1 par. 142. Ney. 39.*

2. The nature
of it.

Aid.

Attornment.
Extinguishment

And this is of that nature, as it will be more easily transferred from one to another than an Estate in possession: And though the particular Estate, and this Estate in Reversion be divers and distinct, and therefore the Tenant may pray in aid of him in Reversion, yet they have relation one to other. And therefore if there be Lessee for life or years, and he in Reversion disseise his Lessee for life, or oust his Lessee for years of his Term, and make a Feoffment, and the Lessee enter on the Feoffee claiming his Estate only; this is a good Attornment. And if they come both together, the one will extinguish the other; and he that hath a Reversion cannot be ousted of it, unless the Tenant be ousted of his Estate and Possession also. As if one seised of a Manor, make a Gift in tail of part of it rendring Rent, and the Owner is disseised, and the Tenant in tail attorn to the Disseisee; yet the Disseisee shall have the Rent of the Tenant in tail, *Co. 7. 97. Plow. 162.*

If Tenant for life and he in Reversion join in a Lease for life, or Gift in tail by Deed, reserving a Rent; this shall endure to the Tenant for life only during his life, and after to him in Reversion, *Co. upon Lit. f. 214.*

3. What shall
be said a good
Reversion, and
how.

If one seised in Fee, give to the use of himself for life, or the use of another for life, and after to the use of another in tail, and after to the use of the right heirs of the Donor; here the Donor hath a good Fee-simple expectant upon an Estate-tail as a Reversion, and not as a Remainder. So where no Estate for life is limited to the Father; for there the Law maketh an Estate for life, and the Heirs take by descent, *Co. 2. 90. Dyer 7. Co. upon Lit. 21.*

If one have a Lease of Land for twenty years, and he lease for two years rendring Rent, and after grant all his Estate and Term to another, and the Lessee for two years attorn; this is a good Grant of the Term, and the Grantee hath it by way of Reversion, *Co. 4. 52.*

Sec. 2.

But if one make a Feoffment in Fee upon Condition or Limitation, reserving the Reversion; this is no good Reversion, for all the Estate is gone by the Feoffment, and

and a Reversion or Remainder, cannot be Expectant upon an Inheritance in Fee-simple, absolute or determinable. Co. 10. 95.

If a Reversion be granted of a Judicial Office, it is a void Grant, *Officia Judicia Office non conceduntur antequam, vacent.* Co. 11. 4.

All Partentees and Grantees of Reversion, shall have advantage of every Condition, Covenant, and Agreement, against Tenants for life or years, which have their Leases by Indentures.

So also the Lessees against the Grantees of Reversion. See *Condition, Covenants.* Co. 3. 62. 5. 56. 112. & 8. 95.

If the particular Tenant do commit Waste, he in Reversion may have an Action of Waste. See *Waste*, and 32 H. 8. 34. *Plow.* 175. *Dyer* 61. 131. 309. *Wastm.* 2. cap. 4. 5.

A Copiholder for life cannot by any Forfeiture destroy the Estate of him in Reversion. 39 H. 6.

Remainder (*Quasi terra remanens.*) it is a power or hope that one hath to enjoy Lands, Tenements, or Rents, after the Estate of another expired; or the residue of an Estate appointed over at the same time: As if one give or grant Lands or Tenements to one for life or years, the Remainder to another in Fee, Tail, life or years; and in this case the Remainder, and the particular Estate, do make (as it were) but one Estate, and therefore the Remainder is called the Residue of the Estate; and for this cause it is that that which is done by, or to one of them in many cases shall binde and advantage the other, as an Attornment or Release made to one of them, shall advantage the other. And this doth differ from a Reversion, for the Remainder is always a succeeding Estate, appointed and limited over the time, the precedent Estate was made, and the Reversion is an Estate left in the Giver, after the particular Estate for years, life, or intail, made by him. See more in *Crompt. Jurisd.* cap. 11. 62.

A Remainder is, and may be created sometimes by Fine, Deed, or other Conveyance, and sometimes by Will; or it may be without Deed by a Livery of Seison: And the most apt and proper word to create an Estate by way of Remainder, is the word Remainder it self; As a Lease to one for life or years, the Remainder, or [and that it shall remain to] another, and the like: But an Estate by way of Remainder may be made and limited by other words. And therefore it is agreed for Law, That if a Lease for years or life be made to B. the Reverter to C. or [and that after his death, the Lands *Redibunt* at C.] or [and after to C.] or [and after that the Land shall go to C.] or [and that the Land shall descend to C.] or [provided on condition, That if such a thing happen, C. shall have it,] or any other such like words. All these are good Remainders. See more in *Broo. Domes & Remainder.* *Plow.* 134. 9 Hen. 8. 2. Co. 3. 20. *Plow.* 159. 170. 542.

To make a good Remainder by the Rules of Law, these things are requisite.

1. There must be a particular Estate Precedent, as an Estate for life or years, or a Frank-tenement descendible, or special occupancy; and that must be created at the same time when the Remainder is made, as a foundation to support the Remainder, for neither without such a particular Estate: Nor yet upon a Fee-simple, Conditional, or limited, can a Remainder depend.

2. This particular Estate must continue until the Remainder happen, for if it do determine before the Remainder, it is void.

3. There must be a remnant of Estate in the Lessor, to grant more then the particular estate.

4. The Remedy of him in Reversion against him that hath the particular Estate for any wrong done to him, concerning the Land, Condition, Covenants, Waste.

5. Where the Tenant may hurt the Reversion, or not.

6. Remainder, what.

Attornment, Release.

7. How, and by what words a Remainder is and may be made.

8. What shall be said a good Remainder in his Original Creation, or not.

4. The

4. The Remainder must pass out of the Lessor or Donor presently, to him in Remainder, or else it must be put in custody of Law, and in Abeyance, else it is not good.

Señ. 4.

5. The Remainder must vest in Estate, either presently, during the particular Estate, or *eo instanti* when the particular Estate doth determine, and not before nor after; for if the particular Estate be ended, before it happen, the Remainder is void, or if it happen before the particular Estate be ended, the Remainder is void.

6. There must be a person capable at the time of the Creation of the Estate, or at least by common and ordinary possibility, one that may be capable by that time the Remainder happen.

7. If the Remainder be to come, and upon a possibility, it must be such a possibility as is near common and ordinary, as death, death without issue, Coverture, or the like; and not remote, as Entry into Religion, or the like, for then it is void. See the cases below, *Plow.* 136. *Co.* 10. 97. 320. *Plow.* 34, 35. 21 *Hen.* 7. 12. *Co.* 3. 20. *Littl.* 162. *Co.* 1. 66. *Perk.* 12. *Dier* 140. 18 *Hen.* 8. 4. *Plow.* 155.

In respect of
the manner of
Limitation.
By Deed.

If a Lease be made by Deed for life or years, the Remainder over, and Livery of Seisin be given, it seems this is a good Remainder, *Quere.* For it seems experience is otherwise. See the Addition to Justice *Dodridge*, f. 31.

So also is a Gift in Tail, with a Remainder over in Fee. *Co.* upon *Littl.* 143. *Littl.* sect. 60. 21 *H.* 6. 1.

If a Lease be made for life, with Condition, That if the Lessee for life die, that it shall remain over; this is a good Remainder. *Plow.* 25. 27 *H.* 8. 24.

If a Lease be made for life, the Remainder to the right Heirs, or *primo genito filio de 7. S.* this is a good Remainder. *Co.* 2. 51.

If a Lease be made for life, and after the Lessor confirm by his Deed, the Estate of the Tenant for Term of life, the Remainder over to another in Fee; this is a good Remainder. *Co.* upon *Littl.* 317.

If a Lease be made to 7. S. for life, provided, That if he marry the daughter of the Lessor, he shall have the Fee; this is a good Remainder, and the Fee will increase. *Plow.* 25.

If a Lease be made to A. for life, the Remainder to the right Heirs of A. and the Heirs of that right Heir; this is a good Remainder, but A. may Bar his Heir of it. *Co.* 1. 66. *Dyer* 309.

Señ. 5.

If a Lease be made for life, the Remainder to 7. S. in Tail, and if 7. S. die without issue, or marry the Remainder to 7. B. this Remainder upon this Contingent to 7. B. is good. *Dyer* 304. *Co.* 2. 50.

If a Lease be made to 7. S. for life, and after the death of 7. D. the Remainder to another, this is a good Remainder, and will vest well enough, if 7. D. die, during the life of 7. S.

So if a Lease be made to A. for life, the Remainder to B. for life, and if B. die before A. then to remain to C. for life, this is a good Remainder, and will vest well enough if A. survive C.

So if one have a son of nine years of age, and make a Lease till his son come of full years, and after that it shall remain to another in Fee, if he live to his full age; this will be a good Remainder not else. *Co.* 3. 20.

If a Feoffment be to the use of an eldest son for sixty years, the Remainder to a younger son for life, the Remainder to the Heirs Males of the eldest; it seems this is a good Remainder. *Trin.* 7 *Jac.* By the Justices.

If a Lease be made of a House for life, the Remainder to W. for life; *Si ipse inhabitaret super prædict' domum*; and if W. happen to die before the first Tenant, then it shall remain to K. for life, this is a good Remainder. *Plow.* fol. 4.

If Lands be given to A. and B. so long as they live jointly together, the Remainder to the right Heirs of him that dieth first, this is a good Remainder. *Co.* on *Littl.* 378.

If one by Will devise his Land to *A. B.* for eight years, and after that the same shall remain to his Executors, until his son shall come of age of one and twenty years; and then that it shall remain to him and his Heirs for ever; this is a good Remainder to the son and his Heirs, but if it were by Deed, *contra. Co. 3. 20.* By Will.

If one devise to *J. S.* the Remainder to one in *ventre sauncere*; it seems this is a good Remainder. Chief Justice. *Mich. 13 Jac. B. R. John Simpsons case.*

If one by Deed, inrolled and indented, bargain and sell to one for life, the Remainder to another in Fee; this is a good Remainder by this means. *Co. By Bargain and Sale.*

1. 45.

If a Rent that is in *esse*, be granted with a Remainder over, this is a good Remainder. *Plow. 35.* In respect of the thing granted.

And so it seems of a Rent newly created, granted to one for life, the Remainder to another; if there be a clause for the Grantee to distrain for his life, and after for him in Remainder for his time. So if one that hath a Rent-charge in Fee, grant it for life to the Tenant of the Land in Fee with a Remainder over; this is a good Remainder. *Finches Ley. 133.*

If an Estate be made to *J. S.* and his Heirs, during the life of *W.* this is a good Estate precedent, on which to limit a Remainder; and therefore a Remainder limited upon this Estate, is good, as upon a Lease for life or years; for this in effect, is but a Lease for life. In respect of the precedent Estate.

So if two Joyntenants be, and one make a Lease for life, the Remainder to his Companion, it is a good Remainder. *Co. upon Littl. fol. 191, 208. Durels case, Hil. 1 Jac.*

And if I give a Remainder after my death, it is void. *March. 51.*

But if a Lease be by Deed for life or years to a Monk, with a Remainder over, the Remainder is void: But such a Remainder made by a Will, is good enough. *Broo. Grant 133.* For lack of a particular Estate.

If a Lease be by Deed for life, the Remainder to another, and the Lessee for life wave his Estate; now this Remainder is void: But if the Creation of the Estates were by Will, *contra. Co. 1. 101. 37 H. 6 36.* See 6.

If one by Deed convey Land in Fee-simple to one on Condition, That if he do not such a thing, or if such a thing happen, that the Land shall remain to other, this is a void Remainder. *Co. 10. 97. Co. 3. 20. Plow. 34.*

But if this were by Will, perhaps it might be a good Remainder for one Fee-simple cannot depend upon another. *Co. lib. Instit. 1 part, fol. 18. Broo. Donee, fol. 45.*

If one by Deed convey Land to one and his Heirs, so long as *J. S.* hath Heirs of his Body, and after that it shall remain to *W.* this Remainder is void: But perhaps if this were by Will, it might be good; but otherwise a Remainder will not depend upon a Fee-simple determinable. *Co. 10. 97. Plow. 35.*

If he in Reversion confirm to the Tenant for life, with a Remainder over, or the Heir endow his Mother with a Remainder over; these Remainders are void, for the particular Estate was not made at the same time: But if the Lease had been *pur autre vie*, and the confirmation for his own life, with a Remainder over, it had been good. *Co. 3. 20. 1. 175. Doct. & Stud. fol. 20.*

If one Lease for life, and that upon such a Contingent the Estate shall cease, and then after that it shall remain to another; this Remainder is void. *Co. 3. 20. 21 H. 7. 21. Plow. 25. 155.* For lack of continuance of particular Estate.

If one Lease for life, and that two days after the death of the Tenant for life, it shall remain over to another; this is a void Remainder. *21 H. 7. 22.*

If a Lessor disseise his Tenant for life, and after make a new Lease to him for life, with a Remainder over, this Remainder is void, because the Lessee for life, is re-mitted, to his first Estate, and the last estate for life is gone. *Plow. 25. Littl. Sect. Remitter.* Remitter.

If one Lease to *A.* for one and twenty years, if *B.* live so long, and after the death

death of *B.* that this shall remain over in Fee. So if a Lease be made for years, the Remainder to the right Heirs of *J. S.* In these cases, if this be by Deed, the Remainders are void. *Co.* 3. 10.

So if one having issue a son not of age, makes a Lease till his son shall come to his full age, and after he shall so do, that it shall go to another in Fee, it seems this is void. *Idem.*

Sett. 7.
For want of
a Remainder of
Estate.

If a Tenant in Tail, Possession or Remainder, grant all his Estate to *J. S.* the Remainder to *J. D.* This Remainder is void, for he had nothing more in him to grant. So if there be Tenant for life, the Remainder in Tail, and he in Remainder grant all his Estate and Right to one *Habund.* during the life of the first Tenant, and after to the use of the King; this is a void Remainder. *Co.* 2. 52. *Co.* 2. 50.

For that it
doth not vest
in time conven-
ient.

If a Lease be made to two, the Remainder in Fee to one, after the death of the first, this is a void Remainder. *Plow.* 24. 18 *H. 8.* 4.

If a Lease be for life, the Remainder for life, and that after the death of the first Tenant for life, yet shall remain to a stranger in Fee; this second Remainder is void. *Plow.* 24.

If *A.* Lease to *B.* for the life of *B.* and after the death of *A.* to *B.* and his Heirs; if *A.* survive *B.* this Remainder is void. *Co.* 10. 85.

For that he in
Remainder is
not capable.

If a Lease be for years, or life, the Remainder to a Monk, or other dead person in Law; this Remainder is void, though he became after deraigned, and so is made capable, and this be before the Remainder happen. *Co.* 2. 50. *Broo. Domer.* fol. 37.

If a Lease be made to *J. S.* for life, the Remainder to the eldest Issue-male of *B.* and the Heirs-males of his Body, *B.* hath issue a Bastard son, this Remainder is not good to him; but after he hath been born a while, that by reputation he hath gotten the name of a son, a Remainder may be good to him so made as before. So if one make a Lease for life to *R.* the Remainder to the eldest Issue-male of *R.* to be begotten of the body of *J. S.* whether the same be legitimate or illegitimate, and they have issue a Bastard; this Bastard shall not have this Remainder. So a Remainder limited to the first reputed son, or Bastard, is not good in the case of *Blodwell* and *Edwards.* *Hil.* 38 *Eliz.* *Co.* lib. *Inst.* 1 part, fol. 3.

If a Lease be made for life or years, the Remainder to the son of *J. S.* and he have no such son at that time, though he happen after to have such a son, yet this Remainder is void. *Co.* 2. 50. *Dier* 340. 10 *Ed.* 3. 46.

So if it be a Lease for years or life, the Remainder to a Corporation, and there is none of that name.

So if it be a Lease for life or years, the Remainder to such a one as the particular Tenant shall name, though he do after name one, yet the Remainder is void. *Broo. Domer* 37. *Co.* 2. 51. 9 *H. 6.* 24.

Sett. 8.

If a Lease be for life or years, the Remainder to the right Heirs of *J. S.* and there is no such *J. S.* then in being; this is a void Remainder, though after such a one happen to be born, and to have an Heir, and *J. S.* die before the Remainder happen. So if there were such an *J. S.* if he were living. *Co.* 1. 58. 2 *Hen.* 7. 13. *Co.* upon *Listl.* 217.

If *A.* have issue a son and daughter, and a Lease for life be made, the Remainder to the Heirs Females of the body of *A.* dieth, the Heir Female in this case shall take nothing, for she is not Heir. See the *English Lawyer*, 14, 15. *Co.* upon *Listl.* fol. 2.

For lack of
Certainty.

If a Lease be made to one, until he shall enter into Religion, the Remainder to *H.* this is a void Remainder. *Co.* 1. 51.

Also the cases in the last Division answer to this. See them there, and see more in *Plowden*, *Colthirst's* case.

If a Lease be made to *A.* for life, the Remainder to *B.* in Tail, the Remainder to *C.* in forma *prædicta*; this Remainder to *C.* is void: But if it had been to *C.* in *eadem forma*, it had been good. 14 *Hen.* 4. cap. 15. *Co.* lib. *Inst.* 1 part, fol. 25.

If

If one give Lands to one in Tail, on Condition, that if he alien in Fee, that then his Estate shall cease, and the Lands shall remain to another; this is a void Remainder: And yet if one make a Lease for life to *A. B. and C.* And if *B.* survive *C.* then the Remainder to *B.* and his Heirs; this is a good Remainder on this Contingent. *Littl. sect. 721. Co. upon Littl. 377.*

For that it doth not pass out of the Grantor.

If a Lease be made for years, the Remainder to the right Heirs of *J. S.* (which *J. S.* is then living) this Remainder is void; but a Lease for life with such a Remainder over, is good. *Plow. 83. Co. 1. 132, 136.*

If one seised in Fee make a Lease for life, the Remainder to himself in tail; this is a void Remainder. *Co. 3. 20. Broo. Refr. 14.* So if one make a Gift in Tail or Lease for life, the Remainder to his own right Heirs; this Remainder is void, *Co. lib. Inst. 1 part, fol. 23.*

If a Lease be made to *A.* for life, the Remainder to *B.* for life, provided, That if the Lessor shall have any son, during his life, that shall live till his age of five years; that then the Estate limited to *B.* shall cease, and that it shall remain to another; this second Remainder upon a Contingent, is void: For a Remainder must come at first by Livery, and cannot commence after upon a Contingent. *36 Eliz. Co. B.*

If an Estate be made at Will, with a Remainder over; this is not a good Remainder, for this Estate will not support a Remainder. *Co. 8. 75.*

If one have issue two sons *A.* and *B.* and dieth. *B.* hath two sons *C.* and *D.* and dieth. *C.* the eldest son hath Issue, and dieth, a Lease is made for life to *A.* the Remainder to the next of blood in Fee; now by this *D.* shall take, and not the issue of *C.* So if a Lease be made to a son, the Remainder to the next of Blood; it seems the Father, and not the Uncle, shall take by this. So if a man hath two sons, and the eldest have a son and die, and a Remainder is limited to the next of his Blood, the youngest shall take it. *Co. lib. Inst. 1 part, fol. 10, 13.*

Sect. 9.
Who shall take a Remainder:
The next of Blood.

If an Estate be to *A.* for life, the Remainder to the right heirs of *A.* or the right heirs of *B.* or the right heir, and heir of such right heir, or the like, and *A.* make a Feoffment in Fee: Now by this, the Remainder is destroyed for ever, and can never be revived. But if the Tenant for life had been disseised onely, and so died, the Remainder might have continued and vested well enough. *Co. 1. 60. 136.*

9. Where a Remainder shall be destroyed, and how.

If Lands be given or granted for life, the Remainder to the right heirs of *W.* and *W.* is attainted of Treason or Felony; now the heir shall never have this Remainder. But if the Limitation had been to the Heirs Males of *W.* *contra.* *Co. 10. 102. fol. 2. Broo. cap. 302.*

If a Disseisor make a Lease for life with a Remainder over, and after the Disseisee enter; now the Remainder is destroyed and gone for ever. *Littl. sect. 521. Broo. cap. 302.*

If *A.* infeoff *B.* and his heirs to the use of *C.* and *D.* his wife, and the heirs of the survivor of them, and *C.* makes a Feoffment to *E.* and dieth; this Feoffment doth destroy the Contingent Remainder, Adjudge. *Co. 1. 135.*

If a Gift in Tail be made to *A.* the Remainder to the right heirs of *B.* and the Donee makes a Feoffment to *B.* *A.* dies; in this case the heir shall not have the Remainder. *Piggoy and Smiths case.*

CHAP. CXLIII.

Of Rogues, Ryot, Rout, and unlawful Assembly.

SECT. I.
Rogues, what.



Or Rogues, these things are to be known.

1. That all persons above seven years old that go about begging or wandring idly, under any pretence whatsoever, are to be accounted Rogues : But none under seven years old, are to be reckoned Rogues.
2. All idle persons that go about, using unlawful arts, as Juglers, Fortune-tellers, &c. are accounted Rogues.
3. All Proctors, Patent gatherers, Collectors for Gaols, Prisons, or Hospitals, are so to be accounted ; but not Patent gatherers for fire.
4. All Fencers, Bear-wards, Common Players of Interludes, and Minstrels, that wander about, are so to be esteemed.
5. All Pedlers, Tinkers, Petty-Chapmen, and Glafs-men, wandring about, are so to be accounted.
6. All wandring persons, and common Laborers, being able to work, that loyter and refuse to work for reasonable wages, not having whereon to live.
7. Such as having License to beg in their own parish, beg elsewhere.
8. Those who wander in the habit of *Egyptians*, not being Felons, are also accounted Rogues. And *Egyptians* are a counterfeit kinde of Rogues, that being English or Welsh-people, accompany themselves together, disguising themselves in strange Robes, blacking their faces and bodies, and framing to themselves a strange Language, wander up and down, and under pretence of telling of Fortunes, curing diseases, and such like abuse the ignorant common people, by stealing all that is not to hot and to heavy for their carriage.
9. Soldiers and Marriners that beg (not being Felons) and especially where they counterfeit a Certificate of their Commanders, are such also.
10. And so are all these that follow. Persons that go to, or from *Bath*, and do not pursue their License.
11. A Rogue whipped that doth beg again, or not pursue the direction of his Testimonial.
12. He that doth go with a general Passport, and not from Parish to Parish.
13. He that goeth with his Passport by himself, without a guide : Nay, it is held, that all Passports are void, and that none can go with a Pass, but he will be a Rogue.
14. Servants that go out of their Parish without a Testimonial, or with a forged Testimonial.
15. Such as do run away, or threaten to run away from their charges, and to leave them to the Parish.
16. A Soldier or Mariner that hath a Pension, and shall beg or counterfeit a Certificate.
17. Those that are sick of the Plague, and wilfully go abroad in company contrary to the command of Officers ; all these are held to be Rogues. And if it be a Woman that hath a Husband, she may be a Rogue, as well as a Man : But if the Parents be not Rogues, the Children cannot be so, unless they beg, and become so.

What shall be
done with
them.

They that are such persons, are thus to be dealt with.

1. They are to be whipped openly, till their bodies be bloody.

2. They must have a Pass or Testimonial under the Hand and Seal of one Justice of Peace, or under the Hands and Seals of the Minister, Constable, and one of the Parish beside, appointing whither he shall go, which way, and in what time.

3. With this Pass he is to be carried and conveyed from Parish to Parish, by the Officers thereof, the next way to the Parish where he was born, if it may be known by

by his confession, or otherwise; if not, then to the Parish where he last dwelt by the space of one year; or if neither can be known, then through the Parish, through which he last pass, without punishment: And the Officer of that Parish is to carry him to the House of Correction, or Common Gaol, where he is to be till he be placed, if able, in service, if otherwise, in an Alms-house. See 5 Eliz. 4. 42 Eliz. 2. 7 Jac. 4. 39 Eliz. 4. 27. 1 Jac. 7. 12 R. 2. 8. 23 Ed. 3. 7. 22 H. 8. 12. 1 Ed. 6. 2, 3. 3, 4 Ed. 3. 16. 33 Eliz. 7.

Resolution of the Judges upon the Statutes, upon which these things are to be known.

1. Generally the Wife and Children must go and be passed, with the Husband and Parents: And if a Wife become vagrant, she is to be sent to her Husband.

2. None may be forced to turn Rogue, so as to be sent, &c.

3. None but a Rogue is thus to be used; for if a Servant be out of his time, idle, or go into another Parish, and is there idle, he is not so to be handled, so neither is a traveller or passenger.

4. The child of a Woman, hanged for Felony, is to be sent to the place of its birth, and if that cannot be known, to the place where she was taken.

5. He that doth run or threaten to run from his charge, &c. He that being allowed by the Overseers to beg, doth exceed his License: Such as are infected with the Plague, and go abroad, and able idle persons that be poor, and refuse to work: All these upon their delivery, are not to be sent to their place of birth, but to their place of dwelling, if they have any, if not, where they last dwelt for a year. And the loyterer that will not work for the wages assessed, may be sent to the House of Correction.

6. He that is found in the privy search, may be punished by the Justice of Peace, or sent to the House of Correction, there to be set a work.

7. He is not to be relieved; for if any Officer do give him money, or an Ale-house-keeper lodge him, he forfeits ten shillings.

8. He that doth any thing in hinderance of the Execution of the Statute of 31 E. 3. 4. loseth five pound, and is to be bound to the Good-behavior.

He that doth appear to be dangerous to the people, that doth offer violence, or use any threatening speeches towards them, or will not leave his Roguish life, but being punished and sent home, doth rogue again; or when that doth affirm, he was born in such a place, or last dwelt a year in such a Town, and when he is come thither, it appears to be false; or such a one as is able to labor, and he doth threaten to run away, and leave his charge to the Parish, or doth so: All these are to be reputed Incorrigible Rogues, and are to be brought by the Constable to the next Justice, who may secure them. And two Justices may send them to Gaol, or the House of Correction, till the Quarter Sessions, and then they are to be branded on the left Shoulder with an hot Iron, &c. and from the Sessions to be sent to the place of their last habitation. 1 Jac. 7. 25. And he that falsifieth his birth, is to be sent away by the two next Justices to the Gaol or Bridewel. See more of this in my Justice of Peace.

Incorrigible
Rogue, what.

What is to be
done with
them.

Of a Ryot, Rout, and unlawful Assembly.

For the better understanding of the Law in this, these things are to be known.

1. That an unlawful Assembly, is where three or more do meet to do an unlawful act against the Peace, as to beat down a Pale, Ditch, House, or the like, or to do a lawful thing in an unlawful way or manner, as to distrain for his Rent with force and violence; but they do nothing. A Rout is when they go forward (after they are thus met) in a turbulent way to effect, but do not finish it. A Ryot is when they do not onely begin, and go on, but finish their work: So that in these offences there must be these things concurrant.

Unlawful As-
sembly, what.

Rout, what.

Ryot, what.

First, There must be three or more persons in the work, and this may be made up of Women and Children of any discretion: But this offence may be committed, though some of the company stand by, and do nothing; for if they stand by and countenance it, it is as bad, as if they did it: But if they come by chance, and intend nothing, *contra*.

What shall be
said to be a
Ryot, Rout, or
Unlawful as-
sembly, or not.

Xxxxx 2

Secondly,

Secondly, Their Assembly that they go with, or their intent must be evil, to do some hurt to men, or that which is theirs (which in some cases will be presumed,) as if the Lord with two or more persons, enter on his Copiholder with force, and cut and take his Corn, because he doth not pay him his Fine; this is a Ryot, and yet this Entry lawful: So if a man make resistance against the Sheriff, or any other in their doing of Justice. So if two or three make a forcible Entry; and this may be punished both ways. Meetings and Assemblies of any persons upon matches made for Cock-fighting, are unlawful Assemblies, and (it seems) may now be punished as a Ryot. *Ord* 31 *March*, 1654. And so (as it seems) are Meetings to set up May-Poles, especially when it is done with Guns and Drums. *Ord*. *April*, 1644. If many come together unarmed, they know not why themselves; this is no offence punishable, unless it can be known, they came to some evil intent, or they do miscarry themselves in some evil act.

If one ride or go abroad with his Servants armed, and in harness, and do no more; this is an Unlawful Assembly if not a Ryot: But if he intending a Ryot by an Entry in to Land, or the like, go with his ordinary servants, who know nothing, and they do enter, this is not a Ryot in the servants, if it be any in the Master. To go in a Privy Coat of Mail, is not this offence: And albeit one be threatened, and in danger of his life, and to defend himself he gathers aforce, and they ride about armed; this is a Ryot, yet if they did abide in his house, happily it may be justified. But if a man do onely go abroad with his household servants, which he hath commonly in his Family, though they be more then his ability to keep; this is no offence, and if they hap to make an affray, or do any unlawful thing; this will not amount to this offence, except it can appear they had an intent before to do it, but an affray onely.

The Watch in London on *Midsummer* night, Assemblies for merry Meetings onely; wherein there is no breach of the Peace, nor terror to the People, are not taken to be this offence: But take heed they be not such Meetings, as are forbidden, as May-Pole Meetings, Cock-fighting Matches, or at prohibited times, as upon the Lords day; for this may make it questionable. But if there happen to be an affray at such Meetings, it is not interpreted to be this offence: But the coming to such a Meeting with such an intent, or the taking of sides and parties at such a time, and in such a case especially, if after their parting they meet again, may amount to this offence.

If a Jury come to try an issue, and they happen to fall out and fight; this is not this offence, but an affray. The Sheriff, and other Officers of Justice, in going about with Troops and Arms, do not commit this offence.

Thirdly, The manner of their motion and action, (if the matter be good) must be bad, as when it is turbulent; so that by their coming together, they breed some apparent disturbance, either by word, gesture, or action; so that peaceable men are feared, or light men imboldened; for as a man may do an unlawful thing, so as it may not be a Ryot; so he may do a lawful thing, so as to make it a Ryot: And therefore if a convenient number onely, with convenient Tools, onely meet together to abate a Common Nufance; as where a man hath erected a Wearton, a Common River, where the people pass with their Boats, and they come to the place, and make a Trench in his ground that did it, the better to do it; this is no offence. But if in doing this, they come weaponed, or in the night, or use threatening speeches, that they will do it, if they die for it, or the like; this may make it a Ryot. So if I claim a peece of Timber, and another hath better right to it then I have, and I take a convenient number of persons, and peaceably remove it; this is no Ryot.

Fourthly, If a man hath Title to Corn, and he come with a great number to cut it with Sickles; this is no Ryot. But if he have no Title, it is otherwise. *Hugh* *Rep* 438.

How this offence may be punished, and what the Justices of Peace, may and ought to do herein. See my Book of *Justice of Peace*, see 17 R.2.8. 13 H.4.7. 2 H.5.8.9. 8 H.6.14. 19 H.7.13.

CHAP. CXLIV.

Safe Conduct, Sequestration, Serjeant at Arms, Sea,
Scold, and Cucking-Stool.

Safe Conduct is a Security given by the Lord Protector under the Broad-Seal to a stranger, for his quiet coming in, and passing out of the Realm. See 15 H.6.3. 18 H.6.8. 20 H.6.1. 13. 1 H.6.4. 9 H.3.20. 25 Ed.3.2. and others.

Safe Conduct,
what.

Sequestration is the separating of a thing in Controversie, from the possession of both those that contend for it; and it is either voluntary, which is that which is used and done by the consent of both parties, or necessary; which is that which the Judge of his Authority doth, whether the parties

Sequestration,
what.
Sequestrators.

will or not. This word also was used for the act of the ordinary disposing the Goods and Chattels of one deceased, whose Estate no man will meddle with; as also the gathering of the Fruits of a Benefice, void to the use of the next Incumbent. Dyer 232, 252, 160, 271. 28 H. 8. 11. And those that do thus gather the things contended for, are called Sequestrators, and these have no interest; for they can bring no Action of Trespas. *Stapletons case. Hil. 14 Jac. B. R.*

Sequestro Habendo was a Judicial Writ, for the dissolving of a Sequestration made by the Bishop, at the Kings Commandment of the Fruits of a Benefice, thereby to compel the person to appear at the Sute of another (which is a course to be taken against a Parson, if he appear not to a Sute) and the Parson upon his Appearance, may have this Writ for the Release of the Sequestration. *Regist. Judicial, fol. 36.*

Sequestro Habendo, what.

The Commissioners for Approbation of Ministers may sequester the Profits of a Church-living, while it is in Sute, and supply the place therewith. See *Ordinance, 20 March, 1653.* So may the Commissioners of the Counties, for the casting out of Scandalous Ministers, or School-Masters, they may sequester the Profits of the Church. See *Religion.*

As for Sequestration, and Sequestrators of Papists and Delinquents, and Composition with them, see *Att, 25 Jan. 1649. 9 April, 1649. 21 Octob. 1653.*

Serjeant at Arms, see 13 R. 2. 6.

Serjeant at
Arms.

For the Sea, see 18 Ed. 3. *Stat. 1. 3.*

Sea.
Scold and
Cucking-Stool.

A Scold is a troublesome and angry Woman, who by her brauling and wrangling amongst her Neighbors, doth break the Publick Peace, and begot, cherish, and increase Publick Discord.

She is to be presented for it, by, and punished in the Leet, in the Cucking-stool, The punishment. Ducking-stool, or Tumbrel, an Engine appointed for that purpose, which is in the fashion of a Chair: And herein she is to sit, and to be let down in the water, overhead and ears, three or four times, so that no part of her shall be above water, diving or ducking down (though against their wills, as Ducks use to do under the water. *Kitch Court-Leet. 13.*

For Searchers, see 4 H.4.31.

Searchers.

CHAP. CXLV.
Of Seals of the Lord Protector, Seizure of Goods,
Sewers, and Seavorn.

Seiz. 1.
Seals, what.



The Lord Protector hath four Seals, which he doth use in his Gifts and Grants, and publick and private Acts.

The first is the Grand Seal, which is the chief; and of which, the Lord Chancellor, or Keeper, or Commissioners for the time being, have the Custody: And by this onely, the Lord Protector doth, and may Seal Writs, and grant or give away any Office, Manors, Lands, or Tenements; for by the Common Law, no Grant of any Land by the King, was available or pleadable, but under the Great Seal of England, of which onely, all the Courts are to take notice: And therefore though this Seal be chargeable, because every thing doth pass the Privy Signet, and Privy Seal, before it come to this, yet it is the safest and surest way to have any thing from the Lord Protector, under this Seal.

The second is the Privy or Petit Seal, and by this he doth, and may give Fees, grant Prohibitions against a man, that he shall not go out of the Realm, present to a Church, make an Attorney, discharge debts, or the like: But he cannot give or grant away Lands by this onely, nor Seal Writs with this.

The third is the Privy Signet, and by this also he may prohibit a man to go out of the Realm, present to a Church, or the like; but by this he cannot dispose his Treasure, or discharge debts, or the like.

The fourth is the Exchequer Seal, and by this the King did use to grant small matters, as Cottages, and the like, or to make a Lease of greater things for three lives onely; and the Law doth allow of such grants, because else no man would take them, the charge of the Grand Seal is so great: And how the Clerks that have the Custody of the Seals, must use them, and what Fees they must take for the same. See 28 Ed. 1. 5. Co. 2. 17. Bro. 310. Co. 111. 90. F.N.B. 20. 85. March. 55. p. 185. 4 H. 7. 14. 11 R. 2. 10. Art. super. ch. 9. Co. 2. 17. 27 H. 8. 11. 27. 1. 2 Ph. & An. 1.

For the Parliament Seal, see Act, 22 Jan. 1650.

For Sealing, and the Seals of other Mens Deeds, see Deed.

For Seavorn, see 34, 35 H. 8. 9.

As to the Seising of the Goods of a Delinquent, these things are to be known.

Seizure of
Goods for of-
fences.

1. No Goods can be taken, and seised to the use of the Lord Protector, before the same are forfeit.

2. The same cannot be Inventoried, and the Town charged therewith, before the owner be indicted of Record.

3. So there are two manner of Seisures, one verbal without taking, removing, or carrying away, onely to make an Inventory, and charge the Town. And the other an actual Seizure, and taking away the same.

4. Before Indictment, neither may be; and after Indictment, the first Seizure onely, and not the latter, may be made by any Officer of the King. Co. 3 part, Inst. cap. 103. See Crown, sect. 15.

Sewers

Sewar or Sewer hath two significations with us.

First, It did note him that came in before the Meat to the King, or great Mens Tables, and did place the Dishes. The other sense is, That it meaneth the Passages, Gutters, or Rivers, that carry Water into the Sea.

Commissioners
for Sewers,
what.

And the Commissioners of Sewers, are those that are authorized under the Great Seal to over-look these, and to see Drains, and Ditches, well kept and maintained in the Marish, and Fen Countries, for the better conveyance of the Water into the Sea, and the preserving of the Grasse for the Food of Cattle.

And for these things, see 25 H. 8. 10. 13 Eliz. 9. 1 Mar. 11. 3 Ed. 6. 8. 7 Jac. 20. 6 H. 6. 5. 8 H. 6. 3. 18 H. 6. 10. 23 H. 6. 9. 12 Ed. 4. 6. 4 H. 7. 1. 6 H. 8. 10. 23 H. 8. 5. 3 Jac. 18. 14. And Mr. Robert Callis Reading.

CHAP.

CHAP. CXLVI.

Of the Service of God or Religion.



As touching the Service of God, or Religion, and the Laws of the Nation now in force, and of use relating therunto, these things are to be known.

Self. 1.
1. The great regard the Law hath of Religion.

1. That the Christian Religion contained in the Scriptures, is held forth and commended, as the Profession of these Nations; yet so, as no man is to be compelled to it by Penalties, or otherwise, then by the endeavor of sound Doctrine, and the examples of good Conversation, and by the encouragement of painful, and able Teachers for instructing of the people, and confutation of Error, and Heresie. *Government, Art. 35, 36, 37.*

2. That such as profess Faith in God by Jesus Christ, though differing in judgment from the Doctrine, Discipline, or Worship, publicly held forth, shall not be restrained, but protected in the Profession of the Faith, and Exercise of their Religion; so that they abuse not this liberty to the civil Injury of others, and to the actual Disturbance of the Publick Peace on their parts: Provided, That this liberty be not extended to Popery or Prelacy; nor to such as under the Profession of Christ, hold forth and practise licentiousness. *Government, Art. 36, 37, 38.*

3. That the Law hath a special regard of it, and therefore it holdeth forth these Religious Principles.

First, That Religion and Justice are the main Pillars of the Commonwealth.

Secondly, And that that is the best reason that makes for Religion. *Co. 5. 14.*

The main things the Law doth take care of, in order to the Advancement and Preservation of Religion, are Religious times or days; Religious things, as the holy Scriptures, holy Ordinances, or Worship, and an orderly performance of them; Religious places, and Religious Orders of Men, and Officers; such as are the Ministers of the Gospel, and as to them, their due qualification, election, disposal, and reward.

As touching Religious times, these things are to be known.

1. That by our Law, there is no day now ordinarily to be kept holy, but the Lords day. *Act, 27 Sept. 1650.* The Common and Statute Laws also, do highly advance the Authority, and severely injoin the Sanctification, and forbid all manner of profanation of this day. *5, 6 Ed. 6. 3. Plow. 265. Co. 9. 66.* And therefore all works (but works of Piety, Charity, and other works of necessity) are forbidden on this day. And for this cause it is, That if any part of the proceedings of a Sute in a Court of Justice be entred and recorded, as done this day, it makes it all void; and all serving Warrants or Proces on this day, but in special cases, is void; and it is a rule, *Dies dominicus non est juridicus.* And if a Keepers Deer be stoln out of his Park, whiles he is at Church serving God (though this in another case be a forfeiture of his Office) yet in this case, and at this time, it is not at all penal to him. *5 Ed. 3. 27.*

2. But this notwithstanding it is lawful, to pursue and arrest Felons, such as break the Peace, suppress uproars, quench fire in houses, visit sick people, and the like. *Co. 5. 83. Plow. 265.* See more of this in my Office of the *Justice of Peace*, Chapter of the *Lords day*.

3. But as to the other Holy days called Feast days, they are now totally abrogated, and at an end. *Act, 27 Sept. 1650.* But the fifth day of *November*, we are to meet once to thank God for our deliverance from the Gun-powder Treason. *3 Jac. 1.*

As

3 Holy Scri-
ptures;

As touching the holy Scriptures, these things are to be known:

1. The Maximes of the Law, concerning them, which are these.

First, That they are of Sovereign Authority. 34 H. 6. 40.

Secondly, That the Gospel of Jesus Christ is of infallible truth.

Thirdly, That any Statute, Prescription, Custom, or Canon against it, is void, and not to be admitted.

2. Blasphemy
and Heresie.

Fourthly, To maintain and publish, by Preaching, Printing, Writing, or Teaching any thing contrary to them; As in the first place, That there is no God, that he is not present in all places, that he doth not know, and fore-know all things, that he is not Almighty, that he is not perfectly holy, that he is not eternal, or that either of the three persons of the Godhead is not God, or that these three are not one eternal God, or that Christ the Son, is not equal with the Father, or shall divide the Manhood of Christ, or that the Godhead, and Manhood of Christ, are several Natures, or deny that the Manhood of Christ, is without sin, or that Christ, died, rose again, or did not ascend into Heaven bodily, or that his death is not meritorious to Believers, the Resurrection, or day of Judgment, or that the Scriptures are not the Word of God, or that Christ is not the Son of God, and shall be obstinate herein, it is Felony. And in the second place, if any man affirm, as before, That all shall be saved, that man hath free-will, that God may be worshipped by Images, Purgatory, or that the Soul dieth, or sleepeth after death, that the Revelations or Workings of the Spirit, are a Rule of Faith, though against the Word, that Man is not to believe above Reason, that the Moral Law is at an end, that a Christian need not pray nor repent, that Baptizing of Infants is void and unlawful, or deny the Lords day, or Sacraments, or the Ministers and Magistrates office, or are re-baptised, and be obstinate herein, is to be imprisoned, till he give Sureties not to do so again. And in the third place, If any seriously maintain (he being not distracted) by Word or Writing, any Creature to be God, or to be equal with God in his Attributes, or that God dwells in the Creature, or shall deny the Holiness and Righteousness of God, or say, That wicked persons, wickedness, or wicked acts of Swearing, Drunkenness, or Leudness, are not unholy against Gods Word, or are approved by him, or that such things, or such persons therein, are like God, or shall say, That these acts of denying or blaspheming God, or the holiness or righteousness of God, or that the acts of cursing God, or swearing profanely or falsely by the Name of God, or the acts of Lying, Stealing, Coufening and Defrauding others, Sodomy, Drunkenness, Filthy, and Lascivious speaking, are not things in themselves shameful, wicked, and abominable in any person whatsoever to be practised, or shall affirm, That the acts of Adultery, Drunkenness, and the like open wickedness are in their own nature, as holy and righteous, as Prayer, Preaching, or giving thanks to God, or shall maintain, That whatever wickedness is acted by them, may be done without sin, or that such acts are acted by God, or the Majesty of God, or Eternity that is in them, that Heaven and Happiness is in the acting of these things, or that such men as act them, are most like to God or Eternity, which do commit the greatest sins with least remorse, or sense, or that there is no such thing really and truly, as sin, unrighteousness, or unholiness, but as a man or woman judgeth thereof, or that there is neither Heaven nor Hell, Salvation or Damnation, or that these are one and the same thing, &c. For the first offence herein, he is to be imprisoned in the Gaol, or Bridewel, three moneths without Bail; for the second offence, to be banished; and if he return, to suffer as a Felon. Ord. 2 May, 1648. 9 August, 1650. But now we must examine, how the punishment of men upon these, will stand with the Articles of the Government, which willet that men be, not punished for their opinions, that hold the Head-Faith in God by Jesus Christ and do not injury, nor make disturbance, nor hold forth, nor practise Popery, nor Licentiousness: It seems then necessary here to distinguish amongst these Opinions, and to make these onely punishable by these Acts and Ordinances, which deny the Godhead in his Essence, or Attributes, or Christ in his Nature, or Offices; of which sort, are most of the first, and last rank; and all those that tend to Licentiousness, as all those of the last rank. And those

those that are Popish, as Freewill, Purgatory, Images, and the like; such as are against the Scripture, as that Revelations, and workings of the Spirit, are the Rule of Faith, though against the Word of God, and such like. And those that are against Magistracy and Ministry altogether; and such like, which are against Peace, and tend to Licentiousness; that these onely are to be punished, and that the lesser, and not dangerous opinions, denying Presbytery, Baptising of Infants, and affirming, That men must be re-baptised, and the like; that these are not punishable now by these Laws. *Quere* therefore well of this.

As touching the External worship of God, by preaching and hearing Gods Word, Prayer to, and praising of God, and the Administration of the Sacraments; these things are to be known.

5. The Preaching and Hearing of Gods Word. Prayer to, and praising of God, and Administration of the Sacraments.

1. The Law requireth that these things are to be done.

2. That they be solemnly, constantly, unanimously, purely, reverently, and devoutly done; and performed, both by the Minister and the people. See 5, 6 Ed. 6. 1.

3. *1 Eliz. 2. 23 Eliz. 1. 13 Eliz. 1.* But most lively and excellently in the Preamble of the Statute of 5, 6 Ed. 6. 3. *1 Ed. 6. 1. 2, 3 Ed. 6. 1.*

3. But men are not by Law bound now to, but forbidden the use of the Book of Common Prayer, nor are men now bound in the Worship of God, to the Superstitious rights thereby enjoined, and formerly used, as the Cross in Baptism, kneeling at the Lords Supper, and bowing at the name of Jesus; but these are sent after the abominable Males, to the place from whence they came. *Att. 27 Sept. 1650. Ordinance, 3 Jan. 1644. Ord. 23 August, 1645.*

6. Common Prayer Book.

But the External Form and Order, now by the Law set forth, and commended to the Nation for the doing of these Services of God, is the Directory; for this by a Law is to be put in execution for publick worship in all places. *Ordinance, 23 Aug. 1645.*

7. Directory.

And as to these things, this is here to be known:

1. He that useth, the Common Prayer-Book in publick or private, forfeits for the first offence five pound, for the second offence ten pound, for the third offence imprisonment for a year without Bail.

2. He that doth not use the Directory, or by writing, or otherwise doth deprave it, shall be fined by the Judges at their discretion, not under five pound, nor above fifty pound.

This Law seems now to be altered by the Government: *Art. 36, 37, 38.* And that no man now is to be molested about Forms of Religion; and that this is the sense of the present Authority, appears by the Ordinance for ejecting of Scandalous Ministers. *29 Aug. 1654.*

As touching Religious places, such as are Churches and Chappels, which are greater and lesser Meeting-places of Parishes onely, these things are to be known.

8. Churches.

1. That the Law doth not own them, as places capable of Holiness by any Consecration, but as convenient places for the meeting of the people, and doth therefore take care for the keeping of them repaired. For which see my Book of the Office of Church-wardens, and *Att. 9 Feb. 1647.*

2. The Law doth take order for keeping of the Congregations there about Gods Worship in Peace, without disturbance; and therefore any disturbance done there, is very penal. *2, 3 Ed. 6. 1. 1 Eliz. 2. 1 Mary 3.* And all fighting, quarrelling, or striking there, or in the Church-yard, is to be severely punished. *5, 6 Ed. 6. chap. 4.*

3. For the better securing hereof, the Church-yard is also to be defended in peace. *Church-yard. 5, 6 Ed. 6. 4. It is therefore Ordered, That if any do maliciously strike another, or draw his Weapon of purpose to strike another in any Church, or Church-yard, he is to have one of his Ears cut off. 5, 6 Ed. 6. 4.*

4. But the Parishioners are not now bound as heretofore, to come to their own Assemblies, or Parish, or to any Parish Church to serve God; but so as they serve him, they may joyn themselves unto what Assembly, and in what place they please. *Att. 27 Sept. 1650.*

Going to Church.

Abbeys,
Monasteries,
Chantries.

9. Religious
Persons, or
Clergy.

5. As for other places called heretofore Religious Houses, such as were Abbeyes, Priorities, Monasteries, Chantries, being places of Superstitious Chanting or Singing, and such like Houses, they are abolished, and gone, and Conventual Cathedral Churches; for Bishops, Deans, and such like, are going after them, but it is Parish Churches and Chappels the Law takes care of. See *Free Chappel*.

As touching Religious Persons, that is Ministers, and Preachers of the Gospel; sometimes called in our Law by the name of Religious Men; sometimes by the name of Clergy-men, sometimes Ecclesiastical Persons, sometimes Spiritual Persons, sometimes (but improperly the Church) the Church, and sometimes Parsons, Curates, and Vicars.

As to these and the Law concerning them, in order to the preservation of Religion; these things are to be known.

Sec. 3.

1. That they are to be well qualified for, and orderly called and admitted into the office, and then being called to any People or Parish, their duty is to look to, and watch for the Souls of these people, to dispence the Bread of Life by Preaching, to pray for the people, to use, and shew Charity toward the poor, and Hospitality towards all. And that this may be the better done, the Law doth require they should be resident, and will not allow them to be absent from their charges, but by some special Dispensation: And for this, they are to have the Profits of the Church and Church-hay, the Glebe-land, and the Tithes of all the yearly increase within the Parish; also the Oblations, Obventions, and Mortuaries, usually paid in the place; and all Encouragements: And that the present maintenance by Tithes, be not taken away, nor impeached, until a better provision can be made. *Government, Art. 35.* And in respect of their continual attendance upon their sacred Function, they are freed from all personal charges that may hinder them in their Calling; for such shall not be chosen, Bailiffs, Beadles, Reeves, or other such like Officers, nor be compelled to come to the Sheriffs Leet; and they may have an Action of Trespass for any Trespass in the Trees, or Grass of the Glebe, or Church-hay. They may make any Lease of their Tithes, or their Glebe, during the time they are Parsons, but they can do no Act to bar their Successors now, unless it be within the Statutes of Ecclesiastical persons: For they have not the meet Right of the Land in them, in Right of their Churches, but the Fee-simple is in Abeyance; and therefore they cannot discontinue, but every Act they do will be avoided, when they cease to be Incumbents, except such as be done by consent of Patron and Ordinary, which will binde for ever, if none of the Statutes touching Ecclesiastical persons hinder.

But for the particular opening of these things, and the setting forth the Law herein, as it stands at this day, we shall speak something to these two things.

First, What he is to be, and do.

Secondly, What he is to have and receive.

Qualifications
of Ministers.

For the first of these. 1. The Law requires that such as enter into the Office of a Preacher of the Gospel, be duly qualified; that he be unblameable in conversation, sound in opinion, able to teach; and for this, the Bishop was carefully to examine him, and by information from others, to satisfy himself herein: And now there are called Commissioners specially appointed to try, examine, and admit such as are presented to any place.

And as touching them, and this thing, know these things.

Institution and
Induction.

1. That none can come into any Benefice, or Lecture now, but he must pass through this Examination, and have their Approbation under the Seal of their Office.

2. This being done, it will be as much, and as good, as Institution and Induction.

3. These Commissioners before they Approve any, must have a Certificate under the hands of three persons, at least; whereof one a Minister of known Godliness and Integrity of the holy and good conversation of the Man.

Augmentation.

4. All persons that will receive any Augmentation, by Parliament Provision, must be thus approved and allowed. *Ord. 28 March, 1653.*

2. He ought to be admitted and allowed. He was therefore to be called, approved, and allowed by a Bishop, or by one of the Universities; and without this, no man was to have taken upon him the Office. 13 Eliz. 12. 31 Eliz. 26.

3. And

3. And he that is to come to a Benefice at this day, must have some kinde of Presentation. Presentation to it, such as the time doth yield, -if it be from the Lord Protector, or the Keepers of the Great Seal, by the Great Seal, from any other he must have a Gift or Collation.

But here by the way for a third thing, it must be noted, That the Presentation or Collation must be free, and the Incumbent must come in without corruption: And it is therefore provided by the 13 *Eliz.* 12. That if any sell any Spiritual Living; as if a Patron take money or other Reward, to present his Clerk or a Clergyman to any Parsonage, or Vicarage, or take upon him the Parson or Vicar, or promise for any Reward, to resign again upon request all such Presentations, and the Institutions and Inductions thereupon gotten, by this means are void; and the party giving and taking, do each of them forfeit the double value of the Church for one year; and the party that doth give, is hereby made incapable of that Church for ever. 31 *Eliz.* 6.

Wherein these things are further to be known.

1. That if a man give the reward himself, he is said to be *Simoniacus*, but if it be given by another without his Privy, he is said to be *Simoniace promotor*, and in both cases it is alike dangerous and penal. *Co. on Littl.* 120. 10. *Simony.*

2. *A.* (the Church being void) Contracts *Simoniacally* with the Patron to have the Presentation, and upon this corrupt Agreement he presents *R.* a man ignorant of this Agreement; in this case he was removed. *Calveris* case in the *Exchequer*. *Brownl. Rep.* 2 part, 164.

3. This Law of *Simony* doth hold as well where the Patron that doth present is an usurper, as otherwise; but in this case the Rightful Patron, and not the Lord Protector, shall have the next Presentation, but otherwise it is where the Rightful Patron doth make such a corrupt Contract. *Co. upon Littl.* 120. For in this case, albeit he that comes in upon this corrupt Contract, be admitted, and die in the Parsonage, yet the Lord Protector hath not lost his turn, but shall present; but if he had resigned, or made Cession, and then another had been presented, and then the first Clerk had died, then the Lord Protector had lost his Presentment. *Brownl. Rep.* 1 part, 164. 32. 4.

4. But to sell or buy for ones self, or for some other, the next avoidance of a Benefice for Reward, it seems is not *Simony*. *M. 8 Jac. B.R.* And yet see *Winchcombs* case, 14 *Jac. C.B.* The case was *A.* a Clerk, when the Church was full, agreed with the Patron to give him ninety eight pounds when the Church should become void, the then Incumbent being a very old and sickly man; and agreed that the Patron should grant the Avoidance to a Friend of the Clerks, who did present him; this was held a *Simonical Contract*. See this in *Brownl. Rep.* 1 part, 7.

A Contract by one with the Patrons Brother (the Church being then full) that if he could procure three Grants of the next Avoidance to be surrendered, and the Patron to present him, when it became void, he would make him a Lease of Parcel of the Tithes of the Rectory, and he during the life of the Incumbent got the Grants to be surrendered, and all the rest was done, and it was agreed to be void.

5. And in this case the Church will be void without Deprivation or Sentence Declaratory. *March* 84 pl. 139.

6. An Incumbent presented by *Simony*, cannot sue a Parishioner for Tithes. *March.* 84 pl. 139. *Co. 3 part, Inst.* 71.

But the Law at this day doth not require, that he should reade and subscribe the Articles of Religion, nor take the Oath of Supremacy, nor observe any of the Orders, Forms, or Ceremonies contained in the Book of Common Prayer, or in the Canons, nor that he should be instituted, and inducted into a Benefice, when he is to receive it, but it is sufficient that the same be given to, or conferred upon him. And now by the new Ordinance, 20 *March.* 1653. it is declared, That all those

Subscription
and reading
of Articles.
Oath of Supre-
macy.
Common Pray.

Y y y y 2

that

Institution and
Induction.

that come into any Benefice, according to the Rules thereof, shall be as fully intitled to the same, as if they had been instituted, and inducted into it. And by another new Ordinance, 30 *August*. 1654. it is provided, That where one was formerly evicted or sequestred, and yet he keeps in the place, and none was put in by the 30 of *August*. 1654. The Patron may present within four moneths after the 28 of *August*. 1654. to the Commissioners for Approbation, and they may admit him. And in places of all such Ministers, as the Commissioners of the Counties shall eject for Scandal, &c. The Patron must present within four moneths after the ejection, to the Commissioners for Approbation. And if he that is ejected die, or resign, these Commissioners for Approbation, may give the Minister Admission; and this is as good as Institution and Induction, in all these cases.

11. Non-Resi-
dence, what it
is.

Plurality, what.

Session, what.

Chaplain,
who.

Where a Mi-
nister may be
Non-Resident,
and have Plu-
rality of Li-
vings, or not.

20. Being in the Office, and a Charge in his Hands, he ought then to be resident, and abiding amongst his people, and there to watch over, and look to their Souls, and there to be an example of Piety, Sobriety, Honesty, Charity, and Hospitality to them; and it is forbidden him to be non-resident. And therefore Plurality (that is) that such a man should have two or more Spiritual Livings, or Promotions, is generally forbidden to such a man; and the consequence of it, is this. That by the taking of the second, the first doth become void, and he loseth the first by Session: And this is against the ancient Common Law it self; and it is now forbidden by divers Statutes, except onely in some special cases, to some great mens Chaplains (that is) such Ministers as depend upon them for the Service of God in their Houses, where commonly they have a Chappel. But if any such person having a Benefice (be it Parsonage or Vicarage) shall not be Resident upon it, but wilfully absent himself by the space of one moneth for a time, or two moneths; at several times in one year, he loseth ten pound by the Statute of 21 *H* 8. 13. And no Dispensation will serve in this case: But such persons as were in the Kings service beyond the Sea, during that time onely. Schollars under forty years old, studying at the University, that have Office, or do Exercise there, and are in the University; and present at their House Exercises, and such as did, Exercises themselves, the Chaplains of the King, and divers other great persons might have been Non-resident, so long as they were attending upon such great men in their Houses; so such as are imprisoned, or sick, or attending upon, and by order of any Court, are excused of their Residence. And if there be a Parsonage House, some hold that he must be Resident upon it; but if not, he may reside elsewhere in the place. *Co.* 4. 79. 118. 9. *F. N. B.* 34. *Articuli Cler.* 8, 9. 14 *H* 8. 17. *Co.* 6. 21. 28 *H* 8. 23. 16 *H* 8. 14. 25 *H* 8. 16. 33 *H* 8. 28.

If any man that hath a Benefice, with cure of Souls, of the yearly value of eight pound, or above, do accept of, and shall be duly put into another Benefice with cure of Souls, and be in possession thereof; the first shall be adjudged void, and the Patron may present again, and no Dispensation can be in this case.

2. He is amongst his people, to teach nothing but sound doctrine, and purely to administer the holy Sacraments, he is to take care of the holy Worship of God: For this see *Co.* 11. 70. 6. 21. 13 *Eliz.* 12. 2, 3 *Ed.* 6. 1. 5, 6 *Ed.* 6. 6.

3. He is to Preach once on the fifth of *November*. 3 *Jac.* 1.

Common Prayer.
Ceremonies.

4. But he is not bound now to, but forbidden the use of the Common Prayer-Book; nor is he bound now to any Ceremonies therein, nor any thing enjoyned concerning the same, or by the Bishops Canons, or touching the reading of the Articles of Religion, or the Statute of 5, 6 *Ed.* 6. to perswade men to come to their Parish Church; for these Laws are abrogated. *Ordinance*, 5 *March*, 1653. *Act*, 27 *Sept.* 1650. *Ord.* 3 *Jan.* 1644.

12. Dilapidations.

5. He is to take care to keep up, and maintain in good repair the Houses, and Buildings standing upon, and belonging to his Benefice. For if there be any Dilapidations (that is) wilful, or negligent ruine, or decay therein, the Executors, or Administrators of the persons, in whose time the same was done or suffered, must make amends to him that doth succeed in the same Spiritual Living: And he might have sued for the same in the Spiritual Court. And if the offender in this case had made a Deed of Gift, to defeat the Successor of the effect of his Sute, it had been void.

void. 13 *Eliz.* 10. The Spi ritual Court being now gone, we know not what remedy may be had in this case, unless the *Chancery* will give relief herein: But by the new *Ordinance*, 29 *August*. 1654.

The Ministers put into places in the room of others, put out for scandal, &c. are to look to the repair of the Houses, and be forced by Justices of the Peace thereto. Also the Sequestrators, while they have it in their hands, must repair out of the profits.

He is to take care to discharge the first-fruits, and tenths, that the charge thereof be not left upon his Successor.

The first-fruits are the profits of every Spiritual Living for one year. And this had now been given to the Lord Protector; the ordering of which, is in the *Exchequer*: For every one that is chosen, appointed, and presented to any Parsonage, or Vicarage, which doth exceed the value of eight Marks, must before he intermeddle with the profits thereof, pay unto or agree, and give security for to the Lord Protector, or such as he doth appoint to take the same, the first-fruits of their Spiritual Promotion, under pain to forfeit the double value thereof: And if the Benefice be under eight Marks in value, then he is to give security to pay the same first-fruits three years after his Induction thereunto. 27 *Hen* 8. 7. 2, 3 *Edw* 6. 20. 7 *Edw* 6. 4. 1 *Eliz*. 4. 34. 35 *H* 8. 17. 26 *H* 8. 45. *March*. 5. 10. 1 *Eliz* 4. But it seems all this now is set apart for the maintenance of the Ministry. See *At*, 8 *June*. 1649.

13. First-fruits and Annates, what.

6. So also he is to discharge the Tenths; the Tenths are a yearly portion of tribute, to the value of the tenth part of all the profits appertaining to a Spiritual Living; and this is now reduced to a certainty and known. And this every Parson and Vicar must have paid before the first of *April*, yearly, to the use of the Lord Protector. It was wont to be paid to the Bishop, and by him into the *Exchequer*, but now it is paid immediately into the *Exchequer*; and by that Court the same is forced in. 26 *H* 8. 3. 32 *H* 8. 45. *March*. 5. 1 *Eliz* 4. But this also, it seems, is now employed as the first-fruits are. *At*, 8 *June*, 1649. and *Ord*. 2 *September*, 1654.

14. Tenths, what.

7. He may not meddle with any Temporal Jurisdiction, or Authority to the Exercise, whereof he is disabled. 16, 17 *Car*. 17. And he is forbidden the taking of Farms, or taking of Parsonages or Vicarages, and the involving of himself in secular affairs. See for this, 21 *H* 8. 13. *Dyer* 358.

8. He is forbidden by Law to make a destruction upon the Benefice, or to lessen the Revenue, and therefore he can lay no charge, nor make any Estate upon any part of it, for longer time, than his own life, except onely of such Lands as have been usually let, which he may let for three lives, or one and twenty years. 13 *Eliz*. 1. 14 *Eliz*. 11. 18 *Eliz*. 10. And no Lease he can make of such a Benefice with Cure, is good longer then he is ordinarily Resident, and serving the Cure there without absence, above fourscore days in one year. 13 *Eliz*. 20. 18 *Eliz*. 10. 14 *Eliz*. 11. And yet he that is allowed to have two Benefices, may let one of them to his Curate that shall serve that Cure. But that Lease will be good onely, so long as the Curate shall be Resident there, without forty days absence in one year. 13 *Eliz*. 20. 18 *Eliz*. 10. 4 *Eliz*. 11.

9. He is as another man to pay his share of Rates to the Poor, Church, and Highways.

Rates.

And now for the second thing, what these persons are to have and receive, these things are to be known.

They have to their persons divers privileges above other men: For first, such a man cannot be arrested upon a Statute-merchant, or Staple, and if he be, he may have a Writ called *Quod Clericus captus & deliberetur*; nor may he be arrested for any cause but Felony, whilest he is *bona fide* in the doing of his Office, and about his Divine Function: And if therefore he be taken out of the Pulpit, whilest he is Preaching or Praying, some have said, That for this he may have an Action of False imprisonment, against them that do it: But whether it be so, or no, this is certain, That for this, the persons that do it, may be indicted and fined. And for arresting

Quod Clericus captus virtute statuti deliberetur, what.

arresting a Minister in the going to, or coming from Church, about the Service of God, the Bailiffs and those that have any hand in it, may be bound to the Good-behavior. But if the Minister shall keep himself in the Church, of purpose to prevent such Arrests, this privilege will not hold. *Regist. Orig.* 147. 50 *Edw.* 3. 5. 1 *R.2.* 15.

*Quod Clerici
non elegantur in
officio, what.*

2. He is to be freed, and exempt from, and not bound to serve in any office that may dislurb, or distract him in his calling: And therefore he is not bound to serve the office of Constable, Tithingman, Bailiff, Beadle, Church-warden, Overseer of the Poor, or the like office. Albeit he hath secular Lands, besides his Spiritual Promotion, and in respect thereof chargeable, if he were another man; yet he is exempt for this also. And if any such office be put upon him, he may be relieved by a Writ called *Quod Clerici non elegantur in officio, &c.* And by this Writ he may be discharged. *F.N.B.* 177.

3. He is not bound to appear, or do service in a Leet, or Law day, as other men are, *Marib cap.* 10. And to discharge them if they were, they had a Writ to relieve them *F.N.B.* 160.

4. They ought not in person to serve in the Wars; also they ought to be quit, and discharged of Tolls, and Customs, Average, Pontage, Paviage, and the like, for their Ecclesiastical Goods: And if they had been molested therefore, they might have had Remedy by a Writ, provided for the purpose. But this and many others, are gone and lost. *Co. 2 part, Inst.* 4. 121.

Self. 6:

*Quod persona
nec Prebendarii
distringantur,
&c. what.*

5. And as they have privileges for their persons, so for their possessions of Lands and Goods; therefore it is provided, That no Distress be taken in the Ancient Fees, or Lands belonging to the Church; as in the Glebe of a Parson, or the like, that their Goods be not distrained for a fifteenth, due from the whole Parish, if they be, he may be relieved by a Writ called *Quod persona nec Prebendarii distringantur, &c.* That neither themselves, nor their Farmers, or Tenants, were to be forced by Purveyors for the Kings use. See for this 9 *Ed.2.* 9. *F.N.B.* 173, 176. *Crompt. Jur.* 38.

6. They are to have a competency of maintenance: And for this, the Law gives them these things.

First, They are to have the Houses belonging to the Minister, the Glebe, the Tithes, the Profits of the Churchyard, the Oblations, Obventions, and Mortuaries thereunto belonging: But for all this see my Book of *Tithes*, and the Profits sequestered and received, during the Vacation, are to be paid unto the Parson succeeding, save onely the charge of taking in, &c. And for serving the Cure in that time. 21 *H.8.* 11.

*Emblements;
Will.
Leases.*

Secondly. They are to have the Corn growing upon the Glebe when they die, and may by their Will give it to whom they will. *Idem.*

Thirdly, They may make any Lease of, or charge upon their Benefice, for their own lives, and Leases for three lives, and one and twenty years of the Land that hath been usually so let. 13 *Eliz.* 10.

14. *Augmenta-
tions.*

Fourthly, There are now divers Additional helps for their maintenance by way of Augmentation.

As touching which, these things are to be known.

1. There is a great Revenue given, to be employed to this purpose, and Commissioners specially appointed to take and receive accompt thereof, and to look to the improvement thereof. See the *Acts and Ordinances*, 8 *June*, 1649. 5 *April*, 1650. 2 *Sept.* 1654.

2. These Laws judg an hundred pound a year competent for Ministers, save onely in Towns, and Cities.

3. These Commissioners are to overlook all the Augmentations, and by, and with the Approbation of the Lord Protector, and his Council, they may make, adde to, and take from what they please.

16. *Union and
Division of Pa-
rishes and
Churches.*

4. For their help of maintenance, they may divide or unite Churches.

As touching which, take these things.

1. The Commissioners may procure from the *Chancery*, the Return of all the former

former Commissions executed, and have new Commissions where they please, for the discovery of the value of Parsonages and Vicarages, with, or without Cure of Souls, the Incumbents, Scituation of the Churches, &c.

2. When they are informed of the case, by and with the Approbation of the Lord Protector and his Council, out of Parliament time, they may unite two, or more Churches together; and all the profits thereof, if one of them be not maintained at the charge of the Parishioners, and appoint which Church shall be the Meeting-place, and then they must be taxed altogether to repair, but other taxes shall go as before; have their Church-wardens as formerly, the Patrons shall present by turn, as the Commissioners shall set down.

3. In this case, where they see good, they may pull down one of the Churches, and keep the materials for publick use.

4. They may also, by and with the Approbation aforesaid, sever and divide Parishes, and fix the maintenance out of the profits of the Church where they think fit. See the *Ordinances* at large for these things.

5. And now in the last place, if being in this office he be found insufficient, or ill-affected, or be scandalous there for his life or doctrine, he is to be ejected by the *Ordinance*. 29 Aug. 1654.

16. Scandalous and ill affected Ministers and School-Masters.

And for this, these things are to be known.

1. There are Commissioners of every County to put in execution this Ordinance.

2. Any five of these Commissioners may Convent before them, any scandalous, ignorant, negligent, insufficient, and disaffected Minister, Preacher, School-master, and examine witnesses against, and put him out of his place, if they finde him guilty of matter of scandal, or ill-affection to the Government, in any of the particulars here mentioned.

3. The things for which he is to be put out, are;

First, If he hath been formerly ejected or sequestred, and yet keeps in his place.

Secondly, If he hath held and maintained any of the blasphemous Opinions of the third and last rank before-named, at *Self*. 1. Or have held, taught, and maintained the Popes Supremacy, Transubstantiation, Purgatory, Worshipping of Images, That the consecrated Host, Crucifixes, or Images, are to be worshipped; that Salvation may be merited by Works, or be found guilty of profane Swearing or Cursing. Perjury or Subornation of Perjury, Adultery, Fornication, Drunkenness, common haunting of Taverns or Ale-houses, frequent Quarrelling or Fighting, frequent playing at Cards or Dice, profaning of the Sabbath-day, or allow the same in their Families, or countenance it in their Parishes, or Schollars, or have publicly and frequently read, and used the Book of Common Prayer, since 1 Jan. 1653. Or have been publicly profane Scoffers at, or Revilers of the strict Profession, and Professors of Religion, or Godliness, or do encourage or countenance by word, or practise *Whiscon-Ales*, Wakes, Morrice-Dances, May-poles, Stage-plays, or such like Licentious practises, or have by Writing, Preaching, or otherwise declared their disaffection to the present Government, or are negligent, non-resident, and careless of Praying, Preaching, &c. or of their Schollars, if they are School-masters, having no good excuse for it.

Thirdly, If he be put out for insufficiency, it must be with consent, declared of five Ministers also.

Fourthly, Where they put out a School-master, they may put in another, as long as he lives, as oft as the place shall be void.

Fifthly, They may sequester the Profits of the Livings, out of which they put out any Minister in the hands of some of the Parish, to provide for the place, repair the houses, and to keep for the next Incumbent.

Sixthly, If the party put out, be gone, they may allow his Wife and Children a fifth part, and force payment thereof by Sequestration.

Seventhly, None may keep School in the place where he was put out, under pain of ten shillings a day. See the *Ordinance* of the second of September, 1654. at large.

And

Metropolitan
Bishop.

Suffragen Con-
secration.
Conge de Eslier.
Regio Assensu.
Convocation-
house.

Proctors of the
Clergy.

Prolocutor.
Canons.

Discipline.

And now, as touching all the rest of the rabble of the Men, and Orders formerly called Religious, of the Regular and Secular Clergy, such as were the Abbots, Priors, Monks, Fryers, Canons, Nuns, Arch-Bishops, Bishops, Deans, Arch-Deacons, Prebends, and the like: These are abolished, and gone, and not owned by our Law at this day. *Ord. 9 Octob. 1646.*

We are silent therefore about Metropolitans, Bishops, Suffragans, and say nothing of *Conge de Eslier*, Consecration, *Regio Assensu*, and such like abolished things. See *Name*.

The Convocation-house was the House wherein the whole Clergy did assemble to consult of Matters Ecclesiastical, in time of Parliament: It did consist of two Houses, an upper house, where the Arch-Bishops and Bishops alone did sit, and a lower house, where all the rest of the Clergy did sit: And the lower house was made of Clergy-men, chosen for Cathedral and Collegiate Churches, and for the Common Clergy of every Diocese, which were called Proctors of the Clergy, like to the Members of the House of Commons: And in both these Houses they had one they called a Prolocutor, like to the Speaker in the Parliament. But these things are now gone, and abolished; and yet it seems the Provincial or Sinodial Canons and Constitutions formerly made by the Clergy, in the Convocation-house, or in their other Convocations, that are not contrary to the Royal Prerogative, or the Laws and Customs of the Realm, are still in force, if there were any way to put them in execution, as there is not; for the Bishops and their Courts are gone, and therefore the Canons can be of no force at this day. *25 Hen. 8. 19. 27 Hen. 8. 15. 3 Edw. 6. cap. 17.*

As to Discipline by Church-censures; this is now left to the Regular, and orderly Churches to be used and ordered amongst themselves in Christ, and his Gospels way.

But for National Discipline by way of Excommunication, Suspension, and the like, there can be none such used in these days, Bishops being gone; for there is no Law, nor way for it.

See the old Statutes of the Clergy, and that which concerneth them, *25 H. 3. 2 H. 6. 1. 47 Ed. 3. 5. Westm. 1. 34. 50 Ed. 3. 5. 1 R. 2. 13, 14, 15. 4 H. 4. 23. 25 Hen. 8. 19. 5, 6 Edw. 6. 13. Acts, 8 June, 1649. 5 April, 1650. 2 Septemb. 1654.*

For the abolishing of Bishops, Deans, and Chapters. *Acts, 23 Novemb. 1646. 26 April, 1649.*

Sale of their Lands, *Acts, 25 June, 1649. 23 June, 1649. 2 June, 1649. 20 June, 1649.*

CHAP. CXLVII:

Of Shoo-makers, Tanners, Curriers, and Skinners.



None may use the Trade of Tanner, the same time, and so long as he doth use the Trade of a Butcher, under pain to forfeit six shillings and eight pence, for every day he shall use both these occupations together. 1 Jac. 22.

Sec. 1.
Shoo-makers,
Tanners, Curriers.

None may use the Trade of Tanning of Leather, or make gain thereby, but such as have been brought up as Apprentices, or hired servants in the Trade seven years, except the Wife and Sons of a Tanner, as hath been brought up and used in the Trade four years; or the son or daughter of a Tanner, or him that shall marry such a Wife, or daughter, to whom a Tan-house and Fats are left, upon pain to forfeit all the Leather that such a person shall Tan.

Idem.

No person shall use the Trade of Tanning of Leather, so long as he doth use the Trade of a Shoo-maker, Currier, Butcher, or any other Artificer, using, cutting, or working of Leather, under pain to loose all the Hides, or Skins, they shall work, during that time. Nor the Mystery of Currier, so long as he shall use the Trade of a Tanner, Cord-wayner, Shoo-maker, Butcher, or other Artificer, that useth cutting of Leather, under pain of six shillings and eight pence for every Skin or Hide, he shall curry, during that time.

No persons may buy or bespeak any rough Hide, or Calves Skin in the Hair, to Tan the same; but Tanners and such as do Tan the same, under pain to forfeit them, or the value thereof.

No Tanner or other may forestal any Hides, coming towards any Fair or Market, nor shall buy any Hide in any place, but in an open Fair or Market, unless it be of one that killed the Beast, for the provision of his own house, under pain of six shillings and eight pence, for every Hide so bought.

Forestalling.

None may buy or sell any Tanned Leather, not wrought and converted into made Wares, but onely such as will work and convert the same Leather into made Wares, under pain of forfeiture of the Leather.

All Artificers that do use to convert Tanned Leather into made Wares, may buy for that purpose all kinde of Tanned Leather at *Laaden-hall*, in *London*, every Monday, the same being daily searched and sealed.

Sadlers and Girdlers may sell their Necks and Shreds of Tanned Leather red.

Sadlers,
Girdlers.

No person using the Trade of Tanning of Leather, shall suffer any Hide or Skin to lie in the Limes, till the same be over-limed: Nor shall put any Hides or Skins into any Tan-Fats, before the Lime be well and perfectly soaked and wrought out of them: Nor shall use any thing, or stuff in or about the workmanship or Tanning of Leather, but onely Ash-bark, Oak-bark, Tapwort, Mauk, Meal, Lime, Culver-dung, or Hen-dung: Nor shall suffer it to hang wet in the Frost, till it be frozen: Nor shall dry or parch the same with the heat of the fire, or the Summer Sun: Nor shall Tan any Hide that is rotten by long lying: Nor shall suffer the Hides for Sole-Leather to lie in the Woozes less time then nine moneths: Nor shall negligently work the Hides in the Woozes: Nor shall put to sale any Hide that shall not be wrought, as aforesaid, under pain to forfeit the just value thereof.

No Tanner must raise with any mixtures, any Hide to be employed, to back, bend Leather, Clouting Leather, or any other Sole-Leather, unless the same be for largeness and growth, fit for that use, upon pain of forfeiture thereof.

No person may sell any kinde of Tanned-Leather red, and unwrought, but in open Fair or Markets, in the places therefore commonly accustomed, unless the same were first lawfully searched, and sealed in some open Fair or Market, or place ap-

Z z z z z

pointed

pointed for that purpose; nor shall offer any Tanned Leather red, and unwrought before the same be searched and sealed, under pain to forfeit for the same for every Hide six shillings and eight pence, and for every dozen of Calves skins, or Sheep skins, three shillings and four pence, and the same Hides.

If any man offer to put to sale his Leather before it be sufficiently Tanned, and dried, he shall lose so much of the same Leather, and of every Hide, as shall be so untanned or undried, to be judged and cut off from the rest, by the direction and discretion of the Triers.

Tanners.

Tanners must not set their Fats in Tan hills or other places where the Woozes, or Leather that shall be put to Tan in the same, may take any unkinde beasts, or may put any Leather into any hot or warm Woozes, or shall Tan any Hide, Calve-skin, or Sheep-skin, with any hot or warm Woozes, under pain to forfeit ten pound, and stand on the Pillory three Market days for every offence.

Curriers.

No person in any Market or Corporate Town, shall curry any Leather in any Shoo-makers or other house, besides his own; nor shall curry any Leather, except it be well and perfectly Tanned; nor curry any Hide or Skin, being not well dried after his wet season; in which wet season he shall not use any stale Urine, or other deceitful mixture to hurt the same; nor shall curry any Leather fit for utter Sole-Leather, with any other stuff, but hard Tallow, and with enough of that; nor shall curry any Leather meet for over Leather and inner Soles, but with good stuff, fresh, and not salt; nor shall burn or scald any Hide or Leather in the currying; nor shave any Leather to thin; nor shall gash or hurt any Leather in the shaving, or otherwise, but shall work it sufficiently in all points, under pain to forfeit for every offence, (unless it be in gashing or hurting by shaving) six shillings and eight pence; and for such offence double so much as the Hide or Skin is impaired thereby.

Shoo-maker.

No Shoo-maker or other, living in London, or within three miles of it, that doth use wet curried Leather, shall put it to be curried to any but to one that is free of the Company of Curriers in London, under pain to forfeit the Leather, or value thereof. And no person within that circuit, may use any Leather in made Wares, but such as have been searched and sealed by the Warden of the same Company, under pain to forfeit for every Hide or Skin six shillings and eight pence, besides the Leather it self.

Curriers.

No Currier must refuse to curry any Leather brought to him by any one that is a cutter of Leather, with sufficient stuff to liquor the same, but shall well and sufficiently dispatch the same within three days, at the most, under pain to forfeit ten shillings for every Hide or pece of Leather, not so done.

The Wardens of the Company must search all the Leather brought to any of the Company to be curried, and after it is curried well, within one day seal it.

Shoo-maker.

No Cordwainer or Shoo-maker, shall make any Boots, Shooes, Buskins, Startups, Slippers, or Pantofles, of English Leather wet curried (other then Deer-skins, Calves-skin, or Goat-skins, dressed like unto Spanish Leather) but of Leather, well and truly tanned and curried as before, or well tanned onely, and well and substantially sewed with good thred, well twisted and made, and waxed with Wax well Rozoned, and the stiches hard drawn with Hand-Leathers, without mixing the Over-Leathers; nor shall put into any of their Ware they make, any Leather made of a Sheep-skin, Bull-hide, or Horse-hide; nor into the upper Leather of any Shooes, Startups, Slippers, or Pantofles, or into the nether part of any Boots (unless it be in the inner part of the Shoo) any part of any Hide, from which the Sole-Leather is cut, called the Wombs, Necks, Shank, Flank, Pole or Cheek; nor shall put in the upper Sole any other Leather, then the best of the Ox or Steer-hide; nor into the inner Sole, any other Leather then the Wombs, Neck, Pole, or Cheek; nor in the Tresswels of the double soled Shooes, other then the Flanks of the Hides aforesaid; nor shall make or put to sale in any year, between the last of September, and the twentieth of April, any Ware to be worn above four years of age, wherein is any dry English Leather (other then Calves-skins, or Goat-skins) to be dressed like unto Spanish Leather, under pain to forfeit for every offence the said Wares, or the value thereof.

Searchers.

The Masters and Wardens of the Company of Shoo-makers, Curriers, &c. in London, must search all the Wares in London, and three miles about four times in every year,

year, in the houses of all such kinde of Artificers, and those they finde insufficient, they may seise and take away: And the Major and Aldermen of London, must every year appoint honest Freemen of the same Company to be Sealers of Leathers, who must seal what upon search they finde to be sufficient; but Sheep skins are not to be sealed. Also Majors, Bailiffs, and other Head-officers in all Cities, Boroughs, and Market Towns, and Lords of Liberties, Fairs and Markets, out of the Circuit of London, and three miles about it, yearly appoint and swear two or more sufficient men of the place, to view, search, and seal with a seal for the purpose, the Leather of that place, under pain of forty pound: And they must view and seal what they finde sufficient; and if they finde any Leather bought or sold, which shall be otherwise tanned, or curried, then is before appointed; or any Ware otherwise made, then is before prescribed, they may seise and keep the same, until it be tried by the Triers.

In London, the Major after any Leather or Wares seised, and notice given to him, must appoint six Triers, who upon their Oath, must try whether the Leather or Ware is serviceable, or not. And in other places, such as appoint sealers, shall presently after notice to them given, of any Leather or Wares seised, appoint and swear six Triers, to try the Leather or Wares seised, whether they be serviceable or not; and if not, they be to forfeit five pound. All red tanned Leather (except Sheep skin Leather) to be sold in London, must first be brought into *Leaden-hall*, and searched, sealed and registred, before it be brought into house: And none must be sold within London, or three miles, before this be done: And no such Wares must be sold there, but in open Shop, common Fair or Market. All Justices of Gaol-delivery of the Peace, Majors, &c. Stewards of Leets, may hear and determine all those offences.

No tanned Leather shall be sold by weight, under pain of forfeiture of it. See 1 Jac. 22. 4 Jac. 6. As for the Statutes of 5, 6 Ed. 6. 15. concerning the ingrossing and transporting of Leather, and some other things therein assmed, we conceive the same to be repealed by 1 Jac. 22. 4 Jac. 6. and therefore not abridged.

For Skinners, see 3 Jac. 9. 4 Jac. 6.

CHAP. CXLVIII.

Of Silk, Sope Vessels, Spices, Spiritualities, Staple, Steel, and Spiritual Persons.



Or Silk. See 19 H. 7. 21.

For Sope Vessels, see 23 H. 8. 4.

For Spices, see 1 Jac. 19.

These were such Profits as he received, as Bishop not as a Baron of the Parliament, such as were his Visitation-Fees, and making Priests, and the like: And their Temporalities, were the Lands annexed to their Bishopricks.

Staple doth signifie this or that Town or City, whether the Merchants of England, by common Order, or Commandment, did carry their Wools, Woolfells, Cloaths, Lead, Tin, and such like Commodities of our Land, for the utterance of them by the great. See 27 Ed. 3. 1. 2, 36 Ed. 3. 7. 45 Ed. 3. 1. 15 Rich. 2. 3, 9. 2 Ed. 3. 9. Statutum Stapule 16. 18. 28 Ed. 3. 13. 36 Ed. 3. 7. 38 Ed. 3. Stat. 1. 7. 12 R. 2. 16. 14 R. 2. 1, 3.

For Steel and Iron, see 2, 3 Ed. 6. 17. Aft. 27 Nov. 1650. Aft. 2 April, 1651. Steel and Iron.

Of Spiritual Persons.

For Spiritual or Clergimen, (as they are called) these things are to be known.

1. They cannot make what Leases they please of their Church-Land, but are restrained. See for this Lease, Numb. 7.

Z z z z z 2

2. The

Silk.

Sope Vessels.

Spices.

Spiritualities of

Bishops.

Temporalities of

Bishops.

Staple, what.

2. The Successor by Acceptance of Rent, upon a Lease made by his Predecessor, may affirm a Lease, he might have avoided: See for this *Acceptance*.
3. What Leases, made by them, are good, or not: See *Leases*.
4. They have some privileges above other men. See *Services of God*.
5. For the abolishing of Bishops, Deans, and Chapters. See *Ord.* 23 Novemb. 1646. 20 April, 1649.

CHAP. CXLIX.

Of a Statute.

1. Statute,
what.



Statute is a Bond or Obligation of Record: But this word is sometimes used in another sense, viz. For a Decree made in Parliament called an Act of Parliament. *Terms Ley. Stat. de Mercatoribus, Alton Burnel. 11 Ed. 1.*

2. The kinds.
Statute Merchant, what.

And of these Obligations, there are three kinds: First, A Statute Merchant; secondly, A Statute Staple; thirdly, A Recognisance. The Statute Merchant is a Bond acknowledged before one of the Clerks of the Statute Merchant and Major, and chief Warden of the City of London, or two Merchants of the said City, for that purposed assigned, or before the Major, chief Warden or Master of other Cities, as *Tork, Brisfow*, or the like; or the Bailiff of any Burrough or Village, or other sufficient men for that purpose, appointed and authorized, sealed with the seal of the Debtor or Recognisor, and of the King, which is of two peeces; the greater whereof is kept by the Major or chief Warden, and the lesser by the said Clerk. And this albeit at first it was ordained and used for Merchants onely, yet at this day, it is and may be used and given by any others, and is become one of the Common Assurances of the Kingdom.

Statute Staple,
what.

The Staple, doth signifie this or that Town or City, whether the Merchants by common Order and Commandment, do carry their Commodities, as Wool, and the like, to utter by the great. And the Statute Staple is either properly or improperly so called: That which is properly so called, is defined to be a Bond of Record, acknowledged before the Major of the Staple, in the presence of one or two Constables of the same Staple, and is sealed with the Seal of the Staple, and sometimes also with the Seal of the party, the which it seems is not necessary. And this is founded upon the 27 Ed. 3. 9. and was invented, and is used onely for Merchants and Merchandises of the same Staple; this is of the same nature the Statute Merchant is. That which is improperly so called, is also called a Recognisance, which is also a Bond of Record, testifying, That the Recognisor doth ow to the Recognisee a sum of money: And of these there are divers kinds; for there is one Recognisance founded upon the Statute of 23 H. 8. 6. And this is always to be acknowledged before the Chief Justice of the *Kings Bench*, or of the *Common Pleas*, in the Term time, or in their absence out of Term, before the Major of the Staple at *Westminster*, and the Recorder of the City of London, for the time being. And it is to be sealed with the Seal of the Conusor, and with the Seal of the King, appointed for that purpose, and with the Seal of the Chief Justice, Major, and Recorder, before whom it is acknowledged; and they before whom it is taken, do subscribe their names to it: And this was ordained, and may be, and is used by Merchants, or any other whomsoever for payment of debts, or assurance of other things; and this also is of the same nature the Statute Merchant is: And both this, and the two former, are much of the nature of Judgments had upon Sutes in the Courts of *Kings Bench* and *Common Pleas*, and therefore they are called Pocket Judgments. 27 Ed. 3. Stat. 2. cap. 1, 2, 3. 27 Ed. 3. 9. 22 H. 8. 6. *Co. super Litt.* 289. 15 H. 7. 16. Co. 8. 153.

Recognisance,
what.

Pocket Judgments.

There

There are also divers other kinds of Recognisances, that are taken by and acknowledged before the Lord Keeper, Master of the *Wards*, Master of the *Rolls*, Master of the *Chancery*, Justices of the one *Bench*, or of the other, (some of which are called Bails) Barons of the *Exchequer*, Judges in their Circuits, Justices of the Peace, Sheriffs, and others; some whereof are by the Common Law, and some by certain Statutes. And amongst these, some are without Seal, and recorded onely, and some are sealed and recorded also; and some of them are in a sum certain, as the Recognisances taken in the *Common Pleas* for Bail are, and some of them are incertain, as those Recognisances that are taken for Bail in the *Kings Bench*, which are after this manner, *Si judicium redditum, &c. tunc volo & concedo*, That the debt recovered against the Defendant, shall be levied of my Goods and Chattels, &c. And these also are much of the nature of the former kinde of Recognisances; and all Obligations made to the King, are of the same nature, and have the force of a Recognisance. See 33 H. 8. 23. 39. 3 H. 7. 1. 10 H. 6. 1. *Dyer* 315. 307. F. N. B. 251. fol. 132. cap. 133. a. 68. a.

Bail.

Prerogative.

Statutes and Recognisances are sometimes single, without any Defeasance, and sometimes they are double, i. e. with a Defeasance or Condition, upon the performance whereof, the same are to be avoided.

The Debtor, or he that doth enter into the Statute or Recognisance, is called the Recognisor or Conusor, and the Debtee, or he to whom it is made, is called the Recognisee or Conusee.

Conusor, Conusee.

To make a good Statute or Obligation of Record, the form prescribed must be pursued.

1. In respect of the persons before whom; and therefore, the Statute Merchant or Staple, or the Recognisance founded upon the Statute of 23 H. 8. may not be acknowledged before any others, besides the persons appointed by the Statutes: Neither may any other Recognisance be acknowledged before any, but such as either have power *Ex Officio*, and by their Offices to take them, or have special Commission so to do; and therefore a Recognisance taken by a Constable, is void. If a Recognisance be made to the Lord Keeper, and two others, and it be acknowledged before himself, this is void as to him. *Dyer* 35: *Littl. Broo. sect.* 484. 511. F. N. B. 267 a. *Dyer* 220.

3. What shall be said a good Statute or Recognisance, and what not. First, In respect of the persons before whom it is acknowledged.

2. In respect of the manner of making and acknowledging of it; and therefore if the substantial forms, appointed by the Statutes, be not observed, it will be void. If therefore a Statute Merchant be not sealed with the Seal of the Debtor, and there be not a Seal of two peeces annexed to it, this is no good Statute, neither can it take effect as a Statute; howbeit in this case, if it be delivered by the party, it may take effect as an Obligation: But if the variance from the Statutes, be onely in some circumstance, this will not hurt a Statute or a Recognisance. And therefore it is held, That albeit there be no time set for the payment of the money in the Statute, yet the Statute is good, for then it is due presently. And albeit the Statute be written with anothers hand, and not with the hand of the Clerk of the Statutes, or the like; yet is the Statute good enough. And if a Statute Staple be not sealed with the Seal of the party that doth acknowledge it, yet it seems it is good enough, for the Statute doth not require it; but a Recognisance within the Statute of 23 Hen. 8. cannot be good, except the Seal of the party be to it, for so are the words of the Statute. *Hollingsworth versus Ascugh. Pasche, 35 Eliz. Co. B. Adjudg. Perk* 3. Justices, *Co. B. Trin.* 22 Jac.

Secondly, In respect of the manner of making it.

Obligation.

If a Recognisance or a Statute be to pay money at several days, it is good enough, and if the Conusor fail one day, Execution may be sued of the whole Statute. *Co.* 8. 153.

Every Statute Staple or Merchant, not brought to the Clerk of the Recognisances within four moneths next after the acknowledging, to enter a true Copy thereof, shall be void, against all persons, their Heirs, Successors, Executors, Administrators and Assigns onely, which for good consideration shall after the acknowledging of the same Statute, purchase the Land, or any part liable thereunto, or any Rent, Lease, or profit out of it. 27 Eliz. 4.

The

4 All the Proceedings upon a Statute or Recognisance, and the manner and order of Execution thereupon.

Certiorare.

Capias.

Extendi Facias, what.

Liberate, what.

Extent, what.

The proceedings upon a Statute or Recognisance, to have the Fruit and effect thereof, is not like to the proceedings in other cases of Sutes upon Obligations, and the like, to reduce them to Judgment, but as they are in their own nature much like to the nature of a Judgment, so is the Proceeding and Execution thereupon, much like to the Proceeding and Execution upon a Judgment: And therefore the Conusee may, if he please, bring an Action of Debt upon a Statute, and waive all other Proceeding, or otherwise, if he like not this course, he [or if he be dead, his Executor or Administrator, and if his Executor be dead, the Executor of his Executor] may assoon as the same is forfeit, have present Execution of it after this manner: He must bring his Statute to the Major and Clerk, or other Officer, before whom it was acknowledged, and there if they finde the Record of it, and the day to be past for the payment of the money, they are to apprehend and imprison the body of the Conusor, if he be a Lay person, and can be found within their jurisdiction; and if he cannot be found there, they are to certifie the Record into the *Chancery*, which also if they refuse to do, they may be compelled unto by a *Certiorare*: And if that Certificate be faulty, or Execution be not done upon it; by reason of the death of the Conusee, or otherwise, the Conusee or his Executor or Administrator, may have another Certificate: And thereupon, in case of the Sistrate Merchant, he shall have a Writ of *Capias* out of the *Chancery*, directed to the Sheriff of the County where the Conusor lives, to apprehend and imprison him (if he be not a Clergiman) and this is to be returned in the *Common Pleas*, or *Kings Bench*. And when the Conusor is taken, he shall have time for a quarter of a year to make his agreement with the Conusee, and to sell his Lands or Goods to satisfie the Conusee: And for that purpose, he may sell his Lands or Goods, albeit he be in prison; and his sale is good and lawful: And if in that time, he do not satisfie the Conusee, or if upon the *Capias*, the Sheriff return a *Non est inventus*, then by another Writ [or by divers Writs, if the Lands or Goods lie in divers Counties] called an *Extendi facias*. And in the case of a Statute Staple, presently after the Certificate into the *Chancery*, the Conusee shall have a Writ to take his body, and extend his Lands and Goods returnable in *Chancery*; and this Writ is a Commission directed to the Sheriff of the County, where the Lands and Goods lie for the valuing of the same, whereby all the Lands, Goods, and Chattels of the Conusor shall be apprised and valued at a reasonable rate by a Jury of sworn men, charged by the Sheriff for that purpose; which Inquisition so taken, is to be returned by the Sheriff; and thereupon the Lands, Goods, and Chattels are to be taken into the Sheriffs hands, and by him to be delivered to the Conusee (which the Sheriff may do if he will, without any Writ) to hold unto the Conusee, until he be satisfied his debt and damages. And if the Sheriff refuse so to do, the Conusee shall have a Writ out of the *Chancery*, called a *Liberate*, to compel him to deliver to the Conusee the Lands, Goods, and Chattels, so found by Inquisition, and taken into his hands upon the Extent, which the Sheriff need not to return. [Fitz. Accompt. 97. Execution in toto. Broo. Statute in toto. Stat. Alton Burnel de Mercatoribus. 27 Ed. 3. 9. F. N. B. 130, 131, 132. Dyer 180. 15 H. 7. 15. Co. 4. 67. 7 Hen. 7. 12. Plow. 61, 62, 82. Co. super Littl. 290. 23 Hen. 8. 6. 5 H. 4. 12. 2 Rich. 3. 7. 14 Edw. 3. 11. Littl. Broo. Sett. 294. 123. 226. Dyr 299. Co. 5. 87. 4. 82, 57, 66. 11 Hen. 6. 10. Kitch. 116.] Or the Conusee may enter upon the Land himself, and take the Goods out of the Sheriffs hands; and this act of the Sheriff and Jury, upon this Writ, is called an Extent: And if the Jurors or Appraisors upon the *Extendi facias*, over-value the Lands or Goods in favor to the Debtor, the Conusee hath no remedy but by motion in that Court where the Writ is returnable at the Return day, or at least the same Term wherein the Writ is returnable, to desire that the Appraisors may take the Lands or Goods at the Rate they have valued them, in the same manner as the Conusee is to have them. But if the Conusee accept of the Lands and Goods from the Sheriff, or suffer the Term to pass, wherein the Writ is returnable, he is too late, and hath no Remedy at all. And if the Appraisors do undervalue the Lands or Goods, in favor to the Debtee, it seems the Conusor hath no Remedy at all, for he may at any time pay all or the residue of the debt and damages unlevied, and have his Land again if he please. And in case

case where the Inquisition or Extent taken and made, is insufficient, as if part of the Land onely be extended in the name of all the Lands, or it is found the Conusor died seised of Land, and it is not said of what estate, or the like, the Conusee shall have a new Extent, and this is called a Re-extent; and this he may have, albeit the Lands or Goods be delivered to the Conusee by a *Liberate*, if the Conusee have not entred upon, and accepted it, but if he once accept it, he can never after have a Re-extent. And when the Conusee is in possession of Lands by such an Extent as before, then is he Tenant by Statute; and after the Conusee is once settled in peace in the Lands extended, he shall hold it until he be satisfied his debt, and his reasonable costs and damages for travel, sute, delay, and expence. But it seems the time shall not run out, nor be said to begin until the Entry of the Conusee into the Land; for if the Land be extended, and remain seven years without a *Liberate* made, yet he may have a *Liberate* at the end of the seven years: And as soon as the Conusee shall be satisfied his debt and damage by the Goods and Chattels of the Conusor, and by the ordinary and certain, or extraordinary and casual profits of the Land, the Conusor shall have his Land again: And for that purpose, if the Conusee refuse to give him an account, and to yield up his Land to him the Conusor, howbeit he may not enter, yet may compel the Conusee thereunto by a Writ called a *Venire facias ad computandum*, in the nature of a *Scire facias*, by which the Conusor shall call the Conusee, his Executors or Administrators to account; and if upon the account, it shall appear he is satisfied, the Conusor shall have his Land again; and if it appear he is over-satisfied, he shall answer the overplus to the Conusor. But the Conusor may not enter upon the Conusee until he hath brought this Writ, and made it thereupon to appear that the Conusee is satisfied: And if in case the Conusee be dead, his Executor or Administrator, may have Execution of the Statute, without any *Scire facias* upon the shewing of the Statute, and the Testament in *Chancery*: And if the Sheriff return that the Conusor is dead, the Execution shall be made of his Lands onely in the hands of his Heir, or the Purchaser; but if the Heir be under age, the Execution cannot be done until he be of full age: And if the Conusor die in prison, the Execution shall be of his Lands, Goods, and Chattels; and if the Gaoler that hath him in prison suffer him to escape, he must answer the debt: And if it fall out that the Conusee, his Executors or Administrator be ousted, or disturbed of his Execution by the Conusor himself, or any other during the time of the Extent, he may relieve himself against the disturber by Assise, or other Action, as another in the like case may do: And if he be rightfully ousted or disturbed by one that hath better right, as by one that hath a former Statute, or the like, or by the Act of God, as by Fire, Water, or the like; in these cases the Conusee shall hold the Land over after the time of his Extent, until he be satisfied. But when it is through his own neglect onely, that he is unsatisfied, as where the Lands are delivered to him by the *Liberate*, and he after his Entry into them, make a Conditional Surrender of them: As if Lands of the value of ten pound by the year, be delivered to him in Execution for forty pound, and he within four years make a Conditional Surrender of them to the Conusor, and after he enter for the Condition broken; in this case he shall not hold the Land over the four years, for he must take the profits upon his Extent presently. The proceeding in Execution of the Statute Staple, and the Recognisance founded upon the Statute of the 23 of Henry the Eighth, is after the same manner throughout, as the proceeding in Execution of the Statute Marchant is, with these differences onely. (Adjudge *Butler versus Wallis, Pasche, 38 Eliz. B.R.*) That upon the Execution of the Statute Marchant, there doth issue forth a *Capias* against the body, before any Execution be to be made of the Lands, or Goods, and Chattels, and the Lands and Goods cannot be extended until a quarter of a year be past after the body is taken, or the Sheriff have returned a *Non est inventus*; but upon the Execution of the Statute Staple, and the Recognisance, the Body, Goods, and Lands, may be taken together at the first; this therefore is a more speedy Remedy then the former. Also upon a Statute Marchant, one may have an Action of Debt, but otherwise upon a Statute Staple, and the *Capias* upon the Statute Merchant may be retornable in the *Kings Bench*, or *Common Pleas*, but the

Re-extent.

Tenant by Statute.

Venire facias ad computandum, what.

Executor.

Age.

Escape.

the Writ of Execution upon the other, is to be returned in the *Chancery*. 15 H. 7. 46. *F. N. B.* 130, 131.

The proceeding upon the other sort of Recognisances, are after another manner; for upon Recognisances at the Common Law, if the money be not paid at the day, the Conusee his Executor or Administrator, is to bring a *Scire Facias* against the Conusor, or if he be dead, against his Heirs when they be of full age; or if the Lands the Conusor had at the time of entering into the Recognisance, be sold against the Purchasers of these Lands, which the Conusor had at any time after the Recognisance entered into, to warn them to come into that Court whence the *Scire facias* cometh, and to shew cause why Execution should not be done upon the said Recognisance: And if the party or parties cannot be found to be warned, or being warned, do not appear at the time, or appearing, shew no cause why the debt should not be levied, then the Conusee shall have Execution of a Moyety of his Lands by *Elegit*; or if the Conusor be living, of all his Goods by *Levari* or *Fieri facias* at his Election, but he cannot have Execution of his body, unless he bring an Action of Debt upon the Recognisance, or it be by course of the Court, as it is in the Kings Bench upon a Bail, in which case a *Capias* doth lie. *Dyer* 360. 315. *West* 2. 18. *Broo. Execution* 129. *Co. 3.* 11. 15 H. 7. 16. *Kitch.* 117.

Elegit.
Levari facias.
Fieri facias.

Capias.

Sureties.

The proceeding against the Sureties in Statutes shall be as the proceeding against the Principal; but in case where there are Movables of the Principal to satisfy the debt, the Surety (as it seems) shall not be charged. *Stat. de Mercatoribus.*

5. What things are subject and liable to Execution upon a Statute or Recognisance; and when, and how, and what not.

When a man doth enter into a Statute or Recognisance, the Land of the Conusor is not the Debtor, but the body; and the Land is liable only in respect that it was in the hands of the Conusor, at the time of acknowledging of the Statute, or after; and the Land is not charged with the Debt, but chargably only at the Election of the Conusee; but the person is charged, and the Land is chargable in respect of the person, and not the person in respect of the Land. And therefore albeit the Conusor alien his Land to another, yet he remains Debtor still, and his body and his Goods shall be taken in Execution; and yet when Execution is sued upon the Land, the Land is charged and become Debtor also. *Plow.* 72. *Co.* 10. 30, 31. *Broo. St. Marchant.*

First, In respect of the nature and quality of the things themselves.

The body of the Conusor himself, but not the body of his Heir, Executor, or Administrator, is liable to Execution, and may be taken, albeit there be Lands, Goods, and Chattels to satisfy the Debt; and all the Demefn and Copehold Lands, Tenements, and Hereditaments, Corporael and Incorporeal of the Conusor, that are grantable over, as his Manors, Messuages, Lands, Meadows, Pastures, Woods, Rents, Commons, Tithes, Advowsons, and the like: Also all his Goods and Chattels, as Leases for years, Wardships, Emblements, Cattle, Household-stuff, and the like, are liable to Execution upon a Statute. *Stat. de Mercatoribus.* *Co.* 3. 12. *Plow.* 72. *Co.* 2. 59. *Littl. Sess.* 358. *Dyer* 205. *Broo. Stat. Marchant* 44. *Dyer* 7. *Co. super Littl.* 374. And therefore if a man make a Lease for life, or years, and after enter into a Statute, or Recognisance; this Reversion *cum accideris* shall be subject to Execution, and the Conusor cannot (as it seems) by any sale thereof prevent it; and yet the contrary hath been held for Law. *Littl. Broo. Sess.* 227. *Dyer* 373. And if one make a Feoffment in Fee, or Lease for life, reserving a Rent; this Rent is extendable, and the Conusee may distrain for it. *Doll. & Stud.* 33. *Broo. Stat. Marchant* 44. *Dyer* 205. So if the Lessee for life, make a Lease for years rendering a Rent, and then the Lessee for life enter into a Statute; this Rent is subject to Execution, and it seems the Conusee may bring an Action of Debt against the Lessee for years for it. *Harringtons case.* *Pasche*, 9 Jac. B. R. And albeit the Rent become extinct by the purchase of the Conusor or otherwise, yet as to the Conusee it shall be said to be in esse and subject to Execution still. And therefore if a Rent be granted unto me for my life, after the death of my Wife, and after I do acknowledge a Statute, and then my Wife die, and then I Release the Rent to the Terre-tenant; this Rent shall be liable to Execution, *Co.* 7. 38. But Annuities, Offices in Trust, Seignories in Franck-almoign, Homage, Fealty, Rights, Things in Action, and such like things are not liable to Execution upon Statutes or Recognisances.

infeants: Also a remainder in Tail, or in Fee after an Estate Tail in possession, is not liable to execution in these cases, except it happen to come into the possession of the Conusor. *Goldb. 120 pl. 5. Dyer 7. Co. super Litt. 374. Doff. & St. 53. Co. 2. 59. 1. 2.*

The Lands, Tenements and Hereditaments that are Copilhold, albeit the Conusor have the Fee-simple of them, yet are subject to execution, only for the life of the Conusor; but his demesne Lands wherein he hath an estate in Fee simple, are liable to Execution for ever if need require. Ancient demesne land is liable to Execution yet see that Copilhold land not liable by *Brownl. Rep. 1 part 34, Stat. de Mercatoribus Dyer 199. Plow. 82. Co. 7. 39. 3. 12. Bro. Recognisante 7. Co. 1. 62. 13 H. 7. 22. Bro. Stat. Marchant 36. Brownl. 1 part 23.*

Second, in respect of the estate, property and possession of the conusor in the things.

The Lands the Conusor hath in jointenancy with another, are subject to execution during the life of the Conusor and no longer; for after his death the surviving jointenancy shall have all; but if the Conusor survive his companion, then all the Land shall be subject to execution: and the Lands the Conusor hath as Tenant in Tail, are liable to execution only during the life of him being the Tenant in Tail; for afterwards they shall go to his issue in Tail.

And yet if the Tenant in Tail after he hath entred into a Statute, suffer a recovery of the Land intailed, in this case the Land shall be subject to execution as if it were Fee simple Land.

And the Lands the Conusor hath in the right of his Wife, shall be charged and subject to execution only during the lives of the Husband and Wife together, and no longer.

If a Feoffment be made in condition to make an estate to another by a day of the same Land, and before the day the Feoffee enter into a Statute or a Recognisance; this Land shall be subject unto execution untill the Feoffor reenter, for the breach of the condition. *Littl. Sect. 338.*

If one be seised of Land, and then enter into a Statute; this Land shall not be subject to execution: and yet if the Conusor do after recover the Land by entry or action, it shall be lyable to Execution. *Co. 2. 59.*

The goods and Chattels whereof the Conusor is solely possessed, and possessed in his own right; and the Goods and Chattels of which he is jointly possessed with another; and the Goods and Chattels he hath in the right of his Wife, are liable to execution.

But the Goods or Chattels that he or his Wife hath as Executor or Executrix to another or as pledged only, it seems are not subject to Execution. And if the Conusor deliver goods to another to deliver over to L. S. these goods before they be delivered over are liable to execution.

And if he have leases for years in the right of his Wife, and die before Execution be done, it seems these leases are liable to execution. *See quare.*

But if the Conusor have goods in his Custody of another man, or have goods he hath distrained in the nature of a distress, these are not liable to Execution. *Stat. de Mercatoribus. Co. 3. 11. 12. Plow. 334. Co. 8. 17. 13. 90. Dyer 67.*

All the Lands, Tenements and Hereditaments which the Conusor had at the time of the Statute or Recognisance entred into, or at any time after, into whose hands by what means soever the same are beside and come at the time of Execution, are subject and liable to the Execution. But the Lands the Conusor had and did put away before the time of the Statute or Recognisance entred into are not liable to Execution. And all the Goods and Chattels the Conusor hath and are found in his hands at the time when the Execution is to be made by the *Extendi facias*, are liable to the Execution. But the Goods and Chattels he had and did put away before the time of Execution done, are not liable to the Execution. *Stat. de Mercatoribus.*

3. In respect of the time.

And in all these things before subject to Execution, the Conusor may take all or part at his pleasure. And therefore if the Conusor have sold his Lands to divers persons, or have sold some of his Lands to divers persons, or to one

4. In respect of the quantity.

man, and keep the rest in his hands, or it descend to his Heir; the Conusee may sue Execution upon the lands in either of their hands at his election; so that if the Cognisor alter the Statute entered into and before execution purchase part of the land of the Cognisor, he may notwithstanding have execution, upon the residue in the hands of the Conusor, or in the hands of his heir; and yet so that in some of these cases his execution may be afterwards avoided, and he compelled to sue execution againe. See *Brownlow* 1 part. 38. 2 part. 97. *Broo. Stat.* 10. 48. 25. *Plow.* 72. See *infra*.

The Conusee upon other Recognizances shall have the same things in execution, as a man shall have after a judgment in a Suite in the Kings Bench or Common-Pleas by *Fieri facias*, or *Levari facias*, all his goods and chattels, and by *Elegit* the moiety of his lands, and all his chattels besides the Cartel of his plough and implements of husbandry. But in these cases he cannot take the body of the Conusor in execution; unless it be upon a new Suite, or in case of bail, in the Kings-Bench. *Westm.* 2. chap. 18. *Plow.* 72. *Co.* 3. 12. *Dier.* 306. *Kelw.* 100.

Howsoever by the Common-Law after a full and perfect execution had by extent returned and of record, there shall never be any reextent, yet by a speciall Act of Parliament is provided, that if after lands, &c. be had in execution upon a just or lawfull title, wherewith all the said lands, &c. were liable tied or bound at such time as they were delivered or taken in execution, they shall be taken or recovered away from him before he hath received his full debt and damages, in this case after a *Scire facias* had against the Conusor his heirs, executors, administrators, or purchasers, he (or his executors or administrators if he be dead) shall have a new execution to levie the residue of the debt and damages then unsatisfied. 31 H. 8. 5. Wherein these things are to be observed.

1. In case where the Conusee is unlawfully and wrongfully disturbed either by the Conusor or by a stranger in the taking of the profits of the land delivered to him in execution, there he may and must bring his action and recover damages, and these damages shall go toward his satisfaction; for in this case and for this disturbance, he shall not hold the land a day the longer. And where he is hindered by his own neglect or act in the taking of the profits of the land, as where his debt is 40l. and he hath 10l. 5 year delivered to him by which he may satisfy himself in four years, and within the time he make a conditionall surrender to the Conusor, and enter for the condition broken, in this case he shall not hold the land over, neither shall he have any Reextent.

And where the let or disturbance is such, as wherein the Conusee hath remedy given him by the Common-Law to hold the land over after the disturbance removed, in this case he shall have no new execution nor Reextent within this Statute; for where the Conusee hath remedy in *presenti* for part, or in *future* for all or part, this Statute extendeth not to it. And therefore where the Conusee is hindered in the taking of the profits of land by the Act of God, as by fire, overflowing of water or the like; or by the act of the party Conusor, or any by or under him, as when one is bound to A. in a Statute of 100l. and after to B. in a Statute of 200l. and B. extendeth the land first, and then A. extendeth the land and taketh it away from B. or when the Guardian in Chivalry doth put out the Conusor by reason of the Wardship of the heire of the Conusor, or the Wife of the Conusor doth claime her dower and put out the Conusee, or one disseise his lessee for life, or out his lessee for years, and then acknowledge a Statute, and after execution is sued against him, and then the land is delivered to the conusee, and after the lessee for life or years doth reenter; in all these cases, because by the Common-Law, the Conusee may hold over the land after the time given him by the extent, and after the impediments removed, untill he be satisfied his debt and damages, therefore, he shall have no aid of this Statute by Reextent; for he is then only to be relieved by this Statute when as he is evicted and distressed, and is wholly and clearly without any remedy at the Common-Law. *Co.* 4. 66. 82. *Plow.* 61. 15. *H. 7.* 15. *Co. super Litt.* 299. *Kitch.* 116.

2. Where the Statute saith [Untill he, &c. or his assigns shall fully and wholly have levied

5. Where a man shall have a Re-extent or new execution, and where not.

levied the whole debt and damages] if he hath assigned severall parcels to severall assignes, yet all they shall have the land but untill the whole debt be paid.

3. Where the words be [for the which the said lands, &c. were delivered in execution] If *A.* disseisor convey the lands to the King who granteth the same over to *A.* and his heirs to hold by fealty and 20l. rent, and after granteth the Seigniorie, to *B. B.* acknowledgeth a Statute, and execution is sued of the Seigniorie, *A.* dieth without heire, and the Conusee entreth and is evicted by the disseisor; in this case he shall have the aid of this Statute; but the Perquisite of a Villain being evicted is out of the Statute.

4. Where the words be [delivered and taken in execution] yet if after the *Liberate* the Conusee enter (as he may) so as the land is never delivered, yet it is within the remedy of this Statute.

5. Albeit the Statute speake only of the recoveror, obligee, &c. and not of their executors, administrators, or assignes, yet the Statute shall extend to them.

6. Where the Statute speakes of a *Scire facias* out of the same Court, &c. if the record be removed into another Court and there affirmed, he may have a *Scire facias* out of that Court.

7. Where the Statute gives a *Scire facias* against such person and persons, &c. that were parties to the first execution, their heirs executors or assignes, &c. this must not be taken so generally as the letter is; for if the first execution were had against a purchaser, &c. so as nothing in his hands were liable but the land recovered, if this land be evicted from the tenant by execution, no *Scire facias* shall goe against him, his executors, &c. but if he hath other lands subject to execution, then a *Scire facias* lieth against him or his assignes, but not against his executor; neither in that case can he have a *Scire facias* upon this Statute against the first debtor or recognisor, but if there be severall assignes of several parcels of lands subject to the execution, one *Scire facias* will lie against all the assignes. See more in *Brownl. 2. parts 122.*

A Statute or recognisance and the execution thereupon may be discharged divers waies, as by defeasance, release, payment of the money, debt, and damages, or the residue thereof unlevied, delivery up of the Statute, Spurchase of part of the land by the cognisee, or the like.

And therefore if there be a defeasance to the Statute or recognisance, and it be to pay money at a day, or to performe some other thing, and the money be paid, or the thing done accordingly, this is a discharge of the Statute. And therefore if such a Statute or recognisance be afterwards sued against the Conusor, he may be relieved by an *Audita Querela*. And if *A.* bind himself to *B.* by a Statute of 20l. and *B.* sue execution, and the lands of *A.* are delivered to him in execution untill he levy the money, and after *B.* doth make a defeasance to *A.* by Indenture, that if *A.* pay 10l. by a day certaine, that then the Statute or Recognisance shall be void; if this be done accordingly, the Statute and the execution thereupon is defeated and discharged. *D. 297. 315. Co. 6. 13. 20 Aff. pl. 7. See Defeasance.* And if the Cognisee before execution or after, release to the Cognisor the Statute or recognisance, or the debt; this is a perpetual discharge of the Statute and the execution thereupon: But if the Conusee before execution release to the Conusor all his right in or to the land; this will not discharge the whole execution; for if he may not sue execution of the land afterwards (as it seems he may this notwithstanding) yet he may sue execution of his body and goods.

But such a release after execution made of the land, will no doubt discharge the land.

And yet if a Conusee release all his right in the land to the Feoffee of the Cognisor of a parcel of the land, it seems this will discharge the land of execution, albeit it be before the execution sued that this release is made.

And so it is said it was resolved *Mich. 26. 27. Eliz. Co. super Litt. 76. 10. 47. 50. 51. super. Litt. 265. Broo. St. Mar. chant. 25. See Release.*

If the Cognisee assigne the Statute or Recognisance to the Cognisor or to the

Aaaaaa 2

By purchase
or surrender
of the Land.

7. Where and
by what means
a Statute or
Recognisance,
and the execu-
tion thereof
shall be dis-
charged, sus-
pended, or a-
voided in all
or in part, and
where not.
By defeasance.

By release.

Terre-Tenant by way of discharge of the Debt or Land ; it seems this is a good release and discharge of it in Law. And if the Cognisee purchase any part of the Land of the Cognisor after the Statute or Recognisance entred into ; this is no discharge of the Statute or the Recognisance, but the Cognisee may have Execution notwithstanding of the Lands that are left in the hands of the Cognisor, or of his body, or goods, or all. But if the Cognisee purchase parcell of the Lands, and a stranger another parcell ; in this case the Lands that are purchased by the stranger shall be discharged of Execution. And if the Cognisee after Execution sued, purchase any part of the Land, or the Fee-simple of all or part of it doth descend to him ; by this the whole Execution is discharged. And if the Cognisee purchase all the Lands of the Cognisor ; by this the Execution as to the Land is suspended, but this is no discharge as to the body and goods of the Conusor, for they are subject to Execution still. And if the Conusee reinfesoff the Conusor again, the Execution may be revived again against the Lands of the Conusor, so that they will be subject to Execution again, whether they do continue in his hands or be sold away to others.

So also if the Conusee enfeoff a stranger after he doth purchase the Land, and the stranger doth enfeoff the Conusor ; in this case also the Execution is revived, and the Lands shal now be subject thereunto as they were before, *Barrow & Graies* case 38. *Eliz. Plow. 72. F. N. B. 104. Litt. Bro. sect. 293: 11 H. 7. 4. Br. Andia Querrel. 49. Stat Merchant 42. Co. super Litt. 150. 25. Ass. Pl. 7. Bro. Stat. Merchant 25. Litt. Bro. sect. 441. 5. H. 7. 25.*

If a Lessee for life make a lease for years rendering a Rent, and after enter into a Statute to *I. S.* and then enter into another Statute to *I. D.* and after he doth grant his estate to *I. S.* by this the Execution of the Statute made to *I. S.* is suspended, and therefore during the suspension, it seems *I. D.* albeit he be after in time, may sue and have the Rent in Execution. *Harringtons Case. Pasche 19. Jac. B. R.*

8. Where the Conusor, or his Heir, or an alienee, or purchasor shall have contribution upon a Statute or Recognisance, or not.

If the Conusor after he hath entred into a Statute or Recognisance, doth convey away his Land to divers persons, and then the Conusee sue Execution of the Statute upon the Lands of one or some of them, and not of all ; in this case he or they whose Lands is, or are taken in Execution, may by an *Andia querela* or *Scire Facias*, have contribution from the rest, wherein these differences must be observed : That one Purchasor shall have Contribution from another : And therefore if the Conusor sell some Lands to *I. S.* and other Lands to *I. D.*, and the Conusee sue Execution only of the Lands of *I. S.* *I. S.* shall have contribution against *I. D.* And the Feoffee of the Purchasor, the Feoffee of the Heir of the Conusor, the Feoffee of the Feoffee, and another Feoffee shall have contribution of the Heir of the Conusor : But the Conusor himself shall not have Contribution from a Purchasor ; and therefore, if he sell part of his Lands, and keep part in his hands, and the Conusee sue Execution only of the Lands in the hands of the Conusor or his Heirs ; in this case, neither he nor his Heirs shall have any contribution from the Purchasors ; and one Heire shall have contribution from another. And therefore, if one be seised of two Acres, the one in Burrow English ; the other of other Land, and he enter into a Statute and die, and he hath but two Daughters, and the Execution is sued upon the land of one of them ; he shall have contribution from the other. So where some land doth descend to the Heire of the part of the Father, and some to the Heir of the part of the Mother. *Plow. 72. Co. 3. 12. 6. 13:*

If one be seised of Lands in Fee in the County of *A.* and *B.* and enter into a Statute or Recognisance, and the Conusor die, and then the Conusee die also, and his Executor doth sue Execution of the Lands in *B.* only, and hath Execution, and after the Heir doth sell these Lands ; in this case the Vendee shall have no contribution. So also it seems the Law is, if the Heir sell the Land to divers, and one of the Purchasors appear to the *scire facias*, and the Iudgement is given against him, and he afterwards sell the Land, his Vendee shall have no contribution : And in all these cases where it is said the one Purchasor shall have contribution, it is not intended that the rest shall give or allow him any thing by way of contribution, but that the party whose Lands are extended, may by *Andia Querela* or *scire facias*,

faciam, as the case requireth, defeat the Execution, and thereby shall be restored to all the mean profits, and force the Conusee to sue his Execution upon all the Land, that the Land of every one of the Terre-tenants may be equally extended. See more in my Book of *Common Assurances*.

CHAP. CL:

Of a Statute Law.



Statute is taken sometimes for an Obligation of Record; ^{Self. 1.} but here it is taken for a Decree, or Act of Parlia- ^{1. Statute, what.} ment, made by the Lord Protector, and Parliament of the Nation, (which is the Representative, and Body of the same) for the Government thereof; and these Laws are over, and besides the Universal or Common Law of the Nation.

And so a Statute is either general, and publick, or parti- ^{The kindes.} cular and private. Those that are general also, are either such as concern all the Subjects of this Realmlike, as the

Statutes of Champerty, Maintenance, the Statutes of 13 *Eliz.* 10. 18 *Eliz.* 11. 1 *Ed.* 6. 14. *Magna Charta* 25. *Westm.* 12. 25, 18, 41. 23 *H.* 8. *de Attaints* 4 *H.* 7. 17. and divers others, or such as concern all the Species of one General of Men, or things onely; as all the Spiritual Tye, or all Officers. *Westm.* 1. 26. All Trades and Mysteries, or all Lords, or the like. *Marl.* 3. And so it is where the Matter is Special, so that under it be nothing but Individuals; yet if it be General, as to the persons, it is a General Law. *Co.* 4. 76.

Those Statutes that are particular, or private, are either such as are general in a particular; as which concern all Sheriffs, or all Bishops, or all Deans, or all Clouthiers, or all Colledges in the Universities, or the like: 18 *Eliz.* 6. 23 *H.* 6. 18. Or else a particular and special, when it doth concern one Individual; as the Sheriff of *Notwich*, Dean of *Windfor*, Colledge of *Eaton*. *Plow.* 65. 13 *Ed.* 4. 8. *Dyer* 119.

So when the Law, as to the persons, is general, but the matter it doth concern, is Individual or singular. *Co.* 4. 26.

Also some Statutes are Affirmative, and some Negative; and some bring in a new Law, and some do onely declare the old. *Co.* 4. 76.

This word is taken for the first part of an Act or Statute, which is as a Key to ^{Preamble, what.} open the minde of the Makers, and to shew what mischiefs they intend to remedy that make the Statute; and some Statutes have these, and some are without them.

An Action upon a Statute, called an Action Popular, is an Action which is given ^{2. Action Popular, what.} to a man by some Statutes, where none was before, and is called Popular, because it is not given to one, but to every man that will; and yet if one hath begun the Suit, another cannot sue it out. *F.N.B.* 43. *Co.* 10. 75. See *Action*, and the duty of *Informers* upon such Statutes. See 18 *Eliz.* 5. 21 *Jac.* 4. 13 *Eliz.* 5. and *Informers*.

If one hath any occasion, or cause to make use of a Statute that is general in any Court, he need not to plead it, and set it forth at large, but onely that part, or so much as doth concern him, and will serve his turn, or the substance of it. ^{3. Where a Statute must be pleaded, or not.}

And if one will charge another with the breach of any such Statute, there need no more be said, but *encounter tiel Statute, &c.* For the Judges in their giving of Judgments, are bound to take notice of the said Statutes: But if the Statute be special, or particular, or private, thereif any man will have benefit by, or make use of him, or will charge another upon him, he must plead, and shew the Statute at large; for otherwise the Judges in their Judgments, are not bound to take notice of them.

Crompt Jur. fol. 15, 16, 17.

All

What shall be
said a good
Statute, or
not.

All Statutes that agree with the Statutes of Heaven, and Ordinances of God, though they cross, and utterly overthrow any of the former Statutes or Laws of the Nation, are good : But if they be expressly repugnant to the Laws of God, as that no man shall help or comfort them that be in distress ; they are not good, but utterly unlawful ; but it must be made by all the Parliament. See *Crompt. Jur.* 190. 34 H.6.40.

General Rules
for the Ex-
position of
Statutes.

The Exposition of Statutes belongs onely to the Judges, and Justices of Courts, and they are to be guided by these general rules: *March* 90. pl. 148.

1. They must mark the Coherence, and take all the parts together, and then expound them, as neer to the intent and minde of the Makers, as possible they can conceive, and not stick too much in the words ; for, *Qui haret in litera, haret in cortice, & notitia Ramorum Statuti, non in Sermonis foliis, sed in rationis radice posita est.* Co. 10. 100. And therefore if the Law be, that whosoever shall kill a man, shall be hanged ; if a Mad-man do so, or one in Execution of Justice do so, this Law must not be extended to him : But yet the words are to be regarded also ; and therefore it is a rule, That *à verbis legis non est recedendum & maledicta est expositio qua corrumpit viscera textus.* Plow. 18. 396. Co. 10. 100.

2. Where an Act Affirmative, and that is the Introduction of a new Law, doth give power, or Interest to a person certain, or a thing is to be done before a person certain, in that case *Inclusio unius est exclusio alterius* : But if it be the Declaration of an old Law, *contra*, unless there be a Negative clause annexed. Co. 11. Dr. *Fosters* case: An Affirmative Subsequent Law will not repeal, or abrogate an Act Affirmative Precedent, unless it be contrary to it in Matter ; nor alter the Common Law before, neither will such an Act take away Customs. Also, if the Statute be Negative, and but the Declaration of an ancient Common Law, and in Affirmance thereof, this will not alter a Custom. Co. on *Littl.* f. 115. but otherwise the rule is, The latter Laws do abrogate the former Laws.

3. One part of a Statute must expound another ; and this is one of the best means to finde the sence. Co. on *Littl.* 381.

4. There must be an Equity in expounding all Laws, and this doth sometimes extend the sence beyond the words, and sometimes it doth abridge the sence, and make it narrower, and less then the words. Plow. 465.

5. When the words of a Statute are special, but the reason is general, the Statute is generally to be understood. Co. 10. in *Rensfages* case.

6. That which is generally spoken, must be generally understood ; for he that speaketh all, leaveth out nothing. *Idem.*

7. Such an Exposition must be made, as to suppress the mischief, and advance the remedy intended. Co. on *Littl.* 381.

8. The words must always be taken in a lawful, rightful sence. *Idem.*

9. Every Act made against an Injury or Grievance, doth expressly or implicitly give to the party wronged, a Remedy. Co. 2 part, *Inst.* 55.

Where-ever a Statute doth forbid any thing to a man, the party grieved may not onely have this Action upon the Statute for his private relief, but also the offender shall be for his contempt punished at the Kings Sute, by Fine and Imprisonment. Co. 2 part, *Inst.* 131. 163.

CHAP. CLI.

Of Sute, Substance, and Circumstance.



His word is sometimes taken for a Sute in Law, which is nothing but an Action. See *Action*.

SeB. 1:
Sute, what?

Also sometimes it is taken for the following of one in chase, as Feesh-sute. See *Escape*.

The kinder!

Also sometimes it is taken for the Attendance, which a Tenant or other doth owe to the Court of his Lord. And so it is taken here, and then it is either Real or Royal, which is the service that men owe to the Sheriff's Turn or Leet, or other Law-days, unto which, when are bound to come, to hear, and learn the Law by which they are to be governed; and it is called Royal, because of their Allegiance which men are sworn to there; and therein their Oath is, That they shall be loyal Subjects to the King.

Sute at a Law
day,

And this service is not to be done in respect of the Land that he holdeth within the County or place where the Leet is, but by reason of his person and abode there, and ought to be done twice a year; and for default hereof, he is to be amerced, and not distrained.

Amerced,

Sute Covenant is, where one is bound and hath undertaken by Covenant to do Sute to the Court of another.

Sute Custom is, where by the Custom of the place, the Tenant or other is to do Sute to the Court of the Lord.

Sute Service is the Sute that one is bound to yield to his Lord's Court, or the Sheriff's County Court, or some Hundred, from three weeks to three weeks; and this is not to be done, in respect of a man's person or abode in the place, wherein the Court is; but in respect of a man's Land which he holdeth of the Manor, or within the County or Hundred, where the Court is. And for default of this, a man shall be distrained and not amerced: And if a man refuse to do his Sute he oweth to such a County Court, or Court Baron, he may be compelled to it by Writ called *Seffa ad Curiam*. And if a Tenure be to come to a Leet or Hundred to do some special Service, as to be Cryer, &c. it is a good Service, but not a Sute Service. *Bro. Sute* 17. *F.N.B.* 158.

Seffa ad Curiam, what.

And in this case of Sute Service, which is to be done in respect of the Land, if the Land come to diverse Parceners, the eldest of them must do all the Sute; and for that purpose, if he or she refuse, may be compelled by a Writ called *Seffa facienda per illum qui habet initiam partem*: But in this case the eldest shall have Contribution of the rest; and if the eldest do make all the Sute, and the rest will not contribute, he may have a Writ of *Contributions facienda* against them, and compel them to it.

Who shall do
the Sute.

Seffa per illum
qui habet initiam
partem,
what.

Contribution:
Contributions
facienda, what.

So in all other like cases, where there be many Feoffees, the Lord shall have but one Sute, and the rest shall contribute. *F. N. B.* 116. *Marib.* chap. 9.

But if one have Land in divers Hundreds, he can do no Sute, but where he doth dwell; and if he be distrained to do Service elsewhere, he may discharge it by a Writ. *Fitz.* 16.

None shall be distrained to do Sute of Court, unless he be specially bound to it by his Charter of Feoffment, except such as they, or their Ancestors were wont to do it: Forty years before the making of this Statute, where then they were infeofed by Deed or without Deed.

If a man live within one Hundred, and hold Land of 7: 5. as of his Hundred of W. which is another Hundred, and of another man, yet he must do Sute in the Hundred where he dwells, by reason of his personal residence, and so to the County Court. *Mish.* 9 *Car.* Sir Pierrey Harbert's case in the *Exchequer*. See the old Statute of *Marib.* 9.

CHAP. CLII.

Of Subsidy and Superfedeas.

Self. 1.
Subsidy, what.



Subsidy was a Tax or Tribute, assessed by Parliament, and granted by the Commons to be levied of every Subject according to the value of his Lands or Goods, after the rate of four shillings in the pound for Land, and two shillings eight pence for Goods, as was most commonly used, and the manner of Assessing every Mans Lands or Goods, was this

First, There did issue a Commission out of the Chancery, to Men of Honor or Worship, in every County, by virtue whereof, To call unto them the Head-Constables or Bailiffs of every Hundred, and by them the Constable, and three or four of the substantiallest Householdiers in every Town, within their Hundred, at a certain day: Which men so called, or as many of them, as the Commissioners thought good to use, did rate the Inhabitants of their own Town, in such reasonable manner as they thought meet, yet by the discretion of the said Commissioners, and then every man after his value set down, must at their time, pay to the Collectors appointed, after the rate aforesaid.

Tonnage and
Poundage.

For the Subsidy of Tonnage and Poundage, see *Customs and Franchises*, and the *Act*, 11 March, 1650.

Tax and Tallage,
what.

Tax and Tallage was a *Dixme Quinzime*, or other Subsidy granted to the King by Parliament.

Quinzime,
what.

Quinzime was called a Fifteen, and it was a payment granted by the Parliament to the King, and by him laid upon the Subjects; which was rated after the Fifteenth part of Mens, Lands, or Goods in the Country; and after the tenth part of Mens Lands in Cities and Burroughs. 7 H. 7. 5. Broo. 242. *Co. 2 part, Inst.* fol. 77.

Tenth.

So that this doth differ from a Subsidy, for that is uncertain as mens Estates be, because it doth light on the person; this is certain, because it doth light on the Towns, Parishes, and Villages in general; and it is so called, because it amounted to one Fifteenth part of that the Town was valued at heretofore; and every Town, City, and Village, greater or less, do or may know by the *Exchequer Roll*, what their Fifteen doth amount unto: And this was to be levied of Mens Lands, or Goods, as the Custom and use of the place was. Dyer 143.

Dixmes, what.

Dixmes was a Tribute laid on the Spirituality, and granted to the King by Parliament, as the *Quinzime* was upon the Laity. Broo. 342.

Impositions of
Benevolence.
Pole money,
Ship-money.

All Exactions and Impositions of money upon the people, without their consent in Parliament, by way of Benevolence.

Poll-money, Ship-money, and the like, declared to be unlawful, and taken away. See 25 Edw. 1. *De tallagio non concedendo* tem' Ed. 1. 1 Ed. 3. Stat. 2. cap. 6. 11 Rich. 2. 9. 9 H. 4. 7. 1 R. 3. 2. 19 H. 7. 8. 16, 17 Car. 14. 3 Car. 1. 1.

See the new Government. Numb. 30.

No Imposition of money may be but in Parliament, see *Customs*. Co. 2 part, *Inst.* cap. 30. *Petition of Right*, B. Car.

Superfedeas,
what.

Superfedeas is a Writ that lieth in divers cases, and implies a Command or Request to forbear or stay the doing of that, which in appearance of Law were to be done, were it not for the cause, whereupon the Writ is granted. As for example.

A man is to have Surety of the Peace against him, of whom he will swear, that he is afraid, and the Justice required hereunto, cannot deny him; yet if the party

be formerly bound to the Peace, either in the *Chancery*, or elsewhere; this Writ of *Superfedeas* lieth to stay the Justice from binding the same party to the Peace, which otherwise he might not deny. *F. N. B.* 236. *Poulton de Pace* 26.

Where a man doth bring a Writ of Error to Reverse a Judgment, he may have a *Superfedeas* to stay Execution upon the Judgment; but if the Judgment were for Debt on an Obligation, single or double, or upon a Contract, he must first enter into a Recognizance to prosecute with effect, according to the Statute of 3 Jac. 8. *Plow.* 49: 5 *H.* 7. 22. *Dyer* 284. 193: 81.

If one be sued, and a *Capias* or Exigent be awarded against a man, in the Term he may have a *Superfedeas* out of the same Court, whence the *Capias* did issue, or out of the Term, from the *Chancery*; that the Sheriff shall take Surety of him and let him go, or that he shall not arrest him, if he be not arrested. *F. N. B.* 137.

So if one be indicted before the Justices of the Peace, and a *Capias* is out, he may by this Writ command the Sheriff to take Sureties for his appearance, and not to arrest him, or if he have to let him go.

If the Sheriff in his County Court will proceed in such Causes, as wherein he is not to meddle, the party grieved may have a *Superfedeas* and stay him, and so in divers other cases. *F. N. B.* 236, 237.

But in Attaint, he shall not have a *Superfedeas* to stay Execution; nor in case, where a Sheriff or Gaoler doth set at liberty one that is in his custody upon an Execution, and after doth take him again: For in this case he must have an *Audita Querela*. See *Audita Querela*. *Crompt. Jurisd.* 52, 59. 64. 24. 91. 98: 113.

All Writs of *Superfedeas* shall be void, granted for Peace or Good-behavior in the *Kings Bench* or *Chancery*, unless such Proces be granted upon motion in open Court, and good cause shewed upon Oath, and the same indorsed upon the Writ, and upon sufficient Sureties, and unless the Prosecution against the party for the Peace or Good-behavior, be *bona fide*. And here false Sureties for the gaining of such Writs shall be punished. 21 Jac. 8.

Where it lieth, or not, and how.

1. Surrender, what.

Surrendror, Surrendree.

2. The kinds.

CHAP. CLIII.

Of a Surrender and Tenants.



Surrender properly taken, is the yielding or delivering up of Lands or Tenements, and the Estate a man hath therein, unto another that hath a higher and greater Estate in the same Lands or Tenements: But it is sometimes improperly applied to other things. He that doth Surrender, is called the Surrendror, and he to whom it is made, is called the Surrendree. *Co. super Little* 337.

And there be three kinds of Surrender. 1. A Surrender properly taken at the Common-Law. 2. A Surrender by Custom of Lands holden by Custom, or Customary Estates, whereof we speak not here. 3. A Surrender improperly taken, as of a Deed, or Grant of a Rent-charge, of a Patent, and of Lands in Fee-simple to the King.

The Surrender properly taken, is of two sorts. 1. Express, or in Deed, which is when it is done by apt words, and the Express Agreement of the parties. 2. In Law or implied, which is when it is wrought by consequent and operation of Law, or when the Law doth interpret or enure something done to another intent to make a Surrender of it. And in the first case it is sometimes by word onely, and sometimes by writing; and when it is by writing, it is said to be an Instrument testifying by apt words, That the particular Tenant of the Lands or Tenements for life or

B b b b b

years

years doth consent and agree that he which hath the next and immediate remainder or reversion thereof shall also have the particular estate of the same in possession, and that he yeeldeth the same unto him.

3. The effect of it.

Extinguishment.

Covenant.

The Fruit and effect of a surrender is, that it doth pass the estate of the surrendror to the surrendree, and that hereupon the estate of the surrendror is drowned and extinct in the estate of the surrendree, And yet not so but that to some purposes it shall bee said to have continuance still. And therefore if tenant for life grant a rent-charge and after doth surrender his land; in this case the rent-charge shall continue notwithstanding the surrender. So if lessee for life make a lease for years rendring rent, and the lessee for life surrender his estate; in this case albeit the primitive estate for life be yeilded up, yet the derivative estate for years shall continue notwithstanding, but the surrendree shall not have the rent reserved upon the lease for years. So if lessee for life or years break a covenant with his lessor, and after surrender his estate to him, his breach of covenant is not hereby salved, for the lessor may have an action of covenant still notwithstanding the surrender. And if one seised of land grant a rent out of it in fee, and this rent is extended on a statute, or granted for less time to another and then the grantee doth surrender the deed of the grant of the rent to the tenant of the land; in this case the rent shall continue as to him that hath execution and the grantee. And if one make a lease for years rendring rent, and the lessee surrender his estate to the lessor; hereby the rent is extinct: but if the lessor grant the rent to a stranger before the surrender *contra*. And if one lease for years, and the lessee let parcel of his term to his lessor rendring rent, and after the lessee surrender his whole estate; in this case it seems the rent is determined. *Co. super Litt.* 338. Co. 1.96. *Bro. surrender.* 47. *Perk. Sett.* 591. Co. 8. 145. 7. 39. *Bro. Sur.* 42.

4. What shall be said a surrender in law of lands. And by what means an estate shall be surrendered in law. Or not By acceptance and taking of a new estate.

If lessee for life or years take a new lease of him in reversion of the same thing in particular contained in the former lease for life or years; this is a surrender in law of the first lease. As if lessee for his own or anothers life in possession or reversion take a new lease for years; or a lessee for forty years take a new lease for fifty years; the first lease in both these cases is surrendered.

And this rule holdeth, albeit the second lease be for a less time then the first, as if lessee for life accept a lease for years, or lessee for twenty years, accept a Lease for two years. And albeit the second lease be voidable, as being made upon condition, as if lessee for twenty years take a new lease for 20 years upon condition that if such a thing happen the second lease shall be void, and the thing doe after happen; in this case both these leases are become void. As where the lessor doth grant the reversion to the lessee upon condition, and after the condition is broken.

Or if the second lease be made by tenant in tail, or the like: as if a man make a lease for years of land, and then make a Feoffment to another of the land, and then take back an estate to him and his wife of the land, and then make a new lease to the lessee for ten years; this is a surrender in law of the first lease. But if the second lease be meerly void, then it is otherwise. And therefore if the lessor doe by words of covenant only promise to his lessee that he shall have a new lease, and doe never actually make him; this is no surrender in law. And this rule as it seems holdeth also, albeit the second lease be to the lessee and a stranger, or to the lessee and his wife: and albeit the second lease be by word only, and the first lease be by deed, if so be that the thing granted by the lease be such a thing as may pass by word without writing; and albeit the second lease be in another right, as if the husband have a lease for years in the right of his wife and then take a new lease to himself in his own name: and albeit the first lease be to begin presently, and the second be to begin at a day to come, or *à covenant*; and albeit there be a mean estate between, as if land be let to A. for years, and after let to B. for years, to begin after the first term, and the assignee of A. doth take a new lease. So if one demise land for ten years to one, and after demise it for ten years to another, to begin at Michaelmas, and after the first lessee accept a new lease. For in all these cases there is a surrender in law of the first leases. 14 H. 8. 15. *Plow.* 194. *Dier.* 28. Co. 10. 67. *Perk. Sett.* 617. Co. 5. 11. *Fitz. Surrender.* 3. Co. *super Litt.* 218. 37 H. 6. 17. *Dier.* 140, 141. *Dier.* 272. *Dier.* 178. 177. Co. 5. 54. 55. *Kelw.* 70. *Dier.* 140. 141. 1. *Dier.* 178. *Pasc.* 40. *El. Co. super. Lit.* 338. Co. 6. 69. 10. 53. 67. 5. 11. *Dier.* 280. *Dier.* 93. 112. And

And if there be two lessees for life, or years, and one of them take a new lease for years, this is a surrender of his moiety; whereby it doth appear that a surrender in law may be made of some estates which cannot be surrendered by a surrender in fait; for *fortior est dispositio legis quam hominis*. And hence it is that a corporation aggregate may make a surrender in law without deed, although it cannot make an express surrender without deed. But if the lessee doe only licence the lessor to make a feoffment and to give livery of seisin: or do give livery of seisin for him as his Attorney: or doe licence him to enter into the land and no more, neither of these things shall be said to be a surrender in law. So if the second lease be made of another, and not of the same thing whereof the first lease is made, as where the first lease is of the land, and the second is made of a rent or other profit to be taken out of the land, or the first is of a Manor, and the second of the Bayliwick or Stewardship of the Manor, or the first is of a Park, and the second is of the Keepership of the Park; in these cases there is no surrender of the first lease. Also if the second lease be not a good lease, perhaps it shall not be construed a surrender. See *Co. 2. Lanes Case. 17. Dier. 46. Co. 2. 60: Co. 6. 69. 10. 67. Perk. Sect. 608. Bro. Surrender. 48. Trin. 5. Jac. Ca. 6. 69. Adjudged.*

And if lessee for 20 years make a lease for 10 years and he after take a lease for 5 years; this is not properly a surrender, but it maketh void the first lease as it enureth by way of dissolution of Contract.

But if the first lease be of the land it self, and the second lease is of the vesture of the same land, this is held to be a surrender of the first lease. So if the second lease be not to begin untill the first lease end, the taking of this second lease is no surrender of the first lease. So it hath been said if one make a lease of black acre in Dale, and the lessee accept a second lease of all the lands of the lessor in Dale in generall words, and the lessor that doth make the lease have divers other lands there besides this acre, that this is no surrender of the first lease. *Sed quere* of this, for others do much doubt it.

So if one enter into land, and make a lease for the trial of the title only, and after the lessor (he and the lessee being both out of possession) make another lease of the same thing to the lessee; it seems this is no surrender of the first lease: but if the lessor enter before he make the lease *contra. Trin. 5. Jac. Sir Jo. Chamberlains case. See Dier. 100. Co. 5. 11. Per. Curiam. B. R. 9. Jac.*

To make a good surrender in deed of lands, and to make them to pass by such a surrender, these things are first of all required.

That the surrendror be a person able to grant and make, and the surrendree a person capable and able to take and receive a surrender, and that they both have such estates as are capable of a surrender. And for this purpose.

1. That the surrendror have an estate in possession of the thing surrendered at the time of the surrender made, and not a bare right thereunto only.

2. That the surrender be to him that hath the next immediate estate in remainder or reversion, and that there be no intervenient estate coming between.

3. That there be a privity of estate between the surrendror and the surrendree.

4. That the surrendree have a higher and greater estate in the thing surrendered, then the surrendror hath, so that the estate of the surrendror may be drowned therein.

5. That he have the estate in his own right, and not in the right of his wife &c.

6. And that he be sole seised of this estate in remainder or reversion, and not in jointenancy.

7. Some make a seventh and that is that he that doth surrender be in possession of the thing surrendered. And therefore hold that the surrender of land made in London of land in Essex of the land when the surrendror is out of the possession is void. *Goldsb. 47. Pl. 3.*

As for examples, infants, women covert, mad and lunatick men, and all such like persons, as are disabled to grant, are disabled to make a surrender,

B b b b b b 2

and

5. What shall be said a surrender in deed of lands. And when they shall be said to pass by such a surrender. Or not 1. In respect of the person between whom it is made, and their estate & possession.

Husband and
wife.

Executors.
Tenant in
common.

Jointenant.

Livery of
seisin.

and none but such as may grant their land may surrender their land. See *Perk. in his chap. of surrender in toto. Bro. Surrender in toto. Fitz. Surrender in toto. Co. super. Litt. 338.* A Corporation aggregate of many cannot make an express surrender without a deed, but it may make such a surrender by deed. And such persons as are disabled to take by a grant are disabled to take by a surrender, and such as may be grantees, may be surrendrees; and therefore a surrender made to an infant is good. If the husband have a lease or estate for years in the right of his wife, he alone, or he and his wife together may surrender this; but if the husband have an estate for life in the right of his wife, being tenant in dower or otherwise, and he alone, or he and she together surrender this; this surrender is good only during the life of the husband, except it be made by fine. *Co. 10. 67. Perk. Sect. 613. 612. Bro. surrender. 44. 21 H. 7. 25.* One executor may surrender an estate or lease for years which the executors have in the right of their testator. If there be two tenants in common, and one of them have the particular estate, and the other the fee-simple; as where an estate is limited to two and the heirs of one of them, and he that hath the estate for life doth alien his part to a stranger; in this case the alienee may surrender to the other jointenant. So if there be three jointenants for life, and the fee-simple is limited to the heirs of one of them; and one of the jointenants for life doth release to the other, and he to whom this release is made doth surrender to him that hath the fee-simple; this is a good surrender of a third part. But otherwise one jointenant cannot surrender to another jointenant, albeit he be tenant for life which doth make; and the tenant in fee-simple, that doth take the surrender. *Perk. Sect. 586, 587. Fitz. sur. 2.* A lessee for life or years, may surrender to him that is next in remainder in fee-simple, or fee-tail, or to him in reversion in fee, and this is a good surrender, and a surrender as it seems may be made to the grantee of the reversion before attornment; so as attornment be afterwards made. *Perk. Sect. 584. Co. super. Litt. 338. Per. Sect. 600. Bro. sur. 4.* And in case of the surrender of an estate for life there needs no livery of seisin as in case of the grant of an estate for life. *Dier. 251. 358. 280.* A lessee for years of a term to begin at a day to come cannot surrender it by an actual surrender before the day the term begin, as he may by a surrender in law. *Perk. Sect. 601, 602. 4 H. 7. 10. Co. 6. 69.* If lessee for life be disseised, or lessee for years be ousted, and before his entry or the getting of the possession again, he surrender his estate to him in reversion; this surrender is void. So if a woman that hath title of dower surrender it to him in reversion before she hath recovered it; this surrender is void. And yet if lessee for years after his term is begun and before his entry, when no body doth keep from him the profits, doe surrender his estate; it seems this is a good surrender; but if another enter before him, and keep him out, it seems otherwise. *Perk. Sect. 600, 601, 602, 603.* If there be lessee for years, the remainder for life, the remainder or reversion in fee, and the lessee for years be ousted, and he that ousted him die seised, and then the lessee for years enter, and then the tenant for life surrender to him in remainder or reversion in fee; this is not a good surrender, for there is in this case but a bare right of remainder for life and in fee; but if the lessee for years had not been ousted, it had been a good surrender. If there be lessee for years, the remainder for life, the remainder in fee; the lessee for years may surrender to the lessee for life, and so may the tenant for life to him in remainder or reversion in fee, but if there be tenant for life, the remainder for life, the remainder in fee; in this case the second tenant for life cannot surrender to him in remainder in fee. *Perk. Sect. 605. Dier. 251.* If a lease be made for life or years to A. the remainder for life to B. the remainder in fee tail to C. and the first tenant for life or years doth surrender to C. or to the lessor, B. being the next in remainder for life being then living; this is not a good surrender, neither can it take effect as a surrender in respect of the intervenient estate. And so some say the law is if the middle remainder be but for years only; as if a lease be made for years, the remainder for years, and the first termor surrender his interest to the lessor; this is no good surrender. *Sed quere. Perk. Sect. 588.* For it should seem that a future interest will no more hinder an actual surrender of the first lessee, then a surrender in law. And so also it seems the law is for a concurrent lease, which for the latter part of it is in the nature of a future interest. *Dier. 112. Plow. 190. Dier. 93. Plow. 432, 433.*

But

But if in this case it fall out the middle remainder be void; as where a lease is made to *A.* for life, or years the remainder to a monk (who is a person incapable) for life or years, the remainder to *I. S.* in fee; in this case *A.* the first tenant may surrender to him in remainder in fee, and the surrender is good. If lessee for 20. years make a lease for 5. years, and the lessee for 5. years enter, and after the lessee for 20. years surrender to him in reversion or remainder; this is a good surrender. So also if the two lessees join in the surrender. So also if the first lessee surrender first, and the lessee for 5. years surrender after. But if the lessee for five years surrender to him in the reversion or the remainder before the surrender of the lessee for 20. years; this cannot take effect as a surrender for two causes. *Perk. Sect. 604. 14 H. 7. 3. Plow. 541. Bro. Sur. 16.*

1. Because there is a remnant of the term as an intervenient estate to hinder the drowning of the term.

2. Because there wants a privity between the lessee for five years, and him in reversion.

If tenant in fee-simple surrender to the Lord Paramount of whom the land is held; this can never take effect as a surrender, unless it be in a speciall case where the Lord hath cause to have a *Cessavit*. So if tenant in tail surrender to him in remainder or reversion in fee-simple; this cannot take effect as a surrender. So if lessee for life surrender to him in remainder for years: or tenant for the life of *B.* surrender to him that hath an estate for the life of *C.* these are void surrenders; for the estates of them to whom they are made, are not capable of such surrenders, for they are not greater then the estates of the surrendrors, and therefore not able to drown the estates surrendred. And yet if lessee for the life of another, or for his own life surrender his estate to him in remainder that is tenant for his own life, this is a good surrender, for an estate, for a mans own life is greater in judgement of law then an estate for another mans life. And hence it is that if a lease bee made to two for their lives, the remainder to a third person for his own life, and one of the first tenants for life surrender his estate unto him in remainder for life; this is a good surrender for a moiety.

If lessee for life or years surrender to him in remainder or reversion that hath no good estate in the remainder or reversion, as where the remainder or reversion is granted by word only, or being granted by deed there is no attornment of the tenant to the grant, or the like; this surrender is not good. And yet if tenant in taile make a lease for life whereby he gaineth a new reversion (but defeasible) and the tenant for life doth surrender to the tenant in tail, this shall be a good surrender. So if a woman inheriatrix have a husband, and they have issue a son, and the husband dieth, and she take another husband, and he letteth the land for life, and the wife dieth, and the tenant for life doth surrender his estate to the second husband, this is a good surrender to most purposes. *Bro. sur. 9. Fitz. sur. 10. Perk. Sect. 590. Perk. Sect. 589. Co. super. Litt. 42. 3. 61. Perk. Sect. 590. Co. 2. 46. Co. super. Litt. 338.*

If a feme sole be seised of land in fee, and she make a lease thereof to a stranger for life, and then take a husband, and the lessee surrender to the husband, this is no good surrender, neither can it enure so, because he to whom it is made hath not the reversion in his own but in his wives right. *Perk. Sect. 612.*

It is further also required in every good surrender, that if it be made by word and without deed, that then it be made in the same County where the land to be surrendred doth lie, but by writing a man may make a surrender of lands that doe lie in any other County, and in what place so ever it doth lie. And a surrender may be by word or writing of lands lying within the same County in any place out of the land. And therefore if tenant for life surrender to him in reversion in any place out of the land within the same County, and the surrendree agree to it, the freehold is in him presently. *Bro. sur. 2. 8. Fitz. Partition. 5. Perk. Sect. 583.*

3. That it be made of such things, of which a surrender may be made. For surrenders may not be made of estates in fee-simple, or fee-taile, nor yet of rights or titles onely of estates for life or years, nor yet of part of an estate for life or years, as if a man have a lease for ten years, he cannot surrender the last seven years, and keep to himself

2. In respect of the place where it is made. And where the surrender of land in one County may be good for the lands that doe lie in another country. Or not.
3. In respect of the matter or thing. And of what things a surrender may be made. Or not.

himself the three years. But otherwise one may surrender any kinde of estate for life as by dower, by the curtesie, or as tenant in tail after possibility of issue extinct, or for years, or years determinable upon lives, and that of any mesuages, houses, lands, commons, rents or the like, that are grantable from one to another, and such surrenders are good. See *Brownlows Rep. 1. part. 40. 41. 2. part. 155. Bro. surrend. in toto: Per. chap. Sur. in toto. Co. 5. 11 super. Litt. 338.*

4. In respect of the manner. And how and by what words a surrender may be made. And where it may be made without deed, and upon condition. Or nor.

4. That there be words, or words and deeds sufficient to make the mind of the surrendror to appear that he is willing and desirous to part with & yield up the thing surrendered into the hands of the surrendree. And herein it is to be known that albeit the words surrender, Give or yeeld up, be the most significant and proper words whereby to make a surrender, yet any other words, especially if it be in the surrender of a lease for years that, do testifie and declare the will and assent of him that is the particular tenant, that he in the remainder or reversion shall have the estate of the tenant, be sufficient to pass the estate by way of surrender. And therefore if lessee for life or years doe by word or writing say, that he will hold the land no longer, and wish him in reversion or remainder therefore to enter. Or that it is his desire that he shall enter into the land, and have it and his estate therein: Or that he is content that he shall have his estate, or have his lease; such, or any such like declaration as this made to him in reversion or remainder, will be a good surrender. *Perk. Sett. 607 608, 609. Dier. 251. Bro. sur. 1. 35. 37. 17. 21 H. 7. 7.* So if lessee for years deliver his Indenture to a stranger, to deliver it and all his estate up to him in reversion, and doe appoint the stranger to deliver and surrender it to him in reversion, and he doe so, and he in reversion accept thereof, this is a good surrender; but otherwise it is of an estate for life.

So if the particular Tenant doe by the words Give, Grant or Confirm, pass his estate to him in reversion, and he doe enter and agree to it; this is a good surrender.

And by all these surrenders the estates will pass by way of surrender, except it be in some speciall cases where the intent of the parties doth plainly appear to be that the estate shall not pass by way of surrender. See *Brownl. 1. part. 208. Hil. 37 E. 6. R. Sleigh and Batemans case.* But if a lessee for life or years doe only goe from the house or land; and carry away his goods and cattell, and so waive the possession for a time, either because the lessor shall not distrain them for rent behind, or the like, and thereupon the lessor doth enter and enjoy it; this is no surrender, neither is this a good yeelding up of his estate. And in such a manner and by such words as before, any thing that may be granted by word without writing, may be surrendered by word without writing, so as it be made within the same County where the thing surrendered doth lie.

And this holdeth true albeit the estate to bee surrendered were created by deed.

But such things, as commons, rents, advowsons, reversions, remainders, and the like, that cannot bee granted without deed cannot be surrendered without deed. And therefore if a lease be made for life, the remainder for life by word of mouth without any writing; he in the remainder for life cannot surrender his remainder for life without deed.

So where one hath a rent, advowson or the like, as Tenant in Dower, or by the courtesie; this cannot be surrendered without Deed. And in case where there is any speciall matter to be contained in the surrender, as reservation of rent, condition, or the like, there for the most part it must be by deed; or it will not be good. And therefore if tenant for life declare himself by word of mouth to be contented and agreed that he in the reversion shall have the land and his estate therein; rendring ten shillings a years Rent: or yaying such a summe of money, or upon condition that if he survive the lessor he shall have it again &c. this is no good surrender. *Perk. Sett. 581, 582: 583. Fitz. Sur. 1. Co. super Litt. 338: Dier. 251. Bro. Sur. 16.* And a surrender may be made also upon a condition precedent or subsequent, as if it be with reservation of rent that if it be not paid it shall be void; but if it be an estate for life that is so surrendered, it seems it must be made by writing indented, and so likewise it should

seem the law is of the surrender of a lease for years upon a condition, or however it is most safe so to doe. *Perk. Sect. 607, 608. 609, Dier. 251. Bro. sur. 1. 35. 37. 17. 21 H. 7. 7. Hil. 37 El. B. R. Sleight and Batemans case. Perk. Sect. 581, 582, 583. Fitz. sur. 1. Co. super Litt. 338 Dier 251. Bro. sur. 16. Perk. Se. 624. 623. Co. sup. Lit. 218.*

5. That the surrendree doe agree to, and accept of it, for untill then the surrender is not perfect, but if the surrendree doe once agree to it, he cannot after disagree, for his first agreement doth perfect the surrender. But the actual entry of the surrendree into the land is not necessary. And therefore if tenant for life or years surrender to him in reversion out of the land, and he agree to it, he hath the land in him presently. And yet he may not bring any action of Trespass against any man for any Trespass done upon the land untill he have made his entry: *Perk. Sect. 608. Litt. Bro. 163. March. Rep. 5.*

5. In respect of the agreement of him to whom the surrender is made And what agreement is necessary. Agreement. Trespass.

If I make a lease to *I. S.* for so many years as *I. D.* shall name, *I. S.* cannot surrender this before *I. D.* name the time. *Goldsb. 168. by Judge Popham.*

But here note, that in the cases before where things may not pass by way of surrender, either because of an intervenient estate, or the like, if there be sufficient words in the deed, it may avail to other purposes, and may enure and pass the thing by way of grant; but then if it be an estate for life that is intended to be surrendered, there must be livery of seisin made upon the deed. And wherefore if there be lessee for years, the remainder for life or years, the remainder in fee, and the lessee for years in possession doth surrender and grant all his estate to him in remainder in fee; howsoever this deed cannot enure as a surrender, yet it shall enure as a good grant of the estate of the lessee for years unto him in remainder in fee. *Perk. Sect. 588, 589.*

A surrender in generall shall be taken most strongly against the surrendror, and most beneficially for the surrendree. And therefore if I hold of the lease of *A.* one acre for life, and another acre for years, and I surrender to *A.* all my lands, or all my lands I hold of his lease; by this surrender both the acres are surrendered. But if the surrender be of all the lands I have or hold for life, or of all the lands I have or hold for years of the lease of *A. contra.* And if I hold one acre for life of the lease of the father of *I. S.* and I hold another acre for life or years of the lease of *I. S.* himself, and I surrender to *I. S.* all the land I hold of his lease; by this the land that I had by the lease of his father doth not pass. A surrender to one jointenant shall be construed to enure to them all. But if tenant for life or years grant his estate to one of the jointenants in reversion, it seems this shall not enure as a surrender to them all, but as a grant to him alone. *Perk. Sect. 610. 611. Perk. Sect. 615. Bro. Sur. 54.*

6. How a surrender shall be construed and taken.

If the lessor make, and the lessee take a new lease upon condition, this surrender in law is absolute, and albeit the condition be broken, yet the first lease is gone. But if the lessee surrender or grant his estate to the lessor upon condition; this condition if it be broken may revert the estate. *Co. super Litt. 218.*

See more in the next question, and in *Exposition of Deeds.*

If any kind of tenant for life of land infeoff him in remainder or reversion of the land, or grant his estate to him in remainder or reversion; this shall enure as a surrender. And if lessee for years before his term doe begin, make a feoffment to him in reversion or remainder, or grant his estate to him; this shall enure as a surrender. And if lessee for life grant his estate to him in reversion, the remainder in fee to another; this shall enure as a surrender, and this remainder is void. But if such a tenant for life make a lease to him in remainder or reversion for the terme of the life of him in remainder or reversion; this shall not enure as a surrender because it doth not give the whole estate, but it shall enure by way of grant. So if lessee for life make a lease to him in remainder in tail for term of the life of him in remainder; this shall not enure as a surrender, but as a grant, and shall end with the life of the grantee. If lessee for forty years make a lease for thirty seven years on condition, & after grant his estate to him in reversion, and the second lessee attorn; this shall enure as a surrender. If there be tenant for life, the remainder in tail to a stranger, and the remainder in tail to another stranger, the remainder in fee to the tenant for life, and the tenant for life doth make a feoffment to the first tenant in tail, this shall enure as a surrender of the estate for life and as a grant of the reversion in fee also. If tenant for life being a woman take a husband

7. Where a feoffment, lease, grant, or other act made, or done by the tenant for life or years, shall be a surrender or not. And how it shall enure or be construed and taken.

1. When it is made to him in reversion or remainder.

Forfeiture.

Husband, and then her Husband and she by Deed indented make a lease to him in reversion for the life of the Husband; this shall not enure as a surrender, but as a grant. If there be Tenant for his own life, the remainder to *I S* for his life, and the first Tenant for life surrender to him in remainder for the life of him in remainder; it seems this shall enure as a surrender, and is no forfeiture; but if he grant it to him for the life of a stranger, and make livery of seisin, this is a forfeiture. If Lessee for life, the Reversion being in jointenants, grant the Land to one or all of the jointenants for twenty years; this shall not enure as a surrender, but as a grant, for there remains an interest in the Lessee still as a mean estate. If Lessee for years make him in Reversion or Remainder his Executor; this shall not enure as a surrender, albeit it doe give him the whole estate. If Land be given to the Husband and Wife, the Remainder to *I, S*, and the Husband discontinue in Fee, and take back an estate to him and his Wife, the Remainder to *W N*, and die, and the Wife claim in by the second estate, and surrender to *W N*; this shall not enure as a surrender, but as a grant: *Bro. sur. 3. 5. Perk. sect. 616. 620. 623. v Co. super Lit. 42. Bro. Sur. 49. Pasch. 7. Jac. B. R. Perk. sect. 621. Co. super Lit. 42. Bro. surrender 17. Perk. sect. 615. Bro. surrender 52. Bro. surrender 36.*

2. When it is done or made to him and a stranger.

Forfeiture.

If Lessee for life or years grant his estate to him in Remainder or Reversion and a stranger; this shall enure as a surrender of the one half to him in Reversion and as a grant of the other moiety to the stranger. And yet it is said, that if Lessee for life of Land grant his estate to him in the Reversion and two others, that hereby they have a joint estate, and the survivor shall have the whole. If Lessee for life make a lease for his own life to the Lessor, the Remainder to the Lessor and a stranger in Fee; this shall enure as a surrender of the one moiety, and a forfeiture of the other moiety. If Tenant for life surrender to the Husband of a woman Tenant in Tail or in Fee; this shall enure as a grant, not as a surrender. And so also it seems is the Law when the surrender is to the Husband and Wife. And if *B* be Tenant for life, the remainder to *C* in Tail, the remainder to *D* in Tail, and *B* infeoff *C* and *S* his Wife in Fee; this shall not enure as a surrender, but it is a forfeiture: so that if *C* die without issue *D* may enter. If there be Lessee for life, the reversion to two Coparcenours, and one of them take a Husband, and the Lessee doth grant his estate to her and her Husband; this shall not enure as a surrender, but as a grant. And yet if Tenant for life doe grant his estate to the Husband and Wife, she having the reversion if she be an infant and within age at this time: it seems this shall enure as a surrender, not as a grant, *Bro. surrender 11. Co. 2. 61. 3. 61. Perk. sect. 619. Co. super Litt. 335. Perk. sect. 622. Bro. surrender 20. 34. 23. Bro. surrender 46 Perk. sect. 623. 21 H. 7. 40. Bro. surrender 34.*

3. When it is done with him in reversion or remainder.

If Tenant for life, or years, and he in Reversion or Remainder by word without Deed join in a Feoffment; it shall be said the surrender of the estate for life or years to him in the reversion, and the Feoffment of him in reversion.

But if he in reversion infeoff the Tenant for life without any Deed; this shall enure first as a surrender of the Lease for life, and then as a Feoffment, See more in *Deed Numb. and see Brownl. 2 part 75. 156. Plow. 140. Dier 358.*

8. Where a Deed or Rent may be surrendered. And how such a surrender shall enure or be taken.

If I have a rent in Fee, for life, or years, issuing out of another mans Manor, or other lands, I may surrender it, for if I deliver the Deed of the grant of the rent to be cancelled unto any one that hath any estate of the Manor or Land in Fee-simple, for life, or years, in possession or remainder, either solely by himself, or jointly with others, this is a good surrender, and hereby the rent is extinct and gone.

But one that is Tenant in Tail of a Rent cannot surrender it, neither will the delivering up of the Deed in this case determine the rent.

And if one be seised of Land out of which a rent is issuing in Fee, and is disseised, and during the disseisin the grantee of the rent surrender his rent, and give up his Deed; it seems this doth not extinguish the rent, yet hath the Grantee no remedy for his rent when he hath delivered up his Deed. And yet if one be seised of Land in Fee, out of which a rent is issuing in Fee, and he die without Heir, so that the Land Escheat, and before the Lord enter upon his Escheat, he that hath the Rent doth surrender the Deed of the Rent to

to the Lord ; it seems this is a good Surrender to extinguish the Rent. And if the Grantee of a Rent-charge in Fee, grant the same to him in Fee, that is seised of the Land in Fee ; this shall enure to extinguish the Rent, but if he grant it to one that hath onely an Estate for life, *contra*. 14 H.7.2. *Perk. Sess.* 585, 590, 591, 594, 595, 596, 597, 598, 606.

Of Tenants.

FOR all sorts of Tenants holding Estates, these things are to be known.

1. The Tenant in Fee-simple of Land hath the most absolute Estate ; and for him and his Estate, these things are to be known. Tenant in Fee-simple.

First, He may dispose this Land or Estate by Act executed, or his last Will at his pleasure, or he may charge it at his pleasure.

Secondly, He may make what waste and destruction he will upon his Land.

Thirdly, His Wife shall have Dower of a thirds of it, her Husband shall be Tenant by the courtesie of it that hath it.

Fourthly, He may notwithstanding forfeit it by committing Treason or Felony.

Fifthly, It will be liable to the Debts, the which he doth by Deed, engage his Heir to pay. See *Estates*.

2. The like may be said of a Tenant in Tail, save onely in the Case of Forfeiture by committing of Felony : And if he will dispose of, or charge his Land for longer time then his own life, he must do it by Fine or Recovery, otherwise by Deed he cannot do it. Tenant in Tail.

3. But a Tenant in Tail after possibility of Issue Extinct, hath but an Estate for life : And this although, as to the quality of it, it hath more Privileges then other Estates for life, for this Tenant is not punishable for Waste ; yet not as to the quantity : Therefore if this Tenant make an Estate in Fee simple, Fee-tail, or for any other life then his own of his Land, he doth forfeit it no more then any other Tenant that holdeth for his own life, as Tenant in Dower, by the Courtesie, or for his own, or for anothers life. Tenant in Tail after possibility of Issue Extinct. Tenant by the Courtesie, in Dower, for his own, or for anothers life.

As touching all which Estates, these things are to be known.

1. That none of these, but the first, can commit Waste, onely they may take and shall have reasonable Estovers of Fire-boot, Plough-boot, Houf-boot, Hay-boot, &c.

2. They cannot charge, or grant it, but for their own lives, and if they do so they will forfeit their Estates.

3. If they grant their Estates to another for their lives, or hold for anothers life, and they die that hold the Land, so there will be an Occupancy, if it be not carefully prevented.

4. There shall be no Tenancy in Dower, or by the Courtesie under such a Tenant.

5. They cannot make it liable to their Debts, but for their own time.

6. It is forfeitable for Treason or Felony : But it shall not be forfeit by an Out-lawry, as a Lease for years shall be.

7. The like is for a Lease for years ; wherein these things are to be known.

1. That a Lease for years shall go to an Executor or Administrator as a Chattle, which a Lease for life cannot do. Tenant for years.

2. The Tenant may grant or charge it, during the Lease onely, and if the Tenant make a Feoffment, Gift in Tail, or Lease for life of the Land, he forfeits it.

3. He may not do Waste.

4. If the Tenant be out-lawed, though but in a Personal Action, he doth forfeit it.

5. The Tenant at Will, and at Sufferance, is the lowest and least Estate of all ; this cannot be granted, nor charged, nor enjoyed but at pleasure.

See for these things in *Estates*.

CHAP. CLIV.

Of the Term-time, and Tame Beasts.

Term, what.

Vacation.



His word Term is sometimes taken for the bounds and limits of time, as a Lease for Term of life, or for Term of years; or else for the time, when the Courts at *Westminster*, are all open to hear all Complaints for Wrongs, and to seek Right by course of Law: To which, in this respect, is opposed the rest of the year called Vacations. And of these Terms, are four in the year; but for them and their Returns. See *Return*. 32 H.8.21. *Mart* ch. 12. And

the new Statute of 16, 17 Car.6. By which, *Michaelmas* Term is to begin at *Tres Michael*, for the keeping of Essoyns, Profers, Returns, and other Ceremonies heretofore used, and the said Term shall be four days after, unless it hapen a Sunday, then it is to be the next day. And in this Term shall be but six Returns, viz. *Tres Michael*. *Mens. Michael*. *Craft. Anim. Craft. Mar. Oß. Martin*. and *Quind. Martin*.

Self: 1.
Temps or Time.
Instance.

For Time, these things are to be known.

1. The Law doth divide and appty Instance (a thing not dividable by Logicians) to several purposes, as if they were several times. And herein are two Rules or Fictions of Law. First, Priority of time is imagined in things done together. Secondly, In things done in an instant, a Priority is supposed also. Hence it is, that he that kildeth himself, is adjudged a Felon, albeit he be not a Felon, till he have done it, and then he is not in being. *Plow*. 110. 540. 11 H.7.12. 7 H.4.16.

2. In divers cases the Law doth restrain and limit men to a time, for the having or taking of some benefit, preventing some loss, or doing of some thing, and herein the time is reasonable, and according to the nature of the thing. As for the bringing of Actions, in divers Cases there are divers Times; for which see 21 Jac. 16. and in Actions. So upon Penal Laws, the Sute must be according to the time set by the Law; for which see *Action Popular*. For the preventing of a Mans Bar to his Right in Land, by a Fine upon the Statute, he must enter or claim within five years; for which see *Fine*. To prevent the loss of his Goods, as a Waiff, Estray, or Wreck, he must put in his Claim within a year. To prevent the Bar of a Fine at Common Law, or a Recovery in a Writ of Right, he must make his Claim within a year and a day: And if Goods be lost in War, and recovered from the enemy, the owner must claim them before the Sun-set, or else the taker shall have them. *Co. upon Littl*. 254. 125. 136. 7 Ed.4.14. *Plow*. 272. 16. And he that brings a Writ of Right, he must allege himself or his Ancestors, to have been seised of the Land, demanded within such a time. *Westm*. 138. *Co. upon Littl*. 114. 115.

Limitation.

An jour &
Walls.

3. The Lord Protector by his Prerogative, is to have the Lands of Felons, that Escheat to other Lords, he is to have them first of all for a year and a day, and no longer to make spoil thereof, by Rasing, Earing, Cutting, and Subverting, Houses, Trees, Meadows, &c. But this is to be understood when a Tenant in Fee-simple is attainted, for where a Tenant in Tail, or Tenant for life, is attainted of Felony, there the Lord Protector will have the profits of the Land, during the life of the Tenant in Tail, or of the Tenant for life. *Co. 2 part, Inst*. 37.

Tame Beasts.

For Tame Beasts. See 37 H.8.6. 3 Ed.1.20.

CHAP. CLV.

Of a Testament.



Testament is the full and compleat declaration of a mans mind or last will of that he would have to be done after his death : It is in Latin *Testamentum*, i. *Testatis mentis*, the witness of a mans mind ; and to devise by Testament, is to speak by a mans Will what his mind is to have done after his death : And this is sometimes called a Will, or last Will ; for these words are *Synonima*, and are as it seems promiscuously used in our Law : yet most properly, a Will is of Land, and a Testa-

1. Testament.
what.

ment requires Executors. Howsoever by the Civil Law, it is then only said to be a Testament when there is an Executor made and named in it ; and when there is none but a Codicill only ; for a Codicill is the same that a Testament is, but that it is without an Executor ; and a man can make but one Testament that shall take effect, but he may make as many Codicills as he Will. And by the Common Law where Lands or Tenements are devised in writing, albeit there be no Executor named, yet there is properly called a last Will, and where it doth concerne Chattels only, a Testament. He that doth make the Testament is called the Testator ; and when a man dieth without Will, he is said to die intestate. *Terms of the Law*, Bro. *sett.* 360. *Co. super Lit.* 111. *Swinb. of Wills* 24.

Codicil. what.

Testator.
Intestate:

Of Testaments there be two sorts, namely a Testament in writing or a written Testament, which is, where the minde of the Testator in his life time, by himself or some other, by his appointment, is put in writing. And a Testament by word or without writing, which is, where a man is sick, and for fear least death or want of memory, or speech, should surprize him, that he should be prevented if he stayed the writing of his Testament, desireth his neighbours and friends to bear witness of his last Will, and then declareth the same presently by words before them ; And this is called a *Nuncupative*, or *Nuncupatorie* Testament : And this being after his death proved by Witnesses, and put in writing by the Ordinary, is of as great force for any other thing but Land, as when at the first in the life of the Testator it is put in writing. A Codicill also is in writing, or by word as a Testament is : The Civilians have other divisions of Wills and Testaments, as solemn and unsolemn, privileged and unprivileged, whereof the Common Law maketh no mention. *Perk. sett.* 476. *Co. super Lit.* 111.

The kinds.

Nuncupative.

The parts of every compleat Testament whereof it doth consist, are two.

1. The making of Devise, or giving of Legacies. 2. The making and Ordination of an Executor ; for a Testament can be no more without, then a Codicill can be with an Executor. *Terms of the Law*, *tit. Devise. Co. super Litt.* 111. *Swinb. lib. 1. c. 7.*

2 The Parts
of it.
Devise or Le-
gacy, what.

A Devise or Legacy is where a man in his Testament doth give any thing to another ; the first of these Terms is properly applied to the gift of Lands, and the last to the gift of goods or chattels : and therefore a Devise strictly is said to be where a man in his Testament doth give his lands to another after his decease ; and a Legacy is said to be where a man in his Testament doth give any chattell to another to have after the death of the Testator ; but the word is promiscuously applied to the one and to the other. And he that gives by such a Will is called the Devisor, and he to whom the thing is given, the Devisee or Legatee.

Devisor, De-
visee, or Le-
gatee.

And a devise is sometimes simple and without condition, as where I give my land to another and his heires, or I give 20l. to another, without more words. And sometimes it is with a condition, which is when there is a quality added to the devise or legacy, whereby the effect of it suspended or hindered, and it is thereby made to depend on some future event.

Quotuplex.

Conditionall
Devise.

And this condition in this case may be made almost by any words, as if I give to one

Cccccc 2

my

my land if he pay 20l. to my Daughter, or so as he pay 20l. to my Daughter, or paying 20l. to my Daughter, or I give one 20l. if he marry my Daughter, or when he shall marry my Daughter, or I give my Wife 20l. a year whiles she shall live unmarried, or I give to him, or to whomsoever shall marry my Daughter 20l. or the like; in all these cases the devise is conditionall. The first kind of devise is called by the *Civilians* a simple assignation, and the latter a conditionall assignation. *Dyer* 317. 74. *Co. super Lis.* 217. *Swinb.* 132. 134. 136.

Executor
what.

Ordinary.

Administrator

Quintuplex.

Represent the
person of the
Testator.

An Executor in a large sense is taken for any one that is appointed to have the disposition and ordering of the goods and chattels of a man that is dead. And so there are three kinds of Executors: the first is *a lege constitutus*, who is therefore called *legitimus*, and such a one is the Ordinary of the Dioceses who hath ordinary Jurisdiction in matters Ecclesiasticall: the second is *a Testatore constitutus*, who is therefore called *Testamentarius*, and he is strictly and properly called an Executor, and is defined to be one appointed by a mans last Will and Testament to have the disposing and administration of all or part of a mans goods and chattels, and to perform a mans last Will and Testament according to the contents thereof: the third is *ab Episcopo constitutus* who is therefore said to be *Datus*. And such a one is an Administrator, who is defined to be one that hath the goods and chattels of a man dying intestate committed to his charge by the Ordinary for want of an Executor. And his power, benefit and charge is in all things equal to the power, benefit, and charge of an Executor. *New Terms of the Law. Co.* 8. 135, *Plow.* 288. *Co. super Litt.* 209: *Co.* 9. 40.

The Executor and Administrator also is sometimes universall or totall, i. one that hath the power and disposition of the whole personall estate committed to him. And sometimes he is particular or partiall, i. one that hath the power and disposition of some part of the estate, or of all the estate for a time only committed to him. And sometimes he is absolute, i. such a one that hath an absolute power of the estate, as Executor or Administrator, and sometimes he is conditionall, i. one that hath a limited and conditionall power of the estate only. And in both cases he shall be charged and chargeable for so much as is committed to him as the Testator or intestate himselfe: for this cause the Executor is said to represent the person of the Testator; for as to the estate committed to his trust he may charge others, and be charged himself, sue and be sued, as the Testator himself might. And the estate be hath by his Executorship is said to be in him to the use of the Testator and in his right: and that he doth in the disposition of his estate is said to be in the right and to the use of the Testator also; And the Administrator hath the same power and property over and in the goods and chattels, the same remedy by Suit, and so far forth shall be charged as the Executor; for they differ not in nature, but in name only. And yet the Administrator is but the Ordinaries deputy, and he may revoke the Administration, or call the Administrator to an account. *Dyer* 4. *Bro. Executor* 135. *Co.* 6. 19. *Co. super Lis.* 209; *Stat.* 31 *Ed.* 3. c. 11: *Co.* 9. 40. 8. 135.

3. The nature
and effect of a
Testament,
and of a Co-
dicill.

A Testament is of that nature that it doth much differ from other acts and deeds that men doe and execute in their life times: for albeit it be made, sealed and published in never so solemn a manner, yet it hath no life nor vertue in it untill the Testators death; for it is a Maxime in Law, *Omne Testamentum morte consummatum est, Et voluntas ambulatoria usque ad extremum vita exisum*; it is therefore resembled untill death to the interlocutory sentence, and after death to the definitive sentence of a Judge. And hence it is said, *Sed legum servanda fides, suprema voluntas. Quod mandat fierique jubet parere necesse est.* *Swinb.* 12, *Dyer* 143: *Co. super Lis.* 112. *Litt. sect.* 168. *Co.* 4. 61. And for this cause a man may alter, or make void his will at his pleasure, and he may make as many new Wills and Testaments as he will, and there is no means under the Sun to barr a man of this liberty, *Litt. Bro. Sect.* 300. And the latter Testament doth always revoke and overthrow the former; but otherwise it is of a Codicill; *Litt. Sect.* 168. *Perk. sect.* 478. For a man may make as many of these as he will, and make no Testament at all; *Swinb.* 13. 14. or if he make a Testament he may afterwards make as many Codicils as he will, and one of them will not overthrow the other; for in the first case they must all be annexed to

the

the letters of Administration, and the Administrator must perform them, and in the latter case they must be all annexed to the Testament, and the Executor must take care to perform them. *Bro. Testament* 20.

A Testament therefore is said to have three degrees.

1. An Inception, which is the making of it.

2. A Progression, which is the publication of it.

3. A Consummation, which is the death of the Testator, *Plow.* 343: 344:

In grants therefore, the first is of greatest force, but in Testaments the last is of greatest force.

But when a Testament is perfect by the death of the party, it doth as effectually give and transfer estates and alter the property of lands and goods, as acts executed by deed in the life time of the parties. *Co super Litt.* 1. for hereby descents of lands are prevented, and a man may make estates in Fee-simple, Fee-tail, for life, or years, of Lands, Tenements, Rents, Reversions, or services as effectually as by Deed; and these estates also will be good without any Livery of Seisin, or Attournement. And hereby also Rents, and power to distraine for them may be reserved: conditions created and annexed to estates, or things devised. *Lit. Sess.* 167. 168.

And therefore they that take by devises of Lands, are said to take in the nature of purchasers. *Perk. Sect.* 505. And if therefore a Tenant in Tail make a Feoffment to the use of himself in Fee, and after devise the same land to his Wife in Fee, and die; the son is not remitted, though the Father die seised: for the devise doth prevent the descent. *Dyer* 221:

To the making of every good Testament, these things are requisite. *Co.* 6. 3.

1. That the Testator be a person able to make a Testament, and not disabled for any speciall cause, either in respect of his person, mind or condition, or in respect of the thing whereof the Testament is to be made. And for this it must be known.

That a Woman that hath a Husband, cannot make a Testament of her Land or Goods, except it be in some speciall cases; for of her Lands she can make no Testament with, or without her Husbonds consent (*Stat.* 32. & 34 *H.* 8. c. 5. *Co.* 4. 51. *Bro. Testament* 13) of the Goods and Chattels she hath as Executrix to any other, she may make an Executor without her Husbonds consent; for if she do not so, the Administration of them must be granted to the next of kin to the deceased Testator, and shall not go to the Husband, (*12 H.* 7. 14. *Perk. Sess.* 501: *Fitz. Executor* 40.) but of them she can make no devise with or without her Husbonds leave, for they are not devisable; and if she do devise them, the devise is void. And of the things due to the wife whereof she was not possessed during the marriage, as things in action and the like, it seemes she may make her Testament, at least she may make her Husband Executor; of her Paraphernalia. *Plow.* 526. *Fitz. Executor* 109. viz. her necessary wearing apparell, being that which is fit for one of her rank: some say she may make a Testament without her Husbonds leave, others doubt of this, howbeit all agree that she and not his Executor shall have this after her Husbonds death, and that the Husband cannot give it away from her. And of the goods and chattels her Husband hath, either by her or otherwise, she may not make a Testament without the licence and consent of her Husband first had so to do. But with his leave and consent she may make a Testament of his goods, and make him her Executor if she will. *12 H.* 7. 24. 18 *Ed.* 4. 11. *Perk. Sect.* 501. *Fitz. Executor* 5. 28. 109. *Bro. Testament* 11.

And it is said also, that if she do make a Testament of his Goods (in truth without his leave and consent) and he after her death suffer the Will to be proved, and deliver the goods accordingly; in this case the Testament is good.

And yet if the Husband give his Wife leave to make a Testament of his goods, and she do so, he may revoke the same at any time in her life time, or after her death before the Will be proved.

But a Woman after contract with any man, may before the marriage make a Testament as well as any other, and is not at all disabled hereby.

4. What shall be said a good and a sufficient Testament Or not.

First, in respect of the person that doth make it, and the thing whereof it is made. And what Persons may make a Testament, And of what things, or not And how. A Feme Covert.

An Infant.

An Infant untill he be of the age of 21 years can make no Testament of his lands by the Statutes of 32 & 34 H. 8. But by speciall custome in some places where land is devisable by custome he may devise it sooner. And of his goods and chattels, if he be a boy, he may make a Testament at fourteen years of age and not before; and if a Maid, at twelve years of age and not before; and then they may do it without, and against the consent of their Tutor, Father, or Guardian, *Stat. 32 Ed. 34. H. 8. cap. 5. Perk. Sect. 503. 504. Br. Customs 50. Swinb. 37, 38.* And yet some say an Infant cannot make a Testament of his goods and chattels untill he be eighteen years of age. *Co. super Lis. 89.* A mad or lunatick person during the time of his insanity of mind cannot make a Testament of Lands or goods; but such a one as hath his *lucida intervalla*, cleer or calm intermissions, may during the time of such quietness and freedom of mind make his Testament, and it will be good. So also an Idiote i. such a one as cannot number twenty, or tell what age he is, or the like, cannot make a Testament, or dispose of his lands or goods; and albeit he doe make a wise, reasonable, and sensible Testament, yet is the Testament void. *Perk. Sect. 503, 504. 24. Swinb. 37. 40 Swinb. 39. 40 Swinb. 42.* But such a one as is of a meane understanding only, that hath *grossum caput*, and is of the middle sort between a wise man and a fool, is not prohibited to make a Testament. So also an old man that by reason of his great age is childish againe, or so forgetfull that he doth forget his own name, cannot make a Testament; for a Testament made by such a one is void. So also it seemes a drunken man, that is so excessively drunk, that he is deprived of the use of reason and understanding, during that time, may not make a Testament, for it is requisite when the Testator doth make his Will, that he be of sound and perfect memory, i. e. that he have a reasonable memory and understanding to dispose of his estate with reason, *Co. 6. 23. Hill. 3 Car. per the Lord Keeper in the Chancery.*

A Lunaticks person.

An Idiot.

An old man.

A deafe and dumb man.

An alien.

A Traitor.

A Felon.

A Felo de se.
An outlawed person.

A Corporation.

A Villaine?

A man that is both deafe and dumb, and that is so by nature, cannot make a Testament. But a man that is so by accident, may by writing or signes make a Testament. And so may a man that is deafe or dumb by nature or accident. And so also may a man that is blind. *Swinb. 53.* An alien born cannot make a Testament of Lands or goods. A man that is entred into Religion, cannot make a Testament. *Curia. B. R. 7 Jac.* A Traitor attainted from the time of the Treason committed can make no Testament of his Lands or Goods; for they are all forfeit to the King; but after the time he hath a pardon from the King for his offence, he may make a Testament of his Lands or Goods as another man. A man that is attainted or convict of Felony cannot make a Testament of his Lands or Goods, for they are forfeit; but if a man be only indicted, and die before attainder, his Testament is good for his Lands and goods both. And if he be indicted and will not answer upon his arraignment, but standeth mute, &c. in this case his Lands are not forfeit, and therefore it seemes he may make a Testament of them. And if a man kill himself, his Testament as to his Goods and Chattels is void, but as to his Lands is good, *Stat. 5. & 6. Ed. 6. c. 11. Swinb. 54 Prerogativa Regis. Plow. 258. 259. Plow. 261.*

A man that is outlawed in a personall action cannot make a Testament of his Goods and Chattels so long as the outlawry doth continue in force; but of his Lands he may make a Testament. The head, or any of the members of a corporation may not make a Testament of his Lands or Goods they have in Common, for they shall goe in succession. A Villaine cannot make a Testament of his Lands or Goods after the Lord hath seised them. But here note, that howsoever the Testaments of Traitors, Aliens, Felons, Out-lawed persons, and Villaines, be void as to the King, or Lord that hath right to the Lands or Goods by forfeiture or otherwise, yet it seems the Testament is good against the Testator himself, and all others but such persons only. And here note further also. By the Civill Law also the Testaments of divers others, as Excommunicate persons, Hereticks, Usurers, Incestuous persons, Sodomites, Libellers, and the like, are void. But by our law, the Testaments of such persons, at least as to their lands, are good by the Statutes that do enable men to devise their lands. *Fitz. Dec. 16. Fitz. Testaments 1. Swinb. 155, &c. 32. & 34 H. 8. Perk. Sect. 490.*

But

But all other persons whatsoever, Male or Female, old or young, lay or spiritual, Rich or Poor) at any time before their death whilst they are able to speak so distinctly, or write so plainly as another may understand them; and understand that they understand themselves, may make Testaments of their Lands, Goods, and Chattels, and that albeit they have sworn to the contrary: and none are restrained of this liberty, but such as are before named. See more *infra* to this matter, and *Capacities*, *testificandi* in bevelde ad discedendū wā. l. c. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

The second thing required to the making of a good Testament is, that he that doth make it have at the time of the making of it, *animus testandi*, a mind so disposed, a firme resolution and advised determination to make a Testament; otherwise the Testament will be void; for it is the mind and the words of the Testator that doth give life to the Testament; for if a man rashly, unadvisedly, incidently, jestingly, or boastingly, and not seriously write or say that such a one shall be his Executor, or have all his goods, or that he will give to such a one such a thing; this is no Testament, nor to be regarded. And the mind of the Testator herein is to be discovered by circumstances; for if at the time he be sick, or see himself seriously to make his Testament, or require witnesses to be witnesses of it, it shall be deemed in earnest; but if it be by way of discourse only, or of something he would do hereafter, or the like, it shall be taken for nothing; *See more infra* at Numb. 7. 1. 2. 3. 4. 5. 6. 7. 8. 9. 10. 11. 12. 13. 14. 15. 16. 17. 18. 19. 20. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.

Secondly, in respect of the mind of him that doth make it.

The third thing required in a good Testament, is, that the mind of the Testator in the making of it be free, and not moved by fear, fraud, or flattery; for when a Testator is moved to make his Testament by fear, or circumvented by fraud, or overcome by some immoderate flattery; the same is void, or at least voidable by exception. And therefore if a man by occasion of some present fear, or violence, or threatening of future evils do at the same time, or afterwards by the same motive make a Testament: this Testament is void, not only as to him that put him so in fear, but as to all others; albeit the Testator confirm it with an oath. But if the cause of fear be some vain matter, or being weighed is removed, and the Testator doth afterwards when the fear is past, confirm the Testament; in this case perhaps the Testament may be good. And if a man by occasion of some fraud or deceit be moved to make a Testament, if the deceit be such as may move a prudent man or woman, and if it be evil also, the Testament is void, or voidable at the least; but if the deceit be light and small, or if it be to a good end, as where a man is about to give all his estate to some lewd person from his wife and children, and they persuade the Testator that the lewd fellow is dead, or the like, and thereby procure him to give his estate to them; this is a good Testament. And one may by honest intercessions & modest persuasions procure another to make himself or a stranger Executor to him, or the like, and this will not hurt the Testament. Also a man may use fair and flattering speeches to move the Testator to make his Testament, and to give his estate unto himself, or some friend of his, except it be in case where the flatterer doth first beate or threaten him, or put him in fear, or to his flattery joineth fraud and deceit, or the Testator is a person of weak judgement, or under the danger or government of the flatterer, as when the Physician shall persuade his Patient under his hands to make his Testament, and give his estate to himself; or the wife attending on her Husband in his sickness shall neglect him, and continually provoke him to give her all, or where the persuader is importunate and will have no denial, or when there is another Testament made before; for in all these cases the Testament will be in danger to be avoided. And if I be much privie to another mans mind, and he tell me often in his health how he doth intend to settle his estate, and he being sick, I doe of mine own head draw a will according to his mind, before declared to me, and bring it to him, and ask him whether this shall be his will or no, and he doth consider of it, and then deliver him back to me, and say yea; this is a good Testament: But if otherwise, some friends of a sick man of their own heads, shall make a Will and bring it to a man in extremity of sickness, and read it to him, and ask him whether this shall be his Will, and he say yea, yea: Or if a man be in great extremity of sickness; and read it to him, and ask him whether this shall be his Will, and

Thirdly, in respect of the occasion or motive of it.

and he say yea or nay. Or if a man be in great extremity, and his friends prohibit much, and so wrest words from him, especially if it be in advantage of them, or some friends of theirs; in these cases the Testaments are very suspicious. But as touching these two last things, *Quære* how they shall avayle in the Wills of Lands which are not regulated so much by the Civill Law.

Fourthly, in respect of the manner, and form of the disposition. First, naming of an Executor

The fourth thing required in the making of a good Testament, is, that that form and order that the Law prescribeth be observed in the disposition. *Symb. 112. Bro. Test. 21. 22. 23. 24. 25. 26. 27. 28. 29. 30. 31. 32. 33. 34. 35. 36. 37. 38. 39. 40. 41. 42. 43. 44. 45. 46. 47. 48. 49. 50. 51. 52. 53. 54. 55. 56. 57. 58. 59. 60. 61. 62. 63. 64. 65. 66. 67. 68. 69. 70. 71. 72. 73. 74. 75. 76. 77. 78. 79. 80. 81. 82. 83. 84. 85. 86. 87. 88. 89. 90. 91. 92. 93. 94. 95. 96. 97. 98. 99. 100.*

And therefore, that there be an Executor named in all Testaments of Goods and Chattels, and that that Executor named be capable of the Executorship; for this is said to be the head and foundation of the Testament; for if there be never so many Legacies given, and no Executor made, this disposition is but a Codicill, and cannot properly be called a Testament; for in this case the party dead, is said to die intestate and the Administration of his goods must be granted to the Widow or next of kin; whereas on the other side, if an Executor be appointed, albeit there be no Legacy given, yet this disposition is, and is properly said, to be a Testament.

Secondly, if it be of Lands, it must be in writing.

If the Testament be of Lands or Tenements, it must be in writing, and it must be committed to writing at the time of the making thereof: And it is not sufficient, that it be put in writing after the death of the Testator, being first made by word of mouth only, for then it is but *Nuncupative* still.

But if the Testament be first made by word of mouth, and be afterwards written, and then brought to the Testator, and he approve it for his Testament: Or if the Testator, when he doth declare his mind, doth appoint that the same shall be written, and thereupon the same is written accordingly in the life time of the Testator; these are good Testaments of Land, and as good as if they be written, at the first. *Stat. 32. & 34 H. 8. Perk. fol. 476. 477. Dier 72. Plow. 345. Co. 4. 60. Dier 53.*

If therefore one be very sick, and another come to him, and ask him whether his wife shall have his Land, and he say yea, and a Clerk being present doth put this in writing without any precedent commandement or subsequent allowance of the sick man; this is no good Testament of the Land.

So if one declare his whole mind before Witnesses, and send for a Notary to write it, and die before he come, and he write it after his death; this is no good Testament for his Lands, but a good *Nuncupative* Will for his Goods and Chattels, except he declare his mind to be that it shall not be his will unless it be put in, writing, for then perhaps it may not be a good wil for his goods and chattels.

So if he that doth write the will cannot hear the party speak, and another that stands by the sick man doth tell him what he doth say; in this case if there be none others present to prove that he reported the very words of the sick man; this will be no good Testament of the Land.

But if a Notary take direction from the sick man for his VWill, and after goe away and write it, and then doth bring it again and read it to the Testator and he approve it: Or if it be written from his mouth by the Notary according to his mind; and his mind were to have it written, albeit it be not shewed or read to him afterwards; these are good Testaments.

So if the Notary doe only take certaine rude notes or directions from the sick man which he doth agree unto, and they be afterwards written faire in his life time, and not shewed to him againe, or not written faire untill after his death; these are good Testaments of Lands.

If a sick man bid the Notary make a Testament of his Lands, but doth not tell him how, and the Notary make a devise of it after his own minde; this is no good Testament; and yet if it be after read unto, and approved by the Testator, it may be good.

And so if a Testament be found written in the Testators house, and not known by whom, and it be read unto, and approved by the Testator; this is now a good Testament in writing for Lands and goods. *Adjudged Trin. 20. 7. as.*

3. Uses of lands before the Statute of uses, might, and lands and tenements devisable by Custome, and goods and chattels may be disposed by word without writing, and such Testaments of such things so made are good. 4. It is not material in what matter or stuff, whether in paper or parchment, nor in what language, whether in Latin, French, or any other tongue, nor in what hand, or letters, whether in Secretary hand, Roman hand, or Court hand, or in any other hand a Testament be written, so it be fair and legible, that it may be read and understood: Neither is it material whether the same be written at large, or by notes, or characters usual or unusual, as xx^s for twenty shillings, or when the figure (2) is used in stead of the letter A, if it be usual in the Testators writing, or the like; for the Testament is good notwithstanding. So also if some words be omitted, or sentences improper used, when the intent and meaning is apparent, as where a man saith [I make my wife of this my last Will and Testament] leaving out the word [Executrix] yet the Testament is good, and this shall be understood: But if it be so done as it cannot be read, or by reading the minde of the Testator cannot be known, then is the Testament voyd and of no force. In like manner as a *Nuncupative* Will is, when the words spoken, are so ambiguous, obscure, and uncertain, that thereby the meaning of the Testator cannot be known nor understood. *Swinb. part. 4. Sect. 25, 26.*

5. Where writing is needfull (as in the case of disposition of land it is) there sealing of the Testament, or subscribing of the Testators name is not necessary. And therefore if a man by himself or another, do make a Testament of his land, and do not put his Seal or name to it, if he agree to it, this is a sufficient Testament. *Perk. 476, 477. March. Rep. f. 206. pl. 245.*

6. If whiles the Testator is making his Will, and whiles he intendeth to proceed further at that time either by adding, diminishing, or altering, he be suddenly stricken with sickness or insanity of minde whereby he cannot proceed, but gives it over in the midst, and so he dye; it seems in this case the whole Will is voyd, *Swinb. 6. Lit. Broo. Sect. 300. Swinb. part. 7. Sect. 10. Coov. 3. 31.* And yet if a man begin his Will, and make perfect Devise to one, and then of himself give over untill another time: or if a man make a perfect Devise to one, and then dye before he can make any Devise to any others, it seems these are good Testaments for as much as is done. And therefore it is said if one command another to make his Will, and by it to devise White Acre to *IS* and his heirs, and Black Acre to *IN* and his heirs, and he write the Devise to *IS* and his heirs, and the Testator dye before he can write the Devise to *IN* and his heirs; this is a good Devise to *IS*, but a voyd Devise to *IN* and his heirs. But if a man bid the Notary write a Devise of his land to *IS* upon condition, and the Notary write the Devise to *IS*, but the Testator dyeth before he can write the condition; in this case the whole Devise is voyd, *Brownlows Rep. 1. part. 44.* But a man may, if he please, make a Testament of part of his goods, and dye intestate for the rest, and that disposition he doth make is good for so much, *Swinb. 188.*

7. The last thing required to the perfection of a Testament, is, that it be proved; for if it be never so well made, and be in truth the Testament of the Testator, yet if it cannot be by proof made to appear so, it is but a voyd Testament, and of no force at all. And therefore herein these things are to be known:

1. That a *Nuncupative* Testament must be proved by two Witnesses at the least, and those must be such as are without exception, *Swinb. part. 7. Sect. 13. part. 4. Sect. 25.*

2. A written Testament when it is written with the Testators own hand, doth prove and approve it self, and therefore needs not the help of Witnesses to prove it. And for this cause, if a mans Testament be found written fair and perfect with his own hand after his death, albeit it be not subscribed with his name, sealed with his Seal, or have any Witnesses to it; if it be known or can be proved to be his hand, it is held to be a good Testament and a sufficient proof of it self; but if it be sealed with the Seal, and subscribed by the name of the Testator, and can be proved by Witnesses, it is the more authentique. And when it is found

Thirdly, uses and lands by custome, and chattels devisable without writing.

Fourthly, the matter or hand wherein it is written.

Fifthly, sealing and subscribing the Testators name not needfull.

Sixthly, interruption in the making of the Will.

Seventhly, in respect of the proof of it, and what shall be said a sufficient proof of a Testament, or not.

amongst the choyce evidences of the Testator, or fast locked up in a safe place, it is the more esteemed; for if it be written in another hand, and the Testators hand and Seal, or one of them not to it, albeit it be found in such a place as before, yet some proof will be expected of it further by Witnesses in that case. And if a writing be found under the Testators own hand, yet if it be but a scribbled writing, written Copie-wise, with a great distance between every line without any date, in strange characters, with many interlinings, and lying amongst his voyd papers, or the like; this will not be esteemed a sufficient Testament, nor a good proof of it; but it shall be accounted rather a draught or image of the Testators Will for a direction to him after to make his Will by: And yet if it can be proved that the Testator did declare himself that this should be his Will; this will be a good Testament, and a good proof of it.

3. If it be proved the Testator said his Testament was in such a Schedule in the hands of *IS*, and *IS* produce a writing deposing it to be the same; it seems this is a sufficient proof: but if he say withall, it is written with his own hand, then it seems some other proof, as by comparing hands, or the like, that it is his hand, wherein it is written, will be expected.

4. If the Witnesses will prove the writing produced to be the last Will of the Testator, or that he said it was, or it should be his last Will, or that it is the same writing that was shewed unto them, and whereunto they are Witnesses, albeit they never heard it read, or set their hands to it, it is a sufficient proof. And a Will may be proved by Witnesses for Goods though it be not to be shewed: but if any tampering were with the Witnesses, it will be dangerous. 5. All persons, male and female, rich and poor, are esteemed competent Witnesses to prove a Will, save onely such as are infamous, as perjured persons, and the like; and such as want understanding and judgement, as children, infants, and the like; and such as are presumed to bear affection, as kindred, tenants, servants, and the like, *Swinb. part. 4. Sect. 21.* A Legatee is reputed a competent Witness to prove any other part of the Will but his own Legacy, or to prove any thing against himself touching his own Legacy, but not otherwise. And therefore, where there be but two Witnesses of a Will, wherein either of them hath somewhat bequeathed unto himself, this Will cannot be sufficiently proved for those Legacies; but for the rest of the Will it may be sufficiently proved.

6. Where there is no question nor opposition moved or had about, or against a Testament, there the Oath of the Executor alone is esteemed a sufficient proof of it, and in that case regularly no other proof is required. And where more proof is necessary, as in the cases before, it is in the discretion of the Ordinary, what proof to admit and allow: And those Witnesses for number, nature, and quality; or that other proof that he doth deem and accept for sufficient, is sufficient; and the Testament so proved by such Witnesses, or other proof, is sufficiently proved. And of this question, see more *infra*, at *unmb. 7.*

5. Where, and how a Testament good in his beginning, may become voyd by matter *ex post facto*, or not.

By Countermand or Revocation.

A Testament sufficient and good in his creation and beginning, may afterwards become voyd by divers means; as 1. By Countermand or Revocation, and this is sometimes by the party himself that made it, and sometimes it is by another: And sometimes it is exprels, and sometimes it is implied; for it is a Rule, That any act or thing done, or words spoken by the Testator after the Testament made, that doth alter or cross all or part of his Testament made before, is a Revocation of it, or of that part thereof that is so crossed and altered, *Co. 4. 61. Litt. Sect. 168. Plow. 344, 341. Swinb. part. 7. Sect. 14, 15. Perk. Sect. 473. Co. 3. 36. 8. 82, 83.* And therefore if a Feme Covert make a Testament, and after take a husband, by this the Testament is revoked. And if a man make a Testament of land, and after make a Feoffment of the same land, which Feoffment is not good for some defect in the Livery of Seisin or otherwise, so that the Feoffer dyeth seized of the land notwithstanding; hereby the Testament as to this land is revoked. If seized of land, deviseth it by VVill to *I. D.* and after makes a Feoffment of this land; and when he comes to seal it, he saith, will not this hurt my VVill? to which was answered, no: then said he, I will seal it, and so he did, and a Letter of

of Attorney to make Livery, which was made in part of the land; in this case it was agreed to be no Revocation of the VWill for the residue wherein no Livery was made, *Goldf. 33. pl. 7.* If one had made a VWill in writing, and after say of it, it shall not be his VWill, this is a Revocation: But if one hath made a VWill, and another comes to him, and sayes, have you made your VWill? and he saith, no; and he saith, will you make your VWill? and he saith, no; yet this is no Revocation, *Adjudge. Goldf. 33. pl. 7.* So if a man make a latter Testament, and therein by expresse words doth revoke the former Testament; or if a man by any writing, or by word of mouth (for one may by word of mouth revoke a Will in writing, albeit it be of land, *Dyer 310. 34. Eliz. B. R. Burton's Case. Goldf. 33. pl. 7.*) do expressly revoke a former Testament that he hath made, and make no new Testament (for so a man may do and dye intestate, if he will:) or if a man make a latter Testament, and make no mention of the former Testament; all these are Countermands of the former Testament. And the latter Testament doth alwayes revoke the former; and that albeit the Executor of the latter do refuse the Executorship, or dye during the life of the Testator, or after his death; and albeit the King be made Executor of the former; and albeit the former be a written, and the latter but a *Nuncupative* Testament; and this holdeth true in a Testament of lands, as well as in a Testament of Goods and Chattels; but otherwise it is *à converso*; for however a man may by word avoyd a VWill made in writing that is good, yet a man cannot by word make good and affirm a VWill made in writing that is voyd: And therefore if a man devise his land in writing to *I. S.* and his heirs; and *I. S.* dye before the Devisor; and after the Devisor say by word, That the heirs of *I. S.* shall have the land, as *I. S.* should have had if he had lived; this verbal declaration will not affirm the disposition. Also, the latter Testament doth infringe the former; albeit there be no mention made in the latter of revoking of the former; and albeit there be twenty VWitnesses of the former, and but two or none of the latter; and albeit in the former, the Executor be appointed simply, and without condition; and in the latter, he be appointed conditionally, and the same condition be also broken, so that the condition be of something then to come at the time when the condition was made: but if the Executor of the latter Testament be made upon some condition then present or past, the condition not existing; the former Testament is not revoked; and albeit the former Testament be made irrevocable, *i. e.* that the Testator say, I make this my last VWill and Testament irrevocable; and albeit the Testator hath sworn not to revoke the former, the Oath being also revoked together with the Testament; and albeit the Testator enter into an Obligation, with condition not to revoke it, but then in this case he doth forfeit his Obligation. But the latter Testament doth not revoke the former in these cases following, *i. e.* when the latter is imperfect in respect of VWill, *i. e.* when the Testator dyeth whiles he is making of it, and before he can finish it, or when it is vehemently suspected that the Testator was compelled to make the latter by fear or violence, or induced to make it by fraud and deceit, or when the former was made by the Testator whiles he was in his good and perfect minde and memory, and the latter is made by him when he is *inopmentis*, or when the latter is made by the perswasion and for the benefit of certain persons, when the Testator is in extremity of sickness, unless it appear plainly to be the expresse Will of the Testator to revoke the former, or unles the Testator himself did dictate the latter, or in case the latter be in favour of the children of the Testator, or others who are to have the Administration of his goods if he dye intestate. 2. When the Testator doth make two Testaments, a former and a latter, both being written, and afterwards lying sick upon his death-bed, they are both presented unto him, and he is desired to deliver to one of the standers by, which of them he will have to stand for his last Will, and he deliver the former. 3. When the latter doth agree in all points with the former, for then both of them are as one in divers writings. 4. When in the latter Testament there is no Executor named, for then it is but a Codicil or

D d d d d 2

addition

Secondly, by
cancelling of
it.

addition to the former. 5. When the latter is made upon some sudden discontent against the Executor of the former Testament, and afterwards he and the Executor are reconciled again; in these and such like cases, the latter Testament is no Revocation of the former. If the husband license his wife to make a Testament, and after her death he forbid the Probate, this is a Countermand of the Testament, *Lit. Broo. 55*. But note here, that Revocations in general are not favoured in Law, and therefore he that will avoyd a sonner Will by Revocation, must see he prove it well. 2. A good Testament may become voyd by cancelling or other destruction of it, as where the Testator himself, or some other by his commandment, doth cut, or tear it in peices, deface it, or cast it into the fire; by this means the Testament is made voyd, except it be in case where the Testator doth it unadvisedly, or it be done by some other without his consent, or by some casualty, or when he doth willingly pull away the Seals, and then he doth afterwards seal it again; or where the whole Testament is not cancelled or defaced, but some or the chief part thereof, as the naming of the Executor, or the like; for it is good still for the residue; or where there be several papers, or writings, of one, ten, or each of them, containing the whole Testament, the cancelling or defacing of some of them doth not hurt the Testament, unless it can be proved that the Testators minde was to avoyd it all, or where the Testament is lost in the life time of the Testator, or after; for in this case so much as can be proved by Witnesses is still in force, *Swinh. lib. 7. part. Sect. 16*.

Thirdly, by al-
teration of the
estate of the
Testator.

3. A good Testament may become voyd by alteration of the estate of the Testator; as when a man after the time of making the Testament, and before his death is convicted or condemned of some great crime, for the which the Law depriveth him of the making of a Testament, as Treason, Felony, or the like. And yet if the crime be pardoned and purged before his death, the Testament may be good enough. And if a man of sane and perfect memory make his Testament, and after become *inco's memis*, as every man for the most part is before his death, this doth not hurt the Testament. *Swinh. part. 7. Sect. 17. Coe. 4. 62*.

Fourthly, by
intention to
alter it.

4. A good Testament may become voyd by an intention onely to alter it when the Testator is hindered in his intention that it cannot take effect: And therefore if when the Testator intendeth to alter his Testament, or to make a new one, he be by fear or fraud forbidden or letten, that he dare not or cannot alter it, or the Notary or Witnesses dare not, or may not be suffered to come to him; as when a wife or some other that is to have a benefit by the former Will, under pretence that she hath a charge from the Physician that none shall come at him, or under pretence that he is asleep, or the like, will not suffer any body to come at him; or when the Notary and Witnesses are all present, and they make such a noyse or quarrelling, that they hinder the effect of his intent; or when the Testator is kept from doing it by importunate requests, and flattering perswasions; in all these cases, and by these means the former Testament may become voyd, *Swinh. part. 7. Sect. 18*. But if it appear the Testator hath no purpose to alter the Testament when he is let, as aforesaid; the fear is a vain fear, the Testator is prohibited at another time, and not the time when he doth intend to alter the Testament, but he hath sundry opportunities after that time to do it, and doth it not, or he is drawn onely by the fair speeches of a wife or friend, or by the weeping, or other trouble arising from the grief of the Legatary or Executor for the Testators sickness, onely he is disturbed; in these cases perhaps it may not be voyd. And where it is voyd by the prohibition of a Legatary onely, it is voyd for so much as doth concern him onely, and not for the rest of the Testament.

Fifthly, by
making ano-
ther of the
same date.

5. A good Testament may become voyd by making another of the same date; for if two Testaments be found after the death of the Testator, and it cannot be discerned or proved which was made former or latter; the one of them doth overthrow the other, and both of them are become voyd; except they be both to the same purpose, or one of them be made in favour to wife and children,

children, &c. and the other to strangers. *Swinb. part. 7. sect. 11. Perk. Sect. 479.* And yet in the first case also the Testator by declaration of his minde, which of them he will have to take effect, may make either of them good.

6. A good Testament may be made void by the declaration of the Testators minde, as if a man have two Testaments lying by him, the one made after the other, and they are both shewed or delivered to the Testator when he lyeth sick, and he by word or signe declare that he will have the former to stand; this declaration doth revoke the latter, and affirm the former. And where a man would revoke a Will for any of these causes, he must presently after the death of the Testator put in a *Caveat* or exception in that Court where the Will is to be proved, and thereupon proceed to question it; or by a prohibition in some cases he may stay the Probate in the Spirituall Court. See more *infra* at *Numb. 12.*

Sixthly, by the declaration of the Testator.

If a woman covert without the leave of her husband make a Testament of her husbands goods, and the husband doth after her death connive at the Probate, and deliver the goods accordingly, hereby the Testament of the wife is become good; but if an Infant or mad man make a Testament in the time of his Infancy or madness, and after the Infant or mad man become of full age, or sober, before his death; it seemes these Testaments are void. *Perk. Sect. 301. Coe. 1. 99. 2. 55.* And yet if the Infant at his full age, or the mad man when he is sober make a publication of this Testament, it may perhaps be good.

If a man make a former and a latter Will, and by this latter the former is revoked, and after the Testator declare himself that the former shall stand, by this the former that was void before, is now become good again. *Perk. Sect. 479. Coe. 4. 61. Plow. 344.* And yet if a man make a Will that is void, and it be proved after his death; this Probate will not make it good, but it doth remain void as it was before.

6. Where a Testament void or voidable in his Inception, may become good by some matter or accident *ex post facto.* And where not.

If a Feme sole make a Will, and then take a husband whereby the Will is countermanded, and so become void; if her husband die, so that she become sole again: this accident will not make the Will good again, but it doth remaine void still; but perhaps by a new publication after she doth become sole, it may become good again. See more *infra* at *Numb. 11.*

To the making of a good and sufficient Devise, these things are requisite.

What shall be said a good and sufficient Devise or Legacy, or not.

1. That there be a deviser, and he be a person able to devise, and that both in respect of the condition of his own person and of the thing whereof the Devise is made. See before at *Numb. 4.*

2. That there be a Devisee, and that he be a Person capable and able to receive the thing devised, either at the time when the Devise is made, or at least when the Devise is to take effect.

3. That the Devisor have at the time of the devise made *animus testandi*, i. e. a mind to make a devise.

4. That the Will of the Devisor be free, and not drawn or coerced by fraud, flattery, fear, or the like.

5. That the Devise be made in due manner and forme.

6. That the thing devised be a thing devisable.

7. That it be devised upon lawfull termes and conditions.

8. That there be words sufficient to make his mind known.

9. That it be proved after the death of the Devisor. *Perk. Sect. 406.* See before at *Numb. 4.* and after at *Numb. 17.*

First, in respect of matter touching the Devisor, and who may be a Devisor.

10. And if it be a Devise of land, it is further required that the Devisor be solely seised of the land, and not jointly seised with another; and that he be seised of an estate in Fee-simple; and that the Devise be in writing. And for the first of these it is to be known, that whosoever may make a Testament, may make a devise of the same thing of which he may make a Testament. *Et sic e converso.* And whosoever is disabled to make a Testament, is disabled to devise by such a Testament. And therefore Infants may not devise their lands untill they be 21 years of age, nor their goods and chattels untill they be 14 years of age (or as some say untill they be 18 years of age.) Women that have husbands, cannot devise their lands to their

Secondly, in respect of the matter touching the Devisee, And who may be a Devisee. And by what name,

their lands to their own husbands, or others, either by or without their husbands consent, albeit there be a custom to enable them thereunto; but all such devises are void. *Co. super Litt.* 112. 4. 61. *Bras. Devise* 32. And Spirituall persons, as Archbishops, Bishops, Deanes, Archdeacons, Prebends, Parsons, Vicars, or any member of a Corporation may not devise the Lands or Goods they have in the right of their Churches and Corporations. *Perk. Sett.* 496. And for the second thing, this is to be known.

1. That regularly whosoever may be a Grantee, may be a Devisee or Legatee. *Perk. Sett.* 503. 510. *Swinb.* 222. See *infra* at *Numb.* 18. And therefore a Devise made to any person or persons, male or female, children or strangers, bondmen or Freemen, Laymen or Clerks, Debtors or Creditors, Infants or men of full age, women sole or covert, Colledges, Universities, Corporations, or the like, are good. But it is said, that if any Legacy be given to an Heretick, Apostate, Traitor, Felon, Excommunicate person, Out-lawed person, Bastard, unlawfull Colledge, Libeller, Sodomite, Usurer, Recusant convict, it is void by the Civill Law, except it be in some speciall cases. And yet it seems a Devise of lands to any such person is good within the Statute of Villis. *Dyer* 303. 304. *B. R. Curia. Mic.* 3 *Ja.* A Devise to an Infant in the womb of its mother, at the time of the death of the Testator is void. *New Termes of the Law* tit. *Devise.* See *infra* *Numb.* 11. And yet if a man devise to such an Infant, and he happen to be born before the death of the Testator, it seems in this case the Devise is good; for it is a rule. That the Devisee must be capable of the thing devised at the time of the death of the Devisor; if it be then to take effect in possession, or if it be a remainder, he must be capable of it at the time when the remainder shall happen, or otherwise the Devise is void. *f. 9 Ja. B. R.* And a man may devise his lands, goods, or chattels, to his own wife, as well as to any other. *M.* 19 *Ja. Curia. B. R. Crumpe versus Rodie.*

Incertaincy.

Averment.

2. But he that may be thus a Devisee, and is capable of a thing devised, must be certainly named and described; for if a Devise be to a person altogether incertaine, the Devise is altogether void. And therefore if I give my land to my best friend, or to my best friends, these are void Devises. *Cor.* 6. 68. If one have two sonns of one name called *J. S.* and he devise to his son *J. S.* without any distinction; it seems this Devise is void for incertaincy; but in this case perhaps an averment which son is meant, may help. *Swinb.* 293, 294, 295, 296. So if one give to *J. S.* 20 l. and there be two or more of that name; this Devise is void, except it may be proved by so thing which of them he meant. So if one say in his Testament I give to one of the world 20 l. this Devise is void for incertaincy. So if one give him 20 l. whose name is written in a Schedule in the custody of such a man; and in truth there is no such Schedule in the custody of such a man to be found; or if there be no name written therein; it seems these Legacies are void for incertaincy. So if a man give a Legacy to a man incertaine, and no such man is to be found, and the meaning of the Testator cannot be known; this Devise is void. And yet if a man by his Will say thus, I devise to him that shall marry my daughter; this is a good Devise; and he that doth marry my daughter in my life-time, or after my death shall have it. And if a man devise any thing *ad pias causas*, as to the Church, or to the Poore, not expressing what Church or Poor; this perhaps may be a good Devise. So if a man gives 20 l. to his kindred; it is said this is a Good Devise, and that a reasonable exposition shall be made of it as near the intent of the Testator as may be, *viz.* that those in the next degree shall have it first, and then those in the next degree to that shall have it afterwards; and if it be a Devise to the kindred of another man, that they shall have it equally. *See quare* of this Devise, for it seems altogether uncertain.) So if a man give to *J. S.* or *J. D.* 20 l. this is held to be a good Devise, albeit it be somewhat incertain, and the disjunctive shall be taken for a copulative; and so *J. S.* and *J. D.* shall take both by this Devise; but if in this case one of them be nearer of kin than the other, then it is said, he shall have it for his life, and the other afterwards. *Swinb. part. 7. Sett.* 9. And if one devise 20 l. to *A.* or *B.* which of them *J. S.* will appoint; this is a good Devise, and he that *J. S.* shall appoint shall have it.

And

And if one devise to *J. S.* and his children; this is a good Devise and certain enough, and hereby he and his children shall take the thing devised together. *Plow. 345. Coe. 1. 105. 155. Perk. sect. 508.*

3. And as the person to whom the Devise is made, must be capable, and certainly described and named, so must he be capable by that name by which the Devise is made to him, or otherwise the Devise is void, and therefore if a Devise be to the heirs of *J. S. J. S.* being living; this Devise is void. And yet if lands or Goods be devised to the Executors of *J. S.* and *J. S.* die before the Testator, and make Executors; this is a good Devise to the Executors. And if a man devise his land to *J. S.* for life, the remainder to the next of kin, [or next of blood] of *J. S.*, this is a good Devise of the remainder. *Fitz. Devise 27. Plow. 523. Perk. sect. 509, 510 Broo. Corporation. 55.* And if a man devise goods to the Parishioners of the Parish of *S.*, to the use of the Church; this is a good Devise, and the Churchwardens may recover it. And if a man devise *Ecclesia sancta Andrea de Holborne*; it seems this is a good Devise to the Parson of that Church. And if a man devise to the City of London, University of Oxford, or to Queens Colledge in Oxford, these are good Devises. But if one devise to the Commonalty of a Guild that is not incorporate, as to two of the middle men of the Guild of the Fraternity of Whiteacres in London, or the like; this devise is void.

4. And if the person be capable, well named, and capable by that name, if his name be truly set down, yet if his name be not so, but mistaken, the Devise is void. And therefore if one intending to give 20 l. to *J. S.* devise to *J. N.* 20 l. this devise is void, both to *J. S.* and *J. N.* except the person be certainly denoted and described by some other circumstance, as to *J. N.* the son of *J. S.* my Landlord, or the like. *Dyer. 4. Perk. sect. 505. Swinb. 289, 290.* So if one devise to the Abbot of *S. Peter*, when the foundation is the Abbot of *S. Paul*; this Devise is void. And if one devise to a Corporation, and there be none of that name at the time of the Devise, nor during the life of the Testator, this Devise is void, and so also it seems the Law is, if there be a Colledge made after of that name. But if one devise a thing to the wife of *J. S.* and before the Devisor die, *J. S.* dye, and she take another husband, and is called by another name; yet this Devise is good. *Plow. 344.* So if one give a Legacy to *J. S.* Dean of *Pauls*, and the Chapter there and their Successors, and after before the death of the Devisor *J. S.* die, and another is made Dean; yet this Devise is good notwithstanding this mistake. For the third and fourth thing required in a good Devise, see before at *Numb. 4. Part. 2. 3. Broun. 1. part 13.*

And for the fifth thing; it is to be known,

1. That lands and tenements devisable by custome, may be devised by a Nuncupative Will without any writing for any time whatsoever, as Uses at the Common-Law that are now withing the Statute might have been. *Coe. super Litt. 111. Plow. 345. Swinb. part 1. sect. 12.* Also those Uses that remaine at the Common-Law, and are not within the Statute, may be devised by word without any writing. But no estate can be made of lands by Devise upon the Statute, except the Devise be in writing; and so a man may devise his land, albeit he make no Executor; for an Executor hath nothing to do with the Free-hold of land. Also Goods and Chattells, leases for years of Lands, Wards, Villaines, and the like may be devised by word without any writing at all. *Plow. 345. Swinb. part. 1. Sect. 12. Dyer 140.* And yet it seems questionable whether a Lease for years of a Rent, Common, or such like thing, be devisable by word without writing.

2. The forme of words in a Devise is not at all regarded; and therefore if one say, I give, institute, desire, appoint, or will, that *J. S.* shall have my land, or that *J. S.* shall have 20 l. or let *J. S.* have my land or 20 l. all these Devises are as good as if he say, I devise to *J. S.* my land or 20 l. *Swinb. part. 4. sect. 4. Plow. 23. Littl. Broo. sect. 316. Dyer 23.* And therefore if one at this day since the Statute of Uses devise that his Feoffees of the land shall be seized of the land to the use of *J. S.* and his heirs, or to the use of *J. S.* and the heirs of his body; or if such a man devise that his Feoffees shall make an estate of the land to *J. S.* and

Fifthly, in respect of matter touching the manner and forme of the Devise. And how a Devise may be made.

and his heirs, or to him and the heirs of his body; this is a good Devise of the land in Fee-simple, or Fee-tail. And if a man make a Feoffment of his land to the use of his last Will, and then devise that his Feoffees shall be seized to the use of J. S.; this is a good Devise of the land *per intentionem Pasche*. 9. *Jac. Newmans case*. And if I devise that J. S. shall have, hold, and occupy my land for his life; this is a good Devise of the land for his life. *Plow.* 546. *Coo.* 4. 66. 8. 95. If a man have a Lease for years for land, and he devise his Lease, or his Terme, or his Ferme, or the profits or occupation of the land; by either of these Devises his whole lease and all his interest in the land is given as well as by any other forme of words *Dyer* 122. 33. 128. *Coo.* 1. 83. 6. 42. *Dyer* 4. 33.

3. A man may devise lands, tenements, or hereditaments in possession in Fee, for life or years; or he may devise it in reversion, *viz.* to one for life, the remainder to another in Fee, or in tail, or in any other sort, as a man may grant it by his Deed, and such Devises are good. But if the Fee-simple of land be devised to one, the remainder cannot be devised to another, albeit the first Devise be but conditionall. And therefore if land be devised to J. S. and his heirs and if he dye without heirs, that it shall remain to J. N. & his heirs; this is a void remainder to J. N. So if a man devise his land to J. S. in Fee, *ita quod solvat J. N.* 20 l. and if he faile, that it shall remain to J. N. and his heirs, this remainder to J. N. is void; for if J. S. faile of payment, J. N. shall not enter and have the land, but the heir of the Devisor. And yet perhaps a rent may be devised after this manner. Howbeit if another man have a Rent-charge of 20 l. a year, issuing out of my land for 20. years; and he devise this unto me untill I have levied 100 l. by way of retainer, to J. S.; this remainder is not good. *Dyer* 139. 140.

Condition.

4. A Devise may be of Lands, Goods, or Chattels simply and absolutely or conditionally; the simple Devise also may be *in presenti*, or *in futuro*. And therefore as a Devise to one and his heirs *in presenti*, is good, so a Devise to one and his heirs after the death of J. S. is good. *Plow.* 523. *Perk. sect.* 163. See Condition *Coo.* 8. 95. If I devise land to J. S. and his heirs on condition, as so as, *ita quod*, he pay 10 l. to W. S. or paying to W. S. 10 l. or *ad solvendum* 10 l. to J. S.; the Devise in all these cases is a good conditionall Devise; and if the condition be not performed or broken, the estate is ended, and the heir may take advantage of it. And therefore if lands be so given to the heir, the condition is idle, because none can enter but him. And if I devise that, if J. S. pay my Executors 20 l. that he shall have White acre to him and his heirs for ever, or for life &c. this is a good Devise, and after the contingent shall take effect accordingly, and in this case and in such like the heir of the Devisor must keep the land untill till the contingent do happen. In like manner as if it be a chattell, the Executor shall keep the thing untill the condition be performed, and after a condition broken he shall take advantage of it.

Limitation.

5. A Devise may be also with a limitation, as in the cases before; and as, where one gives land to another, and his heirs so long as J. S. shall have heirs of his body; or where one doth devise his land to A his son and his heirs for ever, paying to B his brother 20 l. when he shall come of age, and then that he shall enter and have it to him and his heirs, and if he die without heirs of his body, the said B. then living then that B. and his heirs shall have it in the same manner: And these and such like Devises are good.

6. A man that is seised of land in Fee, may devise that his Executors shall sell it; or may devise it to his Executors to sell, or Devise it to his Executors, and that they shall sell it; and these Devises are good. *Coo. super Littl.* 112. 113. 236.

Clause of
Distresse.
Warrantie.

7. A Devise may be of a rent, or of land reserving a rent, with clause of Distresse. *Dyer* 348. 100. 8. 84. 85. *broken 2. part* 190. As if a man Devise land to J. S. paying 10 l. by the year to his wife, and if it be unpaid, that she shall distraint for it; this is a good Devise: But a Warranty cannot be made by a Will. *Coo. super Littl.* 386. And yet if a man devise land to another for life, or in Tail reserving a rent; in this case the heirs of the Devisor shall be bound to the Warranty

ranty in Law, and the Devisee shall take advantage of it,

8. A man may devise his land to one, and devise a rent out of the same land to another, and these Devises are good. So a man may devise his land to one in Fee, and after devise the same land to another for life or years; and these are good Devises, and may stand together. *Plow. 523. 540. Dyer 357. Co. 8. 94. 83.* So also if a man in the fore-part of his Will by generall words, devise all his lands to one in Fee, and in the latter part of his Will, devise some speciall part of it to another in Fee; these Devises are good and shall stand together, as for example, if one have a Farm, and in the first part of his VWill, give this Farm to one, and in the latter part of his VWill give one Close (a part of this Farm to another) or a man devise all his land in *B* (which is in the County of *Glouc.*) to *A* his daughter, and the latter part of his Will devisech all his land in the County of *Glouc.* in the possession of *J. S.* to his son, and part of the land in *B.* is in the possession of *J. S.* and in *Gloucestersh.* these are good Devises & shall stand together. But otherwise, it is when the generall clause doth come last, as where one doth give his land to *A* his daughter and in the latter part of his Will, doth give all his land in *Hartfordshire* in the possession of *J. S.* to *W.* and the land given to *A.* is in *Hartfordshire*, and in the possession of *J. S.* in this case the Devises will not stand together, for the first Devise is void *38. Eliz. Co. B. Agreed* divers times: and so also it is where both the Devises are particular, as, where first in a mans VWill, he doth give VWhite Acre to *A* and his heirs, and after in his VWill he doth give VWhite Acre to *B* and his heirs; in this case the first Devise to *A* is void. And yet in this last case, some have held the Devises shall be good, and that *A* and *B* shall be Joint-tenants *ideo Quare*, *Dyer* in his Lecture, 1. & *per Inst. Dodr.* If one devise all his land to *J. S.* and his heirs excepting 20 l. for seven years, which he willeth shall be employed for his children; this is a good Devise of this sum of 20 l. a year. *Trin. 9. Ja. B. R.*

9. And a man may devise his land for so many years as *J. S.* shall name, and after, appoint that his son shall have it during the minority of his son, and both these Devises may stand together: And therefore, if *A* be possessed of the Mannor of *D* for years, and he devisech all his Term to his eldest son if he live so long, and if he die before he have any issue of his body, then to his younger son in the same manner, but withall, he doth appoint that his wife shall have the occupation of the land untill his eldest son be 21 years of age; these Devises shall stand together, and the wife shall enjoy the Mannour, for that time by this Devise. *Plow. 523. 546.*

10. A man may devise a term of years by way of remainder; as for example, A man that is possessed of a term of years of land, may devise it to *J. S.* for life, the remainder to *J. D.* or to *J. S.* for life, and that it shall after remain to *J. D.* or to *J. S.* for so many years as he shall live, and after to *J. D.* or in any such like manner, these are good Devises both to the first, and to him in remainder also by way of Executory Devise, though not by way of remainder, and in this case the first Devisee cannot hinder the second Devisee of the remnant of the terme. *Co. 8. 95. Plow. 519. 546. 516. 539. Dyer 277.* But a man cannot by Deed in Grant his life time grant his term in this manner. Nor if a man be possessed of a term can he entail it by his Will: And therefore, if a man possessed of his term of years of land Devise his term or his land to *J. S.* and his heirs, or to *J. S.* and the heirs of his body, or to *J. S.* and his issues, the remainder to *J. D.* this remainder is void; and it is a good devise of the whole term to *J. S.* and his Executors. *Co. 10. 87. 47. Pasche. 17. Jac. B. R. Child. versus Baily.* Also a Chattell personall may (as it seems) be devised to one for life, and afterwards to another, but yet so as the one must have the property only, and the first but the occupation only, as if one devise that *J. D.* shall have the occupation of his plate for his life, and after that it shall remain to *J. S.* this is a good Devise of the plate to *J. S.* *37 H. 6. 30 Little. Broo. sect. 388. 314. 209.* But if the thing it self be devised to the first of them; then the Devise to the second is void, for the gift of a chattell personall for one hour is the gift of it for ever. And so it did seem in the *Lady Daves Case. Hill. 9. Car. B. R.*

11. A Legacy of Goods or Chattels may be given to, or untill a certain time, or from or after a time certain or incertain; as for five years, or from, or untill the marriage of *A* or the like; and these Dispositions are good. *Swinb. part. 4. sect. 17.*

12. A man may devise his land for so many years as *J. S.* shall name, and if *J. S.* do name a certain number of years in the life-time of the Devisor, this will be a good Devise. But if one devise his land for so many years, as his Executor shall name, it seems this Devise is not good. *Plow. 524. 6.* As touching the sixth thing required in a good Devise, these things are to be known.

Sixthly, in respect of matter touching the thing devised, and what may be devised, and by what name.

Devise of land and re-nements.

1. That Lands, Tenements, and Hereditaments for the nature and quality of them are devisable as well as other things. *Dyer. 371. Coe: 8. 83. 6. 16. super Littl. 111. Perk. sect. 496. 500. 497. 538. Littl. sect. 167. Dyer 155. old N. B.* And therefore by the custome of some places, lands in possession, reversion, or remainder are devisable in Fee for life, or years; and a man that hath a Lease for years of land, may devise the land at his pleasure during his term. But by the ancient Common-Law in favour to heirs, the lands that a man had in Fee-simple were not devisable by Testament, except only in some speciall places by the custome of the place, as Gavelkind-lands in *Kent*, and lands within certain Borough-Townes, as *London, Oxford, &c.* and by the custome of those places such lands are devisable: And in some places the custome is, that they may devise their purchased lands only; and in other places, that they may devise their lands descended also: And in some places the custome is that they may devise for life only, and in other places, that they may devise in Fee-simple and Fee-tail also. And in all these places where such customes are, they may devise their lands now as they might have done before the Statute; for the Statute hath not destroyed their custome. And therefore at this day they that have such lands in such places, have their election either to devise according to the power the custome doth give them, or according to the power the Statute doth give them, and in the first case the Devise is good against the heir for the whole; and in the last case, it is good against him for two parts in three only. Also by the Common-Law, the Uses of lands were devisable, as Goods, and Chattels were at the pleasure of him that had them. *Perk. sect. 496. 528. 538.* But otherwise, and in other cases, lands and tenements, might not be devised and disposed by Will, untill 32 *H. 8.* at which time the owners of lands, tenements, rents, &c. were by Act of Parliament enabled to devise and dispose their lands as followeth: He that hath any land in possession, reversion, or remainder by Socage Tenure, and hath no land held *in Capite*, or by Knights Service, may devise all his land, or any rent, Common, or other profit appender out of it to any person in Fee-simple, Fee-tail, for life or years, at his pleasure. *Stat. 32 H. 8. c. 1. 34 H. 8. c. 5.* He that hath any such land held of the King *in Capite* by Knights Service, or by Knights Service and not in Chief, or held of any common person by Knights Service, may devise two parts thereof in three, to be divided, or any rent &c. out of those two parts at his pleasure, and no more; for the third part must descend to the heir and come to satisfy the Lord his duties; and therefore the Devise of the whole land in this case is void for the third part. He that hath any such land held by Knights Service *in Capite*, and other lands held by Socage Tenure may devise two parts of the whole, and no more, or any rent &c. out of it at his pleasure. He that doth hold land of the King by Knights Service only, and not *in Capite*; or of a meane Lord by Knights Service, and hath also other lands held by Socage Tenure, may devise two parts in three of all the land held by Knights Service or any rent &c. out of it, and all his Socage-land at his pleasure. So that now by these Statutes, a man that hath lands in Fee-simple, may devise them in Fee-simple, Fee-tail, for life, or years absolutely, or conditionally at his pleasure. And therefore if one devise his land to one for life, the remainder in Fee, or Fee-tail to another; or devise his land to *B.* the remainder to the next heir male of *B.* and the heirs males of the body of such heir male or the like; these are good Devises. But for the more full understanding of these things, it is to be known in the next place.

2. That this Statute doth not enable men to devise land that are disabled by Law

Law in respect of their persons or minds, as Infants, women Covert, men, *de non sana memory*, or the like; nor such as are disabled in respect either of the nature of their land, as Copi-holders (for Copi-hold-land is not devisable) or of the estate they have in the land, as Tenants in Taile, or *per aversuram*; or Joynt-tenants; for these can no more devise the land they do so hold, than they could before the Statute. But such as are seised of land in Common, or Coparcenary, may devise their land as well as those that are sole seised. See the Statute *Co. super Littl.* 111. *Perk. sect.* 544. *Littl. sect.* 287. *Dyer*, 210. old; *N. B.* 89. *Perk. sect.* 500, 539, 540. 446, 497, 498. And if two be Joint-tenants for life; the Fee-simple to one of them; he that hath the Fee-simple, may devise his Fee-simple after the death of his companion. Neither doth this Statute enable those that are seised of lands in Fee, in the right of their houses and Churches to devise the same lands: And therefore, Bishops, Deans, Parsons, Vicars, Masters of Hospitals, or the like, can no more devise the lands belonging to their Bishopricks &c. than they could before the Statute, but the lands they are seised of in their own right, they may devise like other men.

3. Hereditaments that are not of any yearly value, are some of them devisable, and some not; for if the King grant to one and his heirs *bona & catalla felonum & fugitivorum vel ut lagatorum*, Fines, and Amercements within such a Mannour or Village; in this case, the owner can neither devise these things to another, as part of the two parts; nor leave them to descend for a third part. *Co.* 10. 81. 3. 32. *super Littl.* 111. And yet if one have a Mannour unto which a Leet, Waife, Estray, or the like is appendant or appurtenant; thereby the Devise of the Mannour with the appurtenances, these things may passe as incident to the Mannour: But if a man have a Hundred, with the goods of Felons, Out-laws, Fines, Amercements, *Retorna brevium*, and other such casual Hereditaments within the same Hundred, and these have been usually let to Farm for a rent; in this case, these things may be devised or left to descend for a third part.

4. Such uncertain Franchises as before that are Hereditaments of no yearly value, albeit they are not devisable, yet may restrain the devise of a mans lands and tenements, and make it void for a third part, if they be held *in Capite*; for if it is not requisite, that the thing held by the Tenure *in Capite* be devisable; and such things as may not be left to descend to the Lord for a third part, and to satisfy him, his duties, may notwithstanding be devisable, or restrain the Devise of other lands and tenements, and make it void for a third part. And therefore, a Reversion upon an estate taile, which is dry and fruitless, if it be holden of the King by Knights Service *in Capite* will hinder the Devise of the third part of a mans lands and tenements: Also an estate taile of lands held *in Capite* may restrain the Devise of a third part of other lands. And therefore, if such lands be conveyed to one and the heirs of his body, the remainder to another, and he have other lands in Socage; if he have any issue, he can devise but two parts of his Socage land. And where the Statute speaks of a remainder, it is to be intended of such a remainder, only, as may draw Ward and Marriage by the Common-Law, and this is that remainder only, that doth hinder a Devise.

And therefore if *A* be seised of lands in Socage Tenure; and *B* be seised of lands in Fee, held *in Capite* by Knights Service; and *B* make a Lease for life or gift in Taile to *C*, the remainder to *A* in Taile or in Fee; in this case, *A*, during the estate for life or in Taile, may devise all his Socage-land, notwithstanding this remainder. But if a man make a Lease for life or years, and after grant the reversion for life, or in Taile, the remainder in Fee, and after the Grantee for life dyeth, or Donce in Taile dyeth without issue, in this case, this remainder which now is in point of reversion, will restrain the Devise of other lands, and make it void for a third part. *Co.* 10. 81, 82. *super Littl.* 111. *Co.* 3. 35. 30. 34.

5. In all cases where a man is restrained to devise any part of his lands held

in Socage, he must have lands held *in Capite* at the same time, and therefore the time of having of lands to devise, and holding of other lands *in Capite*, and disposing of the lands to be devised, must concur. And therefore, if a man be seised of an Acre of land in Fee, held of the King in Chief by Knights Service, and of other two Acres in Fee held in Socage, and enfeoff his younger son of the Acre held *in Capite*, and of one of the other Acres, or convey it to the use of his wife, or for the payment of his debts, &c. and after purchase land held in Socage; in this case, he may devise all the new purchased land held in Socage without restraint. *Coo. 10. 81. 11. 24. 3. 30. 34. 35. super Littl. 111. Dyer 158.* So if a man be seised of lands held by Knights service *in Capite* in possession, reversion, or remainder, and of lands held in Socage, and by his Will in writing, doth devise all the said lands, and after the land held *in Capite* is recovered from him, or aliened by him *bona fide*; in these cases the Devise is good for all the land held in Socage: And hence it is, That if the King grant land to one in Fee Farm to hold in Socage at a rent, and after grant this rent to another and his heirs, to hold *in Capite*, and the Grantee of the rent doth grant it to him that hath the land; in this case, because the rent is extinct, and he cannot be said to hold lands *in Capite*, this shall not restrain the Devise of any of his lands.

And yet if a man hold some lands by Knights Service *in Capite*, and other lands in Socage, and be disseised of the lands held *in Capite*; he cannot devise all his Socage land, but the Devise will be void for a third part, for he is said to have that land still, whereof he hath the right. And albeit the Statute say [that he that hath lands held of the King *in Capite*, and other lands in Socage, may give two parts for the advancement of his wife, payment of his debts, preferment of his children] whereby he is restrained to devise any more. And therefore, if by act, executed in his life time, he convey two parts to any such uses or intents, he cannot devise any more by his Will, but the residue must descend, yet this also is to be intended of the land he hath at the same time. For if a man be seised of land held in Socage of the yearly value of 20 l. *per annum*, and he hath not any land held *in Capite* by Knights Service, and he make his Will in writing, and by it, devise his Socage land to one in Fee, and then purchase land of the value of 20 s. *per annum* held *in Capite*, and die; this will make the Devise void for a part of the land that is held in Socage: But if a man seised of land in Fee of Socage Tenure, assure it to the use of his wife for her Jointure, and after purchase lands held *in Capite* by Knights Service; he may devise two parts in three of all this *Capite* land, and the King shall not have any thing out of, or for the Socage land: If a man seised of lands, part of which are held *in Capite*, and part in Socage make a Feoffment of the lands held *in Capite*, (being two parts in three of the whole) to the use of him and his wife for life, with divers remainders over; in this case, he may not devise any of the Socage land. And if a man have no Socage land but *Capite* land, and convey it away in Fee-simple, keeping no Reversion to any such use, and after purchase Socage land; he may devise all the Socage land newly purchased. *Coo. 34. 11. 24.*

6. As the Testator enabled to devise by this Statute without restraint, is, and must be one that hath the land he doth devise at the time of the Devise made, and no other land then to be an impediment to his Devise, so he must have a sole estate as well in the land he doth leave to descend to the heir, as in the land he doth Devise: And therefore, if lands held *in Capite* be conveyed to a man and his wife, and the heirs of their two bodies; and this man hath other lands whereof he is sole seised held of the King *in Capite* by Knights Service; in this case he may not devise two parts of the whole, supposing this may suffice for the Kings third part, for he may devise but two parts of the residue; *i. e.* of that whereof he is sole seised, either at the time of making of the Will, or at the least at the time of the death of the Testator. *Coo. 3. 32.*

7. The estate of the land that is held, must continue after the death of the Tenant

Tenant, otherwise it will be no restraint; *Co. 10. 84.* And therefore, if a Tenant in Tail be to him and the heirs males of his body, the remainder in Fee to another of Lands held by Knights Service *in Capite*; and he is seized of other lands in Socage in Fee, and by his Will in writing devise all the Socage land, and dye without issue male; in this case, the Devise is good for all the Socage land. And so also it is, where the estate the Ancestor had of the land held is defeated by condition. 8. That which a man cannot dispose by any act in his life time, shall not be taken for any such Mannours, &c. whereof a man may devise two parts by authority of this Statute at his death: And therefore in the case of an undivided estate of lands between husband and wife, where the husband can make no disposition for longer time than during the Coverture; these lands are not to be esteemed such as are to be accounted amongst the lands; whereof two parts in three are devisable, *Co. 3. 32.* 9. The Tenure by Knights Service must continue after the death of the Devisor, otherwise the land so held will be no restraint. And therefore if the King grant land to one and his heirs, to hold during his life by Knights Service *in Capite*, and after in Socage, or to hold during his life in Socage, and after by Knights Service; in these cases, the Grantee may devise all his land; notwithstanding the Tenure of this land, *Co. 10. 84. 3. 34.* 10. The King or other Lord must have a full and clear yearly value of the third part left to descend to him, and the value is to be esteemed as it is, and doth happen to be at the time of the death of the Testator; for the King or other Lord must have the like and equal benefit for his third part, as the Devisee hath for the two parts, without diminution or subtraction; when therefore a man will have his Devise good for the residue, he must take care that the third part be so left; for if the third part be not valuable, or be charged with any rent; &c. or be upon any uncertainty; as if it be upon a possibility only, as where a man and his wife be seized of a joynt estate Tail made during the Coverture, and he Devise other lands to her on condition, that she shall wave her estate made during the Coverture, and so intend that that part of his land shall be left for the Kings part, this Devise will not be good for the residue; and albeit the wife do wave the estate after the husbands death, yet this will not help the matter, or make the Devise good for that part for which it was voyd before: But it is not material by what Tenure the third part descending be held: For it is holden by the better opinion, That if a man be seized of 20 l. land held of the King *in Capite*, and 10 l. land held of a Subject by Socage, and he devise all the *Capite* land to a stranger; that this is a good Devise for the whole, and that the King shall be satisfied by the Socage land. And if be of the value of the third part, albeit it be but of an estate Tail whereof the Ancestor was seized, or it be new purchased land, yet it is sufficient: And therefore if some lands be given to a man and the heirs of his body of the value of 10 l. *per annum*, and he be seized of other lands in Fee-simple to the value of 20 l. *per annum*, and all or part of these are held *in Capite* by Knights Service; in this case he may devise the lands in Fee-simple; and leave the entailed land to descend for a 3d part: And if a man be seized of such land, and convey it to the uses within the Statute, or any of them, and after purchase new land, and leave that to descend, this is sufficient; *Co. 3. 32. 31. super Litt. 111. 10. 84.* 11. The third part that is left to descend to satisfy the King or other Lord, must descend immediately, and he must not stay for it. And therefore, if a man be seized of three Acres of land held by Knights Service *in Capite*, and make a Lease of one Acre for life, and after devise the other two Acres; this Devise is not good for the whole two Acres; but for two parts in three thereof onely; and albeit the Tenant for life dye afterwards, yet this will not help the matter. But if the Devisor leave a full third part immediately to descend in Fee-simple or in Fee-tail, he may devise the other two parts at his pleasure. And if he do not leave a third part to the full, it must be made up and supplied out of the other two parts, which in case of the King is done by Commission out of the Court of Wards, and in case of a Subject by Commission out of the Chancery, *Co. 3. 34.* 12. As the third part left to descend, must be of as good value as either of the other two parts is at the time of the

death of the Testator, or otherwise the Devise of all the residue will not be good, so must it be taken out of the lands of the Testator indifferently: And therefore, if a man be seized in Fee of land held in Chief by Knights Service, and make a Feoffment of the one half of it to the use of himself for life, and after to the use of one he doth intend to marry, and after to the use of another in remainder, or to any other such like uses within the Statute, and after he doth marry the same woman, and after he deviseth the other moiety to his wife, children, or any other; in this case, albeit the wives estate have precedency, yet the King shall have his third part out of both the moities equally. So if one be seized of Gavel-kind land held *in Capite*, and his son being dead, devise part of it to one of his grand-children, and part of it to another, and part to a third Tail; in this case, the Kings third part shall come out of all the three parts equally, and accordingly the Devise will be voyd for so much to every one of them, *Coe. super Litt. 111. 9. 133. 3. 32. 30.* So if one hold three several Mannours of three several Lords, he cannot devise two of these Mannours, leaving a third to descend, but he may devise two parts of every of the third Mannours, and a third part of each Mannour must descend to each Lord, for there must be an equality in these things. For further illustration of which things, the examples following are to be heeded. *W. B.* being seized of the Mannour of *Thoby in Capite*, and of lands in *Fobbing* held in Socage in Fee, and he and his wife being seized of the Mannour of *Hinton* held *in Capite* to them and the heirs of their two bodies begotten by an estate made to them during the Coverture for the joynture of the wife, the reversion to *W.* in Fee, and *Thoby* doth amount to the value of two parts, and *Hinton* and *Fobbing* to a third part, and *W. B.* by his Will in writing doth devise *Thoby* to his wife for life, upon condition that she shall not take her former Joynture, with divers remainders over, and dye, and she refused her former Joynture in *Hinton*; in this case it was adjudged, that the Devise was not good, for the whole Mannour of *Thoby*, and that the Mannour of *Hinton* was not a sufficient third part to descend, *Coe. 3. Butler and Bakers Case. L. L.* being seized of the Mannour of *Affaland*, *Heanton*, *Riketon*, *Pengelly*, *Willeworthy*, and *Trivesquite* (the last onely held *in Capite*) in Fee, and having issue *Thomas* his eldest son, *William*, *Humphrey*, and *Richard*, younger sons, which *Richard* had issue *Leonard*, makes a Feoffment of these Mannours to, divers uses, *viz.* of the Mannours of *R. P. W.* and *A.* to the use of the Feoffor, for life, and after to the use of such person as he should appoint by his last Will, and after to the use of *W.* his second sonne in Taile, and after to his other sonnes in Tail, and after to the use of the Feoffor and his wife in Taile, and after to the use of the Feoffor and his heirs for ever, *Coe. 10. 78. Leonard Lovells Case. Coe. 11. 24.* And of the Mannour of *H.* to such like uses, and of the Mannour of *T.* also to such like uses, and the same uses were with power of Revocation: And after the Feoffor purchased eight Acres of other land held in Socage, and after did revoke the uses of the Mannours of *R. P. W.* and *A.* and after devised some of the said Mannours (excepting some peices) and the said eight Acres of land to his eldest son and the heirs male of his body for 500 years on certain conditions, and if he dye without issue, that it shall go to *William*, &c. and afterwards he dyed seized of the said eight Acres of land, and the lands devised by the Will at the time of the death of the Testator were of the yearly value of 24 *l.* 14 *s.* 10 *d.* per annuum, & non ultra, and the lands whereof the Feoffment was made, and not revoked, were at the time of the death of the Testator of the value of 55 *l.* 6 *s.* 8 *d.* in this case, it was adjudged that the Devise of the eight Acres newly purchased was voyd, at least for a third part, and restrained by the reversion in Fee expectant upon the estate Tail made to the younger son of the Mannour held *in Capite*. And it was resolved, That if a man be seized of three Acres of equal yearly value, one of them held of the King by Knights Service *in Capite*; and have issue two sons, and give the Acre so held; and another of the Acres to his younger son, whereby he hath so executed his power by the Statute, that he cannot devise by his Will any part of the third Acre; and after he purchase three Acres of equal value held in Socage; that in this case, because he hath the reversion in Fee

Fee upon the estate Tail made to the younger son, he can devise no more but two parts of the said land so newly purchased. But if the reversion be gone before the purchase, he may devise the whole; but if a man be seized of lands in Fee, part of which are held of the King *in Capite* by Knights Service, and he convey two parts of it unto any of his sons, or to the use of his wife for life, or in Tail; in this case, albeit he may not devise any part of the residue, yet he may by his Will devise the reversion of the two parts. And in case, where he hath not conveyed the full two parts, he may devise so much as to make up that he hath conveyed full two parts: And it was further resolved in the same *Leonard Loves* case, That whereas the Statute saith, All persons, &c. having, &c. of any Mannours, &c. in possession, reversion, or remainder, &c. and the Feoffor *L. L.* in the case before had a remainder in Tail expectant upon the estates in Tail limited to the sons; that this remainder was not within the Statute, nor would have restrained the Devise, but for the reversion in Fee afterwards, *Coo. 6. 16. super Litt. 111. A. B.* being seized in Fee of the Mannour of *Gracedin* held *in Capite*, and of the value of 30 *l. per an.* and of the Mannour of *Normanton* held *in Capite*, of the value of 18 *l. per an.* in consideration of a marriage with *M.* did covenant to stand seized of the Mannour of *G.* to the use of himself and the heirs males of his body on the body of the said *M.* and after to the use of *W. B.* his brother, and the heirs males of his body, and after to the use of another brother in Tail, and after to the use of his own right heirs; and of the Mannour of *N.* to the use of himself and *M.* he is to marry, and the heirs of his body, and after the remainders as before of the other Mannour, and after the marriage is had, and *A. B.* doth purchase other lands held in Socage of the value of 3 *l. per annum*, and then devised the same new purchased lands; in this case, it was adjudged that the Devise was voyd for a third part of the Socage land, in respect of the reversion dependant upon the estate Tail, and yet that it was a good Devise for two parts of the new purchased land, albeit he had executed his power, and given more than two parts to the use of his wife, *Coo. 11. 23. Henry Harpur's Case.* And in these cases where a man hath land held *in Capite*, and other land, and he convey the land held *in Capite* to any of the Uses within the Statute, as to his younger children or the like, or convey it with power of revocation only, so that he hath power of the land still, and after he purchase land held in Socage; in this case it seems he may devise all the land newly purchased, as if the land were conveyed without any such power of revocation, *Coo. 10. 83. A.* being seized of land in Fee held of the King *in Capite*, made a Feoffment of two parts of it to the use of his wife, for her life, for her Joynture, and after made a Feoffment of the third part to the use of such person and persons, and of such estate and estates as he shall limit and appoint by his last Will and Testament in writing, and afterwards he did by his last Will in writing devise this third part to one in Fee; in this case it was resolved that the Devise was good for the whole third part, *Coo. 6. 17. Sir Edwards Case.* And yet if a man make a Feoffment in Fee of land held *in Capite* to the use of his last Will, albeit the Devise of the Land be with reference to the Feoffment, yet it is voyd for a third part. *E. B.* being seized of six Mannours, the one in Fee, and the rest in Tail, with the reversion expectant to him and his heirs, and hath issue *T. B.* divers of which Mannours are held of the King *in Capite* by Knights Service, and every of them of equal yearly value, by his last Will in writing did devise all the said Mannours to divers persons and their heirs for payment of his debts, and advancement of his children, and then died, and the estate in Tail that descended to his issue was more than a third part of all; in this case it was resolved that the Devise was good for two parts of the reversions, and for the entire Mannour in Possession, and not voyd for a third part of the Mannour in Possession, and for all the reversions in Fee, *Coo. 10. 81. Tr. 34. Eliz. Bedinfield's Case.* A man being seized in fee of Gavelkind land in *Kent*, part whereof is held of the King *in Capite*, and part of Common persons in Socage, hath issue *A.* who hath issue *B. C.* and *D.* and *A.* devise some of these lands to *B.* and some to *C.* and some to *D.* his Grandchildren in Tail; in this case the Devise is voyd for a third part of the whole.

Devise of a
right to Land,
or of Land
that is another
mans.

Devise of
Rent, Com-
mon, Seignio-
ry, or the like.

Occupant.

Devise of hou-
ses, doors,
glafs, wain-
scot, &c.

as well for the land held in Socage as the land held *in Capite*, *Coq. Rep. Stamf. Per. 8.* And yet if in this case no Will be made, the King shall have but a third part of that which doth descend to the eldest son, the heir at the Common Law, and not the third part of that which doth descend to the younger sons by custom. And if lands devisable by custome come into the Kings hands, and he grant them to hold of him *in Capite*, and the Patentee devise them to the use of his wife, children, or for payment of his debts, &c. in this case the Devise is voyd for a third part: And here note, that in all the cases before, where a man is restrained to devise a third part of his land, if he devise the whole, the Devise is good notwithstanding for so much as he hath power to devise. See more, *Brownl. 2. part. 105, 106, 107.* And enquire what alteration is made in the Law in these Cases by the order of Parliament, whereby these Tenures and the Incidents thereof are taken away. And as touching the thing devised, it is further to be known, 13. That a man must have right to, and possession of the land he deviseth, or else the Devise is not good. And therefore if a Disseisor devise the land he hath gotten by Disseisin, this Devise as to the Disseeisee is voyd, *Plow. 485.* And if a man be disseised of his land, so that he hath nothing but a right thereof left, and then he devise this right, or devise the land, this Devise is voyd. And if one contract for land, and pay his money for it, but hath no assurance of the land, and he devise this land to another, this cannot be a good Devise of the land, but perhaps the Devisee may in a Court of equity compell him that hath received the money to assure and settle the land according to the Devise. *Nevils Case.* And if one devise another mans land, this Devise is voyd; but if he after the Devise made purchase this land, now is the Devise good, *Plow. 144. Fitz. Devise 7.* If a man bargain and sell land to me on condition to re-enter, if he pay me 10 l. and I covenant that I will not take the profits untill default of payment, and he make a Lease of six years of it to another, and after break the condition; in this case I may devise this land, and the Devise will be good, *Adjudged Powlsley and Blakemans Case. 14.* A Seignior, Rent, or the like thing is devisable as land is, and will pass without the Attornment of the Tenant, *Perk. Sect. 538. Litt. Sect. 585, 586. Dyer 253. 140. 5. 52. F.N.B. 121. Coq. super Litt. 111. 8. 83. 3. 33. Brownl. 1. part. 75, 76.* The like Law is of a reversion also. And a man may devise a Rent *de novo* issuing out of land, or a Rent issuing out of land that is in *esse* before. And therefore if a man make a Lease for life or years, rendering Rent, the Lessor may devise this Rent. So if a Rent be granted to one and his heirs, the Grantee may devise this Rent. So a man that is seized of land in Fee, may devise any Rent out of it at his pleasure. And therefore if a man that holdeth his land by Knights Service in Chief, by his Will devise any Rent Common, or other profit out of it; this Devise is good, and that albeit the Rent or Profit doth amount to the value of the whole land; as if one have three Acres of land worth 3 s. by the year, and he devise 3 s. Rent out of it; this is a good Devise of the whole Rent; but in this case the Rent shall issue out of two parts of the land, and a third part shall be free and not charged with it, but he may charge 2 parts in 3 parts of such land at his pleasure. And so also it is if a man have lands holden by Knights Service, and not *in Capite*, and other lands in Socage, he may charge two parts of the Knights Service land, and all his Socage land at his pleasure. And if a man have lands held in Socage, and no lands held *in Capite*, or by Knights Service, he may devise what Rent he will out of it. But a man cannot devise a Rent Common, or any such like thing out of another mans land that is none of his own, nor out of that he hath not. And therefore if one devise 10 l. out of his Mannour of *Dale*, when in truth he hath no such Mannour, this Devise is voyd. If a Rent be granted to me for the life of *I. S.* it seems I may not devise this Rent, but that the Terre-tenant shall hold it as an Occupant, *Dyer. 253. 15.* Where a man is seized of a house in Fee, and may devise the house it self, there it seems he may devise the doors, windows, wainscot, or the like Incidents of the house. And where a man may devise the land it self, it seems he may devise the trees or grasse growing upon the land, *Quando licet id quod majus videtur & licere id quod minus.* But where the land it self is not devisable, there such things incident or annexed to,

or

or growing, or being upon it, are not devisable. And therefore the Tenant in Tail for life or years of land, may not devise the houses or windows, doors, or wainscot of houses, or trees or grass being or growing thereupon, but this Devise is voyd, *Coo. 4. 63. Perk. Sect. 512, 518. Coo. 11. Rich. Liffords Case. Kely 88. 16.* Where a Devise of a man hath a Use that is not executed by the Statute of Uses, but remains at the Common Law, he may devise it as he may any other thing *Perk. Sect. 510. Dyer.* And therefore if one be possessed of a Term of years, and grant it over to another to the use of the Grantor, he may dispose this use by his Will, for it is in the nature of a Chattel. But if a man have such a use in joynt-tenancy, he cannot devise it, *See Uses: 17.* All manner of Goods and Chattels real and personal may be devised by Testament. And therefore Leases for years of lands, Grants for years of Rent, Common, or the like, Wardships of the bodies and lands of heirs of Tenants by tenure in *Capite*, and by Knights Service, Cattel, as Oxen, Sheep, Horses, &c. Gold, Silver, Money, Plate, Household-stuff, as Beds, Pots, Pans, Platters, &c. Corn, Wool, and Implements of Husbandry may be devised by Will; and not onely those a man hath at the time of the Devise, but those a man is to have or may have afterwards. And therefore it is held, a man may give his corn that shall grow in such a ground the next year after his death, or the wool or lambs his flock of sheep shall yield the next year after his death; and that these Devises are good; but if in this case there shall be no such corn growing in that ground, or any lambs or wool arising out of his flock that year, the Legacy is fruitless. And yet if the Testator devise to *J.S.* 20 quarters of corn, or 20 lambs, and both will that the same shall be paid out of his corn that shall grow, or out of his flock the next year, and there be not so much corn, or not so many lambs, or not any at all growing or arising, yet this is a good Devise, and the things must be paid. In like manner, if a man give to *J.S.* a horse, or a yoke of oxen, in this case, albeit the Testator have neither horse nor yoke of oxen, yet the Devise is good, and must be performed, *Swinb. part. 3. Sect. 5. Perk. Sect. 511. 525. 18.* Things in action, as debts, and the like, albeit they be not grantable by deed in the life time of the party, yet are they devisable by Will. And therefore if the Testator doth by his Will give any debt due to him, or an obligation, or on a contract, or the like; this Devise is good. And the thing devised may be had thus; the Testator may if he will make the Legatary Executor as to that debt, or if he do not, the Legatary may sue the Executor in the Spiritual Court, or in some Court of equity, and thereby compell the Executor either to recover it himself, and so to pay it to the Legatary, or to give the Legatary power to sue for and recover it himself in the Executors name. But if it be such a cause of action as is altogether uncertain, as where a man may have an action against another for taking away his goods, or to compell him to make an account, or the like; this is such a cause of action as is not devisable. And yet possibilities and uncertainties are in divers cases devisable, *Perk. Sect. 527. Litt. Bro. Sect. 437. Dyer 272. Plow. 520.* And therefore if one have money to be paid him on a Mortgage, he may devise this money when it comes; as if I enfeoff a stranger of land, upon condition that if he do not pay me 20 *l.* such a day, that I may re-ent, in this case I may devise this 20 *l.* if it be paid, and the Devise is good, albeit it be made before the day of payment come. And if a man be possessed of a Term of years, and devise all the residue of that Term of years that shall be to come at the time of his death; this Devise is good, and yet such a Grant by deed is voyd, *Childs Case, 17. Ja. B. R.* But a meer possibility, and a thing altogether uncertain, is no more devisable by will, than it is grantable by deed, *Perk. Sect. 520, 521, &c. See in Grants. 19.* Emblements, *i. e.* the corn that is sown and growing upon a mans ground at the time of his death, and which himself should have reaped if he had lived to the harvest (as in most cases he shall where he doth sow it) are devisable. And therefore if a man have land in Fee-simple, Fee-tail, for life, or years, and sow it with corn; he may devise the corn at his death to whom he please; and yet if the Lessee for years sow his land so little while before his Term expire that it cannot be ripe before the end of the Term, and he dye, it seems he cannot devise this corn, for if he had lived he could not have reaped it after the end of the Term.

F f f f f

20. Ob-

Devise of Obligations.
Counterpanes of Leases, &c.

20. Obligations, Counterpanes of Leases, and such like things also are devisable; but in this case the Devisee cannot sue upon the Obligation in his own name, nor enter for the condition broken upon the Lease, if there be cause, but he may cancel, give, sell, or deliver up the Obligation or Counterpane to the Obligor, or Lessee, *Perk. Sess. 527*. And finally, whatsoever shall come to the Executor after the death of the Testator in the right of his Executorship, may be devised by the last Will and Testament of the Testator. *See infra in numb.*

Devise of the things a man hath in Joyn-ture with another.

21. The Goods and Chattels that a man hath joynly with another are not devisable. And therefore if there be two Joynt-tenants of Goods or Chattels, as where such things are given to two, or two do buy such things together, and one of them devise his part of the things to a stranger, this Devise is voyd. Inasmuch, that if in this case the Testator make the other Joynt-tenant his Executor, the Will as to this is voyd, and he shall not be charged as Executor for those Goods, but he shall have them altogether by right of survivorship, *Perk. Sess. 526. Litt. Sess. 287. Dolt. & St. 167*.

Devise of the things a man hath in anothers right.

22. The Goods and Chattels that a man hath in anothers right are not devisable; and therefore an Executor or Administrator cannot devise the Goods and Chattels he hath as Executor or Administrator, for such the Devise is voyd, *Plow. 525. Broo. Administrator 7. Fitz. Adm. 3*. Howbeit the Executor may appoint an Executor of the Goods of the first Testator, which the Administrator cannot do; and of the profits that do arise by the Goods and Chattels the Executor or Administrator hath during the time of his Administration, he may make disposition. The Goods and Chattels belonging to Colledges and Hospitals may not be devised by the Testaments of the Masters or Governours thereof, nor the Goods and Chattels belonging to other Corporations by the Mayors, Bayliffs, or Heads thereof. And the Goods & Chattels that Churchwardens have in the right of the Church are not devisable, *Dolt. & St. lib. 2. c. 39. Perk. Sess. 496, 498, 499*. All the Chattels real that a man hath in the right of his wife by her means, and all the Obligations that are made to her alone before, or during the time of the Coverture, and the Chattels real or personal that his wife hath as Executrix to any other, are not devisable by the Testament of the husband. But all the Chattels personal that a man hath by his wife which she hath in her own right, and the debts due upon Obligations made to the husband and wife both during the Coverture, are devisable by the Testament of the husband, *Perk. Sess. 560. Dolt. & St. c. 7*.

Husband and wife.

Devise of things that are incident and annexed to some other thing.

23. Such things as are annexed and incident to a Free-hold or inheritance, so that it cannot be severed from it by him that hath the property of them, as wain-scot, and glasse to houses, and the like, are not devisable; but in such cases where the thing it self to which it is annexed is devisable, *Perk. Sess. 526. Relw. 88*. See before.

Devise of things that are not the Devisors, or belong not unto his Executor.

24. The Goods and Chattels that are another mans, are not devisable, and therefore if a man give another mans horse, it is a voyd Devise. So if one devise the things that by special custome of some places, as the heir loomes do belong to the heir, this Devise is voyd, for it is not devisable from him, *Plow. Granthams Case. Coe. super Litt. 185. Coe. super Litt. 308*.

Devise of a Presentation to a Church.

25. If a Bishop have a Ward belonging to his Bishoprick fallen, he may devise it; but if a Church of his become voyd in his life time, he cannot devise the Presentation. If a Parson of a Church have the Advowson in Fee, and he devise that his Executors two or three of them shall present at the next avoydance, this is a good Devise, *Trin. 13. Ja. Curia. B. R.*

Mistake or errour in the thing devised.

26. All these things before that are devisable, when they are devised must be named, and devised either by their proper name, or otherwise described by some other matter whereby the minde of the Testator may be known and discerned; for if he erre and mistake in the name or substance of the thing devised, or it be so uncertainly devised and described that it cannot be perceived what he intendeth, the Devise is voyd, *Swiub. part. 7. c. 5. Plow. 525. Perk. Sess. 500. Brownl. 1. part. 132*. And therefore if one devise a peice of ground by the name of a Messuage, except it be so called, the Devise is voyd; and yet by the Devise of the use, profit, or occupation of land, the land it self is well devised; and by the De-
vise

wife of land it self, the reversion thereof may be devised. But if one intending to devise a horse, doth devise an ox; or meaning to give gold, doth give apparel; these Legacies are voyd, unless his meaning may appear by some circumstance to be otherwise; as if a man have but one horse, and he be called *Arundell*, and he devise his horse *Bucephall*; this Legacy is good enough. And if a man give all his money in such a Chest, when in truth there is no money in that Chest; or give to another the 10 *l.* which *I. S.* doth owe him, when in truth *I. S.* doth not owe any such money; this Devise is voyd. And yet if the Devise be thus, *viz.* I give to *A. B.* 10 *l.* and I will that the same be paid of the money I have in such a Chest, or of the money which such a man doth owe me; in this case the Devise is good, albeit there be not any money in the Chest, or owing. And if one give 10 *l.* remaining in such a Chest, whereas in truth there is but 5 *l.* in the Chest, in this case the Legacy is good for the 5 *l.* But error and mistake in the quantity and quality of the thing devised, when the same for the substance of it is certain, doth not hurt: And therefore, if the Testator meaning to give the fourth part of his goods, give the one half, or meaning to give but 50 *l.* give 100 *l.* or *converso*, meaning to give a greater, doth give a less quantity or sum; in these cases, the Legacy is good, and the Legatary shall have as much as the Testator did mean. If a man give his white horse, when in truth he hath but one horse, and that is black; this is a good Devise of this horse: And if the thing devised be under such general words, that the minde of the Testator cannot be known by it, the Devise is voyd; and therefore, if the Testator say, I do bequeath something, or I bequeath a substance, or I bequeath a body, or I bequeath, or the like; these Devises are voyd for uncertainty: So if he say, I do give lands, or I do give goods; these Devises are voyd: And yet if the Testator give a horse, an ox, a gold chain, or the like indefinitely; in these cases, the Devise is good, albeit he have no such thing. But if one devise thus, I give lead, money, wheat, oil, or the like; and say, not how much, or what quantity; this Legacy is voyd for uncertainty, or at least the Executor may deliver what quantity thereof he will, and this shall satisfy the Legacy, *Swinb. part. 7. cap. 10.*

Uncertainty in the thing devised.

7. As touching the terms of a Devise, it must be known, That if one devise any thing to wicked ends, or upon wicked conditions, as to the end that the Devisee shall kill a man, or because he hath killed a man, or the like; these Devises are voyd in like manner, as it is when the cause or motive is false, as because one is my Cofin, or hath lent me money, I devise to him 20 *l.* and he is not my Cofin, or did not lend me money; these Devises are voyd, *Swinb. 289.* And as touching the rest of the properties of a good Devise, see them before in the properties of a good Testament, *Coo. 3. 36.* And here by the way, be advised if thou hast land to fettle, rather to do it by act executed by advice of learned Counsel in thy life and health-time, and therein adde such conditions and provisos of revocation, and otherwise as thou wilt; or if thou wilt do it by Will, then do it in thy perfect memory, and by learned advice: Let the Will be indented, and of two parts, and leave one part with a friend, that it be not suppressed after thy death; Let there be credible Witnesses to the publication thereof, and let their names be subscribed to it: Let the whole Will be written with one hand, and in one peice of paper or parchment for fear of alteration, addition, or diminution: Let the hand and seal of the Devisor be set to it: And if it be in several parts, let his hand and seal, and the hands of the Witnesses be to every part: If there be any raising or interlining, let there be a *Memorandum* of it. And if thou make any revocation of thy Will, do it by good advice, and by writing;

Seventhly, in respect of the tenures and conditions, causes and ends of the Devise.

A Caveat for making of Testaments.

Vox audita perit, Litera scripta manet.

The general rules for the Exposition of Wills, are these, That they must have a favourable and benign interpretation, and as near to the minde and intent of the Testator as may be; and yet so withall, as his intent may stand with the rules of Law, and be not repugnant thereunto, *Plow. 540. Coo. super Litt. 323.* It is said to be therefore a Maxim of Law, *Quod ultima voluntas testatoris perimplenda est secundum veram intentionem suam*, according to these Verses:

8. The Exposition of Testaments and Devises, and how they shall be construed and taken. Devises of Land.

First, in respect of the person that is to take by the Devise; and what, when, and how he shall so take by the Devise.

Grant.

*Sed legum servanda fides, suprema voluntas.
Quod mandat fierique subest parere necesse est.*

If a Devise be made of land to *I. S.* and the heirs males of his body; by this Devise the sons and not the daughters of *I. S.* shall have the land. And if a Devise be made of land to *I. S.* and the heirs Females of his body; by this Devise the daughters and not the sons of *I. S.* shall have the land. And yet it hath been said in these cases, that if in the first case the Devisee hath issue a daughter, who hath issue a son; or in the last case, hath issue a son, who hath issue a daughter, that this son and daughter shall take by this Devise in these cases; but it seems the Law is otherwise, *Terms of the Law, 1st. Devise, Coo. super Litt. 25. Plow. 414.*

If a Devise be made of land to *I. S.* and his heirs males, by this Devise *I. S.* hath an estate Tail; but otherwise it is of such a limitation by Deed; for if one by Deed give land to another and his heirs males, by this the Donee hath a Fee-simple, and his heirs general shall have it, *27. H. 8. 17.*

If a Devise be of land to *I. S.* and to the eldest heirs females of his body; by this Devise all his daughters, and not one of them onely shall take it: So if one devise Gavelkind-land to a man and his eldest heirs; this doth not alter the custom, but by this all the sons shall take, *Coo. super Litt. 27.*

If a man devise his land to his wife for life, the remainder to his son and the heirs males of his body engendred, and for default of such issue the remainder to his next heir male, and the heirs males of the body of that heir male, and after his son dye without issue (his wife living) and the Devisor hath issue a daughter, who hath issue a son; in this case and by this Devise it seems the daughter and not her son shall have the land, and that in Fee-simple, *Fitz. Devise 2.*

If a man devise his land to his wife for life, and after to his own right heirs males, and he hath issue three daughters, and after his death one of them hath a son; in this case, and by this Devise the next collateral heir male of the Devisor, and not the son of the daughter shall have the land, *Trin. 9. Jac. Adjudged Curteis Case.*

If a man have issue two sons and a daughter, and devise his land to his wife for ten years, the remainder to his younger son and his heirs, and if either of the said two sons dye without issue of their bodies, the remainder to the daughter and her heirs, and the younger son dye in the life time of the father, and after the father dye; in this case, and by this Devise the daughter hath a good remainder, but it seems the elder son hath first an estate Tail by the intent of the Devisor, *Dyer 122.*

If a man devise some land to *A* his eldest daughter and her heirs, & if she dye without issue, to *T* his youngest daughter and her heirs, and if she dye within 16 years, that *A* shall have her part to her and her heirs, and if *A* marry such an one, that *T* shall have her part to her and her heirs; and if *T* dye having no issue, that all her part shall go to *M* and *E* his Nieces; and if *A* dye without issue, that *T* shall have her part to her and her heirs, and *T* after the 16 years doth dye without issue; in this case the Nieces *M* and *E*, and not *A* shall have her part that is dead, *Dyer 330.*

If land be devised to *A* for life, the remainder to a Monk for life, the remainder to *I. S.* in Fee; by this Devise he in the remainder in Fee shall take presently after the first estate for life ended; and if the Devise be to a Monk for life, the remainder to *I. S.* in Fee; by this *I. S.* shall take presently, *Park. Sett. 566, 567.*

If a man devise his land to a woman and her brother, and the heirs of either of their two bodies, and for default of issue of the said woman and her brother, the remainder to the right heirs of the Devisor; and after the death of the Devisor the brother dyeth without issue, and the sister hath issue and dyeth; in this case, and by this Devise, her issue shall have a moiety, and no more of the land, *Dyer 326.*

If one devise two parts of his Land to his four younger sons in Tail; and that if the Infant in the wombe of his wife be a son, and that he shall have the fifth part as co-heir with the four, and if his five sons dye without issue, that the

two parts shall revert, and then the Devisor dyeth, and after a son is borne, and after he and three of the other sons die; in this case and by this Devise, the Infant shall not take any thing, because he is incapable, and the two parts shall not revert to the heire untill the five sons be dead without issue *Dyer 304.*

If one devise the Mannor of *Dale* to the eldest sonne of *J. S.* in Fee, and the Mannor of *Sale* to *J. D.* for life, the remainder to such of the children of *J. S.* as shall be then living, and shall have the Mannor of *Dale*, and the eldest son of *J. S.* after the Testators death doth sell the Mannor of *Dale*, and after *J. D.* dyeth; in this case and by this Devise none of the children of *J. S.* shall have the Mannor of *Dale*, but it shall goe to the heirs of the Devise. Adjudged. *Co. B. M. 36. 37. Eliz. Browns case.*

If one devise his land to the children of *J. S.* by this devise, the children that *J. S.* hath at the time of the Devise, or at the most, the Children that *J. S.* hath at the time of the death of the Testator, and not any of them that shall be borne after his death, shall take.

If one have two daughters by divers women, and devise a moiety of his land to his wife for seven years, and that the elder daughter shall enter into the other moiety at her day of marriage, and if his wife be with child of a daughter, that then she shall have an equall portion with the other sister, and the Devisor dyeth, and the wife doth enter and hath not a daughter, and then the elder daughter doth take a husband, and enters upon a moiety, the younger daughter dies without issue, and the seven years expire; in this case and by this devise, the collaterall heir of the younger daughter shall have the moiety of the whole; and not the moiety of a moiety only, and that by descent. *Dyer 342.*

If a man have issue *B. C.* and *D.* sons, and he devise his land to *D.* his son, the remainder *proximo de sanguine*, or to the next of blood of the Testator; in this case and by this Devise *B.* shall take after the death of *D.* as the next of blood. In like manner, if the Testator have four daughters, and he devise his land to the youngest in Taile, the remainder to the next of blood; by this Devise the eldest daughter and not all the rest shall have the land: And if the Testator have issue *B.* his elder son and *C.* his younger son, and *B.* have issue *D.* his his son, and *B.* is attainted and dyeth, and the Testator deviseth his land to *J. S.* for life, the remainder to the next of blood of the Testator; by this Devise *D.* and not *C.* shall have the land. *Curia B. R. Mich. 20 Jac.*

If a man have issue *B.* and *C.* sons, and *E.* a daughter, and devise his land to *C.* for life, and after that it shall remain to the next of blood to his children, to the next heirs of the blood of his children, and *C.* dyeth, and *B.* dyeth without issue, and *D.* hath issue a daughter; in this case, and by this Devise, the heirs of *A.* shall not take, but the next of blood to the children of *A.* which is the daughter of *D.* and his children themselves are excluded, and if the sons have any issues living, they shall take with her by this Devise. *Broo. Descent. Pl. 19. 8. Aff. Pl. 6.*

If the Testator have issue by *A.* his first wife, three daughters, *Joane*, *Elizabeth* and *Anne*; and by *B.* his second wife, *Alice* and *Elizabeth*; and by *C.* his third wife, *William* a son; and three daughters, *Mary*, *Katherine* and *Johan*; and he devise his land to *Johan* his youngest daughter for life, paying 13 s. 4 d. to the son, and after her death to the son and the heirs of his body, and after his death without issue to *Elizabeth* the daughter of the second wife, and *Mary* the daughter of the third wife for their lives; the remainder (in Latin) to the next of the blood of the Devisor for ever; and the elder *Joan* hath issue *J. P.* and dyeth, the son dyeth without issue; the younger *Joan* hath issue and dyeth, *Elizabeth* of the first wife hath issue and dyeth; *Anne* dyeth having issue, *Alice* dyeth without issue, *Mary* and *Elizabeth* born of the second wife die without issue, *Katherine* dyeth without issue; in this case and by this Devise the son and heir of the elder daughter after the death of the son without issue, and of *Elizabeth* and *Mary*, and not all or any of the children or their children shall have the land, because *proximo* in Latin doth devore a person certain; and there be expresse Devises to others: But if in this case the remainder be limited in generall to the next of blood without any other

other matter, all the daughters perhaps may have it as Joint-tenants. Adjudged *M. 26 Jac. petin. versus Pearse. B. R.*

If a man have two sons and a daughter which hath two daughters, and he devise his land to a stranger for life, the remainder to his second son for life, the remainder in Fee to the next of blood to his son; in this case, if the eldest son die without issue, the daughter and her daughters shall have the land. *Fitz. Devise 9. Perk. sect. 508.*

Secondly, in respect of the thing devised.

Whatsoever will passe by any words in a Deed, will pass by the same words in a Will, and more also; for a Will is always more favourably interpreted than a Deed; See in the Exposition of Deeds *supra*.

And therefore if a man devise the profits, use, or occupation of land, by this Devise the land it self is devised. *Coo. 8. 94. Plow. 525.*

If a man devise the profits of his land, this is a Devise of the land it self. *Brownlows 80. 1. part.*

If a man devise thus, I give all my lands to J. S. or I give all my tenements to J. S. or I give all my lands and tenements to J. S. by this Devise is given, and J. S. shall have not only all the lands whereof the Devisor is sole seised, but also all the lands whereof he is seised in common or co-partinery with another, and not only the lands he hath in possession, but also the lands he hath in reversion of any estate in Fee-simple; but by this Devise regularly, Leases for years of lands will passe. *Mervils case. Fitz. Devise 4. Brod. Dont. 41.*

If a man devise thus, I give all my land in possession only; by this Devise there is given the lands he hath in possession only, and none of the lands he hath in reversion. *Plow. 66.*

If a man be seised of land in Fee-simple in Dale, and devise thus, I give all my lands in Dale to J. S.; and after the Will made and published, he doth purchase other lands in Dale, and dyeth; in this case and by this devise J. S. shall not have the new purchased lands. *Plow. 343, 344. old N. B. 89. Fitz. Devise 17.* and in this case it hath been held further, That if the Testator do by word of mouth after the purchase of the same lands declare himself to be minded that J. S. shall have the same new purchased lands also by this Devise, that notwithstanding J. S. shall not have them by this Devise. And yet it hath been adjudged, That if in this case one come to the Devisor to buy his new purchased land, and he say nay, but J. S. shall have it as the rest, that this is a new publication of the Will, and that J. S. by this devise shall have these new purchased lands; for a new publication of the Will in these cases will make the land to pass. *Trin. 37 Eliz. B. R. Breckford versus Parincote.* But if a man devise the Mannor of Dale, and at the time of the devise he hath it not, or devise his lands in Dale, and at the time of the devise he hath no lands there, and afterwards he doth purchase the Mannor of Dale, or lands in Dale; by this devise, and in this case, the Mannor and the new purchased lands will pass; for in this case it shall be intended he meant to purchase it. And yet the Statute enabling a man to devise lands saith, *Any person having, &c. Coo. 3. 30.* See before.

If one have an ancient Tenement, and lands belonging to it, and then purchase more lands, and occupy them altogether with the Tenement many years, and being all thus in his occupation, he doth make a devise after this manner, I give my Tenement in Dale, and all my lands belonging to it now in my occupation, to J. S. by this devise J. S. shall have the ancient land only, and none of the new purchased land; but if there be no ancient land belonging to the Tenement, but new purchased land only, there perhaps it may be otherwise; for in this case the words cannot else be satisfied. As in case where a man hath some lands in Fee-simple, and other lands for years only in Dale, and he devise all his lands and Tenements in Dale; by this devise the lands he hath for years doth not pass; but if he have no other lands in Dale; but these lands, in this case perhaps this land will pass. *Lofis versus Baker. Hill. 20 Ja. B. R.*

If one have a moiety of lands in Essex, and a moiety of lands in Kent, and he devise thus, I give my moieties, and all my other lands in Kent to J. S. it seems by this devise the moieties in both Counties do pass, and that J. S. shall have both the moieties. In *Mervils case*. If

If a man be seised in Fee, in possession of the moitie of a Farm called the Farm of C. and of the reversion in Fee of the other moitie, expectant on a lease made to A. and B. for their lives, and he make his Will thus, I will that my wife shall have all my living which I now occupy, untill my son come to 21. years of age, and then I will have her have the thirds of all my living, and that my son shall have all my Farm of C. to him and his heirs; by this devise if A. and B. dye before the heire be 21. years of age, the wife shall have the thirds of the whole Farm, and not of the moitie in possession onely. *Plich. 20. Ja. Adjudged Scattergood. case.*

If a man be seised of land in a Village, and in two Hamlets of the same Village, and he devise all his lands in that Village, and in one of the Hamlets; by this devise none of his land in the other Hamlet doth pass. *Dyer 261.*

If a man make his Will the first day of May, and thereby give the Mannor of Dale to one in Fee, and the tenth of May one of the Tenancies escheat, and the 20. of May the Devisor dyeth; in this case and by this devise, it seems the Devisee shall have the Tenancie that doth escheat. *Plow. 343.*

If one devise his land thus, I give my land in Dale to J. S. and his heirs, or to J. S. in Fee, or to J. S. in Fee-simple, or to J. S. for ever, or to J. S. *Habendum sibi & suis*, or to J. S. and his Assignes for ever; or thus, I give my land to J. S. to give, sell, or do therewith at his pleasure; by all these, and such like devises, a Fee-simple estate is made of the thing devised, and J. S. shall have the same to him and his heirs for ever. *Littl. Broo. sect. 133. Perk. sect. 1. 6. Littl. sect. 586. Kelw. 43. Coe. super Littl. 19. 20 H. 6. 35. Littl. Broo. sect. 432. 19 H. 8. 10.*

3. In respect of the estate and time that is devised. Fee-simple.

But if land be granted by Deed after this manner, J. S. by this grant in all these cases, except only in the first case, hath only an estate for life. And if a man devise his land to J. S. and say not how long, nor for what time, by this devise J. S. hath an estate for life only in the land. *Fitz. Devise 111. See Gouldsb. 183.*

Devise of land let for 99. years thus: I give to J. S. my house with all the lands 99. years: and J. S. shall have all my inheritance, if the Law will allow it; this doth give the inheritance to J. S. *Hobb. Rep. ib. 7.* And if I give to my right heirs males and posterity of my posterity of my name part and part like, this is a Fee-simple. *Brownlows 129. 1. part. See Brownlows 129. 1. part 147. 169. 2 part. 272. 277.*

If a man devise his land to J. S. and his Assignes, without saying [for ever] it is said by some, that by this devise J. S. hath onely an estate for life. *Coe. super Littl. 9. Perk. sect. 57. 239. New Terms of the Law tit. Devise.* But the contrary is affirmed elsewhere, and that it is a Fee-simple *Tr. in 2. C. B. R. reply & Daniels case.*

If one devise his land to his wife, to dispose thereof at her will and pleasure, and to give it to one of her sons; in this case, and by this devise, she hath a Fee-simple; but it is qualified, for she must convey it to one of her children, and cannot convey it to another. *Coe. 6. 16. Dyer 126.*

If one devise his land to J. S. paying 10 l. and use no other words, by this devise the Devisee hath the Fee-simple of the land, albeit the 10 l. be not the hundredth part of the worth of the land. And yet if one devise his land to J. S. for his life, paying 10 l. by this devise J. S. shall have an estate for life only. *Adjudge Hill. 36 Eliz. Coe. B.*

If one devise land of the value of 50 l. per annum to J. S. for life, the remainder to J. D. paying 40 l. to W. by this devise J. D. shall have the Fee-simple of the remainder upon condition.

If one have two sons, and he devise his land first to his wife and then he saith thus: In like manner, I will that my son A. shall have it after my wives death; and if my wife dye before my son B. then that my son A. shall pay to B. 3 l. by the year during the life of B. and also 20 l. to W. S. by this devise A. shall have the Fee-simple of this land. *Hill. 17 Jac. B. R. adjudged Spicers case.*

If one devise his land thus, I will my land to my son W. for his life, and after his death to my son T. and if my son W. purchase land as good as that land for my son

son T. then that my son W. shall sell the land devised to my son T. as his own, and I will that my son W. shall pay to his sisters 10 l. by 20. s. a year; in this case, and by this devise W. hath a Fee-simple; for power to sell given by implication an estate in Fee-simple, and it is paying also; *Sec. Curia M. 18. Jac. B. R. Green versus Dewell.*

If one devise land to his wife and her heirs, and if the heir put her out that she shall have other land; by this devise she hath the Fee-simple of the first land, and is not abridged by the latter words. *Pasch. 14 Jac. B. R. Curia.*

If one devise his land thus, I give White Acre to my eldest son and his heirs, for his part: *Item*, Black Acre to my youngest son for his part; by this devise the younger son shall have the Fee-simple of Black Acre: So, if I give White Acre to J. S. *Item*, Black Acre to J. S. and his heirs; by this devise J. S. shall have the Fee-simple of White Acre also. *Thin. 30. Eliz.*

If one give land to his wife for life, the remainder to his son and the heirs males of his body, and for want of such issue the remainder to the next heir male of the Donor and the heirs males of his body; it seems by this devise, that the next heir male of the son hath a Fee-simple. *Perk. sect. 365.*

Fee-tail.

If one devise his land thus, I give my land in *Dale* to J. S. and to his, or [to the] heirs males, or heirs females of his body, [or of his body begotten] or to J. S. and his issues male, or his issues female; or to J. S. and the heirs males of his body begotten on M. or to J. S. and E. his wife, and the heirs males, or heirs females of their two bodies begotten; or to J. S. and his heirs, if he shall have any heirs of his body, else that the land shall revert; or to J. S. and his heirs, if he have any issue of his body; or to J. S. and the right heirs males of his body; or to J. S. and his heirs, provided that if he dye without heirs of his body, that the land shall revert; by all these and such like devises an estate tail is made of the thing devised, and J. S. the Devisee shall have the same accordingly. See *Brownlows Rep. 1. part. 45. 2. part. 75.*

Deed.

If one devise his land thus, I give my land in *Dale* to J. S. & *semini suo*; by this devise J. S. hath an estate tail: But if he say, I give my land in *Dale* to J. S. & *sanguini suo*; it is said by this devise J. S. hath the Fee-simple of the land. If one devise his land to J. S. & *exilibus, vel prolibus de corpore suo*; by this devise of J. S. have no children at the time, it seems he hath an estate tail; but by such a limitation by deed is made only an estate for life. If one devise his land thus, I give my land in *Dale* to J. S. for life, the remainder to J. D. and E. his wife and their children; or to J. D. and E. his wife and their men children; or to J. D. and E. his wife and their issues; by these devises, if the husband and wife have no children at the time of the devise, is created an estate tail; and if they have any children at the time of the devise, then hereby is created an estate for all their lives only in jointenancie. And if land be devised to A. for life, the remainder to B. and the heirs of this body, the remainder to J. S. and his wife, and after to their children; by this devise J. S. and his wife have estates for their lives only, and their children after them estates for their lives jointly: And albeit they have no children at the time, yet every child they shall have after, may take by way of remainder. And so also it seems is the law upon such a limitation by Deed. *Coo. super Littl. 9. Broo. tit. tail 21. Coo. super Littl. 20. 6. 16.*

If one devise his land to his wife for life, the remainder to his son, and if the son dye without issue not having a son, that then it shall remain over; this is a good estate tail. *Brownl. 2. part. 270.*

Deed.

If lands be devised to J. S. and his heirs males, or his heirs females, without saying [of his body;] by this devise J. S. hath an estate tail. But if such a limitation be by deed, it is a Fee-simple. *Littl. sect. 1. H. 6. 25. 27. 9. H. 8. 27.*

If one have two sons, and devise White Acre to his eldest son and his heirs, and Black acre to his youngest son and his heirs, and if either of them dye without issue, then that the other shall be his heir; by this devise either of them hath an estate tail, and no Fee-simple. *Hill. 22. Jac. B. R. Daniels case.*

If one have land in Kent in W. S. and T. and have one male-child and a daughter,

daughter, and his brother hath three children, *B*, *C*, and *D*, and he devise his land thus; *Item*, I give my land in *Kent* to my male child and his heirs, and if he dye without heirs of his body, that the land in *W.* shall go to *B*. and his heirs, *Item*, I will my land in *S.* to *C*. and his heirs, and my land in *T.* to *D*. and his heirs; in this case, and by this devise, the male child of the Devisor hath an estate taile in all the lands, and after his death without heirs it shall remain according to the Will; So that if one devise his land to his eldest son and his heirs, and if he dye without heirs of his body, that it shall remain to his youngest son and his heirs; by this devise, the eldest son hath an estate taile, and the youngest son the Fee-simple. *Adjudge M. 9. Jac. Willups case.*

If one devise his land to his son *W*, and if he marry and have any issue male begotten of the body of his wife, then that issue to have it; and if he have no issue male, then to others in remainder; by this devise, it seems *W*. hath an estate taile to him and the issues male begotten on the body of his wife. *Coo. 9. 127.*

If one devise White Acre to *J. S.* and the heirs of his body, and then after faith thus, and I will that *J. D.* shall have Black Acre in the same manner that *J. S.* hath White Acre; by this devise *J. D.* hath an estate tail in Black Acre as *J. S.* hath in White Acre. *Perk. sect. 561. 20 H. 6. 36. Et sic de similibus.* And if one devise White Acre to *J. S.* and then say, *Item*, Black Acre to *J. S.* and the heirs of his body; by this devise he hath an estate taile in both Acres. *Tr. 30 Eliz.*

If one devise his land to his wife for years, the remainder to his younger son and his heirs, and if either of his two sons dye without issue, &c. that it shall remain to his daughter and her heirs, and the younger son dye in the life time of the Father, and after the Father dyeth; it seemeth by this devise the elder son shall have the land in taile. *Dyer. 122.*

If one devise his land to his wife for life, and after to his son, and if his son dye without issue, having no son [or having no male] then that it shall go to another; by this devise the son hath an Estate taile to him and the heirs males of his body. *Adjudge. Tri. 7. Jac. Coo. B. Robinsons case.*

If lands be given to a man and woman unmarried and the heirs of their two bodies, or to the husband of *A*, and wife of *B*, and the heirs of their two bodies; by these Devises are made estates in Taile. *Coo. super Littl. 20. 26. Plow. 33.*

If a man devise White Acre to his three brothers, and Black acre to *C*. his brother, so as he pay 10 l. to *J. S.* and otherwise that it shall remain to the house, provided that the same lands be not sold, but go unto the next of name and blood that are males, if it may be; it seems that by this devise *C*. hath an estate tail in black acre, and that if he die without issue, it shall go to the three other brothers and their heirs males in taile one after another: and that white acre also is so entailed in every of their parts. For the words [shall remain to the house] shall be construed to the most worthy of the Family, and the words [that are males] shall be construed in the future tense. *Dyer 33.*

If land be devised to *J. S.* and the heirs of his body, and that if he dye, that it shall remain to *J. D.* by this Devise *J. S.* hath an estate Taile, and the latter words do not qualify the former, but *J. D.* must attend his death without heirs of his body before he shall have the land. *Adjudge. 14. Eliz. Coo. B. & Trin. 9. Jac. B. R.*

If land be devised to *J. S.* and the heirs males of his body, and if it happen that he dye without heir of his body, that it shall go to *H.* and his heirs; by this Devise *J. S.* hath an estate to him and the heirs males of his body, and the subsequent words do not alter nor enlarge the estate. *Dyer 171.*

If land be devised to *J. S.* and *E.* his wife, and to the heirs of the body of the Survivor of them; by this Devise the Survivor shall have a generall estate Taile. *Coo. super Littl. 26.*

If land be devised to *J. S.* and the heirs he shall have by *A.* his wife; by this Deed. Devise *J. S.* hath a Fee-Taile, and not a Fee-simple as he hath in case of such a limitation by deed. *Coo. super Littl. 26.*

If land be devised to *J. S.* and to the heirs of the body of such a woman; by this Devise *J. S.* hath an estate Taile, and begotten shall be intended begotten by him. *Coo. super Littl. 26.*

If one devise land to his son and his heirs, and that if his son dye within the age

of 21 years or without issue, that the land shall remain over: and the son dyeth within age having issue; in this case and by this Devise the son hath an estate Taile, and [or] in this place shall be taken for [and] *Adjdg. M. 37.38. Elin. Sale ver. sus erard.*

Deed.

If land be devised to a man and his wife, and to one heir of their body, and the heir of the body of that heir; by this Devise an estate Taile is made in a Will as well as in a Deed. *Coo. super Littl. 22.*

If a man devise his land thus, I give White acre to *A.* my son and his heirs, Black acre to *B.* my son and his heirs, and Green acre to *C.* my son and his heirs, provided that if all my said sons die without issue of their bodies, that then all my said lands shall goe to *M.* my wife and her heirs; by this Devise they have all of their estates in Taile of their land, and as it seems crosse remainders to either of them of the land of each other. *M. 18. Jac. B. R. Gilberts case.*

If one devise his land thus, I give my land in *Dale* to *J. S.* and if he die without issue male of his body, then that it shall remain over to *J. D.* by this Devise *J. S.* hath an estate Taile. *Coo. 9. 128.*

If a man hath issue three sons, and devise his land thus, viz. one part to two of his sons in Taile, and another part to his third son in Taile, and that neither of them shall sell his part, but that either of them shall be heir to other; in this case case, and by this Devise, either of them hath an estate Taile, and if one of them die without issue, his part shall not revert to the eldest, but shall remain to the other son, for it is an implied remainder. *Littl. Broo. sect. 431. Broo. Devise 38. Dons. 44.*

If there be husband and wife, and they have issue a son and a daughter, and the husband die, and land is devised to the wife and the heirs of her late husband on her body begotten; in this case, and by this Devise the wife hath onely an estate for life, the son an estate in Taile, and so also the daughter in case he die without issue. *Coo. super Littl. 26.*

For life.

If one devise to *J. S.* that if he and his heirs of his body be not paid 20 l. rent yearly, he and they shall distraine, &c. by this Devise *J. S.* hath an estate taile of this rent. But if the Devise be that if *J. S.* be not paid 20 l. yearly, he shall distrain &c. by this Devise *J. S.* hath only an estate for life. So if one devise a rent of 10 l. out of his land to be paid quarterly, and say not how long the rent shall continue: this is but an estate for life. *Coo. super Littl. 147.8. 85. Brownl 2. part 74. 75.*

If one devise his land thus, I give my land in *Dale* to *J. S.* for his life, or to *J. S.* [without any more words] or *J. S.* & his heir, in the singular number; or *J. S.* and his children, and *J. S.* hath children at the time of the Devise; or to *J. S.* & his successors, (*J. S.* being a naturall person;) by all these and such like Devises *J. S.* hath only an estate for life in the thing devised. *Fitz. Devise 16. Coo. 6. 16. Perk. sect. 577.* But if the Testator have only a Terme of years in the land whereof the Devise is made, and devise this land to *J. S.* and doth not say for what time; it seems that by this Devise the whole Terme is devised, unless the intent doth appear to be otherwise. And if one devise land (whereof a man is seised in Fee) to *J. S.* paying 10 l. to *J. D.* by this Devise, albeit there be no estate expressed, yet *J. S.* hath the Fee-simple of the land, in respect of the payment of the money. *Mich. 13 Ja. B. R. Dyer sect. 307.* But if the intent of the Testator appear to be that *J. S.* shall have the land but for his life, *contra*; for there the consideration will not alter the estate expressed upon the gift. See before *Littl. Broo. sect. 406. 125.*

Deed.

If land be devised thus, I give my land in *Dale* to *J. S.* and his assignes, [without more words] by this Devise is held to be given no more but an estate for life by construction upon a Will, as it is upon a Deed. *Coo. super Litt. 9.4. 29.* And yet in the *New Termes of the Law tit. Devise*, the contrary is affirmed, *Ideo quare.*

If one devise thus, I will that *J. S.* shall have and occupy my land in *Dale*, and say not how long; by this Devise *J. S.* shall have the land for his life. *Pasch 9. Jac. Newmans case.* But if I devise that *J. S.* shall enter into my land, and say no more; by this Devise *J. S.* hath no estate at all, but power to enter into the land only. *Dyer 342.*

If a man have a son and a daughter and dieth, and lands are devised to the daughter, and the heirs females of the body of the Father; by this Devise the daughter hath

hath only an estate for her life; for there is no such person, for she is not heir.
Co. super Littl. 24.

If one devise his land thus, I give my land in *Dale* to J. S. for his life, and after to the next right heir of J. S. in the singular number, and to his right heirs forever; by this devise J. S. hath only an estate for life. *Co. 1. 66.*

So if one devise land to J. S. for life, and after to the next heir male of J. S. and to the heirs males of the body of such next heir male; by this devise J. S. hath an estate for life only; but if it be thus, I give my land in *Dale* to J. S. for his life, and after to the heirs, or to the right heirs of J. S. by these devises J. S. hath the Fee-simple of the land; And if it be to J. S. for life, and after to the heirs males of J. S. by this J. S. hath an estate Taile.

If one devise land to J. S. and E. his wife, and after their decease, [or the remainder] to their children; by this devise whether they have, or have not children at the time, J. S. and E. his wife have estates for their lives only. *Co. 6. 16. See Goldsb. 138. Plow. 47. 134. Plow. 33.*

If one devise his land to his wife for her life, and if she live till his son come to the age of 24. years, that then he shall have the land; And if she dye before he come to that age, then that J. S. shall have it till his son come to that age, and J. S. dye before the wife, and after she dye before the son come to 24. years, in this case the Executors of J. S. shall not have the land till the son come to 24. years of age. *Goldsb. 64. Plow. 2.*

If one devise a moiety of his land to his wife for life, and the other moiety to his second son, and after by another clause doth devise it all to his son after the death of his wife: by this Devise the son hath only an estate for life after the wives death, and no more. *Curia 7. Ja. Co. B.*

If one devise his land to J. S. in Fee after the death of J. B. (being his son and heir apparant;) by this Devise J. B. hath an estate for life by implication, and untill the Devise take effect, the Law gives it to him by descent. And so alio it seems the law is where one doth devise his land to J. S. after the death of his wife: that by this Devise the wife hath an estate for life by implication. And therefore if a man devise thus, I give my goods to my wife, and that after her decease, my son and heir shall have the house where the goods are; it is held by this Devise that the wife hath an estate for life in the house by implication; for a man is bound to provide for his own wife. But if a man devise his land to J. S. after the death of J. W. (a stranger to the Devisor;) it seems that by this Devise J. W. hath no estate at all by implication, and that this doth but set forth when the estate of J. S. shall begin, and that the intent of the Testator is that his heir shall have it untill that time. *Broo. Devise 48. 52. Littl. Broo. 107. 13. H. 7. 13. New terms of the Law tit. Devise Plow. 158. 414. 521.*

If one devise lands thus, I give my land in *Dale* to J. S. to the intent that with the profits thereof, he shall bring up a child, or to the intent, that with the profits thereof, he shall pay to A 10^l. or to the intent that he shall out of the profits thereof pay yearly 10 l. by these Devises J. S. hath only an estate for life, albeit the payments to be made be greater than the rent of the land: And therefore, it is not like to the case before, where a sum of money is to be paid presently. *Co. 6. 16. 3. 20. Broo. Estates 78.*

If one devise his land thus, I give my land to A. my cousin in Fee-simple, after her decease to W. her son (who is her heir apparant;) by this Devise she hath an estate for life first, the remainder to her son for his life, the remainder to the heirs of A in Fee-simple: And so also is the Law when the Devise is to any other after that manner. *Dyer 357.*

If my father be tenant for life of land, the remainder to me in Fee, and I devise this land to my wife, rendering for her naturall life 40 s. to the right heir of my father; by this Devise my wife hath an estate for life after the death of my father. *Dyer 371.*

If one devise his land unto his Executors, untill his son shall come unto 21. years of age, the profits to be employed towards the performance of his Will, and when he shall come to that age, then that his son and his heirs shall have it; by this Devise the Executors shall have it untill he be 21. years of age, and if he die before that time, untill the time he should have been 21. years of age, if he had lived so long; and [shall] in this case shall be taken for [should.] *Co. 3. 20.*

If one devise his land to his Executors for the payment of his debts, and untill his debts be paid; by this Devise the Executors have but a chattell and an uncertain interest, and they and their Executors shall hold it untill the debts be paid and no longer. *Coo. super Littl. 42.*

If one devise his land to J. S. and the heirs males of his body for the term of fifty years; it seems that by this Devise, J. S. hath but a Lease for so many years; if the heirs males of his body shall so long continue, and that for want of issue male, the terme of years shall end: And in this case, the Executor or Administrator, not the heirs males of J. S. shall have it after his death. *Coo. 10. in Leonard Lovell's case, 87. 46.*

Executors.

Fourthly, in respect of other matters.

If one devise his land thus, I give to J. S. and J. D. and their heirs, my land in Dale equally; or my land in Dale to be equally divided; by these Devises J. S. and J. D. shall have and hold the land, not as Joint-tenants, but as Tenants in common, so that the heir and not the survivor shall have his part that first dyeth: And yet in case of such a limitation by Deed, it is otherwise: And if one devise his land to J. S. and J. D. and their heirs [without more words;] it seems that by this Devise they shall take and hold as Joint-tenants. *Adjudged Lowen versus Coxe. Mich. 37. 38. Eliz. Co. B. Dyer 25. Littl. Bro. fess. 133. Littl. 283. Perk. fess. 170. Dyer 350.*

And yet if one devise land to J. S. and J. D. and the heirs of either of their bodies lawfully engendred; it seems that by this Devise J. S. and J. D. shall take and hold as Tenants in common and not as Joint-tenants, *Dyer 326.* And if one devise his land to J. S. and J. D. thus, I will that J. S. and J. D. shall have my lands in Dale, and occupy them indifferently to them and their heirs, *Pasche 9. Ja. Newmans case. See Brownlows Rep. 1. part. 131. 169.*

If one that hath 2. daughters only give his land to them in Fee; they shall be in by devise as Joint-tenants, and not by descent as Partners. But if he have but one daughter, or a son and heir, and give it so, it is void, and they shall take by descent. *Goldsb. 141. Plow. 53.*

Devise of goods and chattels. First, in respect of the person that shall take by the Devise.

If one be possessed of a terme of years of land, and devise the same to his wife during all the years, and if she die within the years, then to A and B his two sons, if they have no issue male; but if they or either of them have issue male, then that it shall go to the use of those issues male; and she die, and the two sons die without issue born, one of their wives being privily with child of a son, which after his death is borne; in this case and by this devise this issue male shall have it alfoone as he is born. *Hill. 13 Ja. B. R. Adjudged. Blandfords case.*

Executors.

Heire.

If one be possessed of a terme of years, and he devise it to another and his heirs, or his heirs males; by this Devise the Executors or Administrators, not the heirs of the Legatee shall have it. *Coo. 10. 46. Lampets case. Perk. fess. 558, 556.* And therefore, if Lessee for years of land devise all his interest therein to his wife, if she live so long, and after her death, if any part of the term be to come, devise the same to J. S. his son and the heirs of his body; in this case and by this Devise, the Executors and Administrators of J. S. not his heirs shall have it, at least, so long as he hath any heirs of his body: And yet if one possessed of a term of years, devise it to J. S. and after his death, that the heir of J. S. shall have it; in this case J. S. shall have so many years of the term as he shall live, and the heir of J. S. and the Executor of that heir shall have the residue of the term. *See Brown. Rep. 1. part. 41. 131.*

If one give 10 l. to the Children of J. S. and at the time of the Devise J. S. hath foure children, and after before the death of the Testator he happen to have two more; in this case and by this Devise, the two children he hath afterwards shall have no part of the 10 l. but those four he had before shall have it all. *Swinb. 316.*

If one give 10 l. to his Parish-Church, and at the time of the Will made, he live in one Parish, and after he doth remove into another Parish, and die there; by this Devise the Parish where he lived before, and not where he died, shall have this 10 l. *Swinb. 316.*

Secondly, in respect of the thing.

If one devise a third part of all his goods and chattels; by this Devise, some say, doth passe, and is given no more but a clear third part after debts and Legacies paid: but it seems a third part of the whole, is hereby devised, out of which the debts must first be paid by Law. *Dyer 598. 164.*

If one devise to another all his Goods and Chattels, or all his Plate, or all of any other thing in general; by this Devise doth pass and is given not onely all the Testator hath of that thing at the time of the making of the Will, but also all he hath at the time of his death; and not onely what he hath in possession, but also what he hath not in possession: But if one devise all his goods, or all his plate, &c. in such a place, or in the occupation of *IS*; by this Devise none other will pass but what are in that place, and in the occupation of *IS*. *Plow.* 343. *Swinb.* 318.

If one have a term of years of a portion of Tithes in *Dale*, and have a term of years of land in *Dale*; and he devise all his lands and tenements in *Dale*, and all his estate therein to *IS*; by this Devise the portion of Tithes doth not pass, for it is neither land, nor tenement: but by devise of all his hereditaments, perhaps it may pass. *Sed Quare. By the opinion of divers Lawyers.*

If one devise to *IS* all his Goods and Chattels, by this devise doth pass and is given all his estate active and passive (except land of inheritance, and free-hold estates, and such things as depend thereupon) as Leases for years, Wardships by Tenure in *Capite*, or by Knights Service, gold, silver, plate, household-stuff, cattel, corn, debts, and the like; and if one devise to *IS* all his goods, or all his Chattels, by either of these is devised as much as by both of them. *Portman versus Willis. Pasche.* 36 *Eliz. Co. B. Co. super Litt.* 118. *Swinb. part.* 7. c. 10.

If one give his Goods by Will to his wife for life, and after her decease to *IS*, this is not good to *IS*, for a Devise of a remainder of goods is not good. But where the Devise is of the use and occupation of goods onely, there it may be good by way of remainder, *March.* 106. pl. 183.

If one have goods worth 100 *l.* and owe 20 *l.* and giveth to his wife the one half of all his goods to be equally divided between him and his executors, in this case the wife shall have the one half of all the estate, and that without defalcation, *Goldsb.* 149. pl. 74.

If one devise to *IS* all his moveables, by this Devise doth pass all his personal goods, both quick and dead, which either move themselves, as horses, sheep, and the like; or may be moved by another, as plate, household-stuff, corn in the garners and barns, or in the sheaf, &c. *Swinb.* 305, 306, 307. also all Bonds and Especialties; and by a Devise of Immoveables doth pass Leases, Rents, grafs, and the like; but not any of those things that do pass by the devise of moveables; but debts will not pass by either of these Devises, *Agree Hill.* 9. *Car. Co. B.*

If one devise to another all his household-stuff, hereby doth pass his plate, coaches, tables, stools, forms, beds, vessels of wood, brass, pewter, earth, and the like; but not his apparel, books, weapons, tools for Artificers, cattel, victuals, corn, plow-gear, and the like; by a Devise of all utensils, it is agreed that plate and jewels do not pass, *Swinb.* 312. part. 7. c. 10. *Dyer* 59.

If a man devise to *IS* one of his horses, or a horse, by this devise *IS* shall have Election, the election, if there be more than one, which horse he will have: but if the devise be thus, I will that my Executor shall deliver to *IS* one of my horses; in this case the Executor hath the election, and may deliver which of them he will, *Swinb.* 302.

If one devise thus, I give to *IS* my corn growing in such a ground this next year; or the lambs of my flock this next year; by these devises the Legatee shall have no more but what doth grow that year. But if he devise so many quarters of corn, or so many lambs; in these cases so much must be paid howsoever, *Swinb.* 94.

If one have a Lease for years of land, and devise it to *IS* for life; by this devise Thirdly, in re- the whole term is devised; and *IS* the Devisee shall have the whole term if he live spect of the so long, and yet *IS* shall not have an estate for life by this devise; and so also it time.

seems the Law is upon a Grant by deed after this manner, *Co.* 4. 66. *Plow.* 520. *Co.* 7. 23. And if a man possessed of a term of years of land, devise his term, or his Lease, or the land it self by a devise, in either of these terms the whole term doth pass, *Brownl. Rep.* 1. part. 41, 45. 2. part. 308, 309. Grandfather, father, and son; the grandfather was possessed of a term of 21 years to come, he devised the land to the son for 21 years, and makes the son his Executor, and dyes; the son being

within the age of 21 years, the Father enters into the land, and makes a Lease for 7 years by Indenture, untill the son come to full age, the father makes the son his Executor, and dyes; the son enters by force of the Devise made by the Grandfather; in this case it was adjudged that the son shall avoyd the Lease made by his father, *Brownl. 2. part. 308.*

If a man be possessed of two houses for years, and devise them to his wife for her life, if she live sole; the remainder to IS; and if she marry, then that she shall have one of them during the rest of the term, [and then addeth these words] and also, I will that she shall have 20 *l.* a year out of my other lands; in this case, and by this Devise, it seems the Annuity shall continue during the term. *Sed quare.* for the Judges were divided in this point, *Pasche 14. Jac. B. R. Gough and Haywards Case.*

If a Legacy be given, and no time is set for the payment or doing of it, if it be simple, it must be paid and done presently; if it be conditional, and upon a condition precedent, it must be paid or done the time the condition is first extant; and if there be a time set for the payment or doing of it, it must be paid or done at the time appointed. See more in Exposition of Deeds, numb. 15. *Plow. 340. Swinb. 354.*

9. Devise of lands to Executors or others to sell; or that Executors or others shall sell or otherwise dispose them: how this shall be taken, and what sale and disposition shall be good, or not.

Devise of Lands to Executors to sell, to pay debts, legacies, &c. are some of them after one manner, and some after another; for sometimes the Devise is thus, I will that my Executors, or that *A B* and *C* my Executors shall sell my land, *Co. super Litt. 236. 112, 113. 15 H. 7. 12. Dyer 177, 219. Kelw. 107 108. Perk. Sett. 343. 542. Litt. Broo. Sett. 371. Kelw. 40 45.* and sometimes the Devise is thus, I give my land to my Executors to be sold, or to the end that they shall sell it; in the first case, the Executors have onely an authority and no interest, and therefore in that case the land doth descend in the interim to the heir of the Devisor, and he shall have the profits of the land untill it be sold; and if it be never sold, he shall ever have the profits of it; and in this case, they may sell it when they will, if they be not hastned thereunto by order of Court; and when they do sell, they must all joyn in the sale by the Common Law, or otherwise the sale had not been good; and therefore if one or more of them had dyed before the sale, they that had survived or their Executors could never have sold it by this authority; so likewise if any of the Executors had refused the charge of the Will, the land could not have been sold by the rest, unless the words of the Will had been, that his Executors or some of them should sell it; for in that case, some of them even by the Common Law it self might have sold, and now also by the Statute of 21 *H. 8. cap. 4.* some of them may sell it without the rest; as if one give his land to *A* for life, and that after his decease it shall be sold by his Executors, and make four Executors, and one of them dye during the life of *A*, and then *A* dyeth; in this case the other three Executors may sell. So if one give his land in Tail, and that if the Donee dye without issue, that the lands shall be sold by his sons-in-law, and he have then five sons-in-law, and one of them dye in the life-time of the Donee, and after the Donee dye without issue; in this case, the other four may sell the land, and the sale made thereof is good: And yet if the words of the Will be, That it, shall be sold by *A B* and *C* his Executors, or his sons-in-law; in this case, if one of them dye, it cannot be sold by the rest: but in the last case before, where the Devise is, I give my land to my Executors to be sold, &c. the Executors have an interest in the land, and an authority about the land also, and therefore in this case the descent is prevented, and the Executors shall keep it till the sale; neither will any disseisin, fine, recovery, or Feoffment by the heir prejudice their interest, but that they may sell it when they will, but they must sell it in time convenient, or otherwise the heir may enter and put them out by a condition in Law that is annexed to the interest, or perhaps the heir may tender to them the worth of the land, and if they refuse to accept it, he may enter upon them, and out them: and it seems in this case, the mean profits untill the sale is no Assets, but the money made upon the sale shall be Assets in their hand: and in this case, albeit one or more of the Executors dye, or refuse, yet the rest may sell it, even by the Common Law it self, and so also by construction upon

Assets.

upon the same Statute, for the estate surviveth. But it seems they may not sell to him that doth refuse; neither may they in either case transfer their power to sell to any other, nor keep the land themselves, and pay so much of their own money as the land is worth. A Devise was to A for life, the remainder to his son in Tail; and if his son dye without issue of his body, that then the land shall be sold by his Executors, and maketh two Executors and dyeth, A dyeth; in this case it seems one of the Executors cannot sell, *Goldsb. 2. pl. 4.*

If the Devise be that the Executors shall sell with the assent of I S; in this case if I S dye before he assents the Executors cannot sell, and in his life time they cannot sell without his assent, *Brownl. 2. Rep. 100.*

If one deviseth by his Will, that his land shall be sold to pay his debts, and say not by whom; in this case it shall be sold by his Executors; and if one devise all his land except one Acre which he doth appoint to pay his debts; by this Devise his Executors or the survivor of them may sell it: but if one say by his Will that I S shall have *sam gubernationem puerorum meorum quam*, the disposing, letting, and setting of my lands; by this Devise I S hath not power given to him to sell the land, *Perk. Sell. 347. Dyer 371. 26.*

If one devise that his land shall be sold after the death of his wife by his Executors with the assent of I S, and make his wife and a stranger his Executors, and dye, and after I S dye; in this case, the land cannot be sold; for the authority is determined, *Dyer 219.*

If one devise that his Executors shall sell the land, and with the money coming or made of it, shall pay such and such Legacies or sums of money, in particular to such and such persons by name; this is not a Legacy for which a Suit lyeth in a Court Christian, but for this, every one that is to have portion may have account against the Executors after the sale, *Dyer 151, 152.*

If one give lands to another, to give them again to the children of the Testator, or to dispose them at the Will of the Devisees to some of the children of the Devisor; in these cases, the Devisees must dispose it accordingly, and cannot give it to any other, *Trin. 2. Car. B. R.* And if one give lands to others, to the intent that with the profits thereof they shall educate children, or pay such sums of money, or the, &c. in this case, the Devisees must do accordingly; or they may be compelled thereunto, *Coo. 6. 16.*

And in all cases of devises of lands to Executors to sell, it is wisdom to make it certain, i.e. that the Executors or the survivor of them, or such or so many of them as take upon them the probate of the Will (if his meaning be so) shall sell it, *Coo. super Litt. 112, 113.* And it is better to give an Authority than an estate, unless his meaning be that they shall take the profits of the land untill the sale; and if he do so, then it is necessary that he appoint that the mean profits untill the sale shall be Assers in their hands, for otherwise it shall not be so. See more, *Brownl. 2. part. 34. 2. part. 47. 100.*

The same words that in a Deed will make a condition, and the thing granted thereby to be conditional, will make a condition in a Will, and the thing given thereby to be conditional, *Dyer 33. 348. 126. Coo. super Litt. 236. See condition.* And therefore these words, *Provided on condition, So that, If,* and the like, will make a condition in a Will: So that if one devise land to I S on condition, or *So that,* or *If,* or provided that he do bring up his eldest son; or pay his wife 20 l. a year for her life, or the like; by these Devises, the estate is made conditional: Also other words that being used in a Deed will not make a condition, yet being used in a Will make a condition, and the estate made by the Devise to be conditional: And therefore, if a man devise his land to his Executors to be sold; or devise his land to them or others to pay 20 l. to I S, or paying 20 l. to I S; in these cases, and by these Devises, the estates are made conditional: and of these conditions regularly the heir, and not a stranger shall take advantage. So as if one devise land to another and his heirs, provided that he pay 10 l. to I S, otherwise that the land shall remain to I D, and his heirs; in this case, if the Devisee do not pay the money, I D shall not take advantage of it, nor have the land according to the Devise,

10. Devise upon condition; and what words in a Will shall be construed in the sense of a condition, and what not.

vise, but the heir of the Devisor shall enter and have the land, and put out the Devisee. And if one devise his land to *I S* for life, on condition to pay 20 *l.* to *I D*, and after to *I D* in Tail; in this case, if *I S* do not pay the 20 *l.* it seems the heir shall enter and hold the land during the life of *I S*, and that *I D* shall not have it till then; *Dyer* 33. 348. 126. 128.

And in cases of Devises of Goods or Chattels, other words will make a Devise conditional in divers cases, as [when] as, I give to *I S* 10 *l.* when he shall be married; and [whiles] as, I give to *I S* 20 *l.* whiles he shall abide with my children, which is as much as if he abide with my children; and [which] as I give him 20 *l.* which shall marry my daughter; and the ablative case absolute, as, my son being dead, I give to *I S* 20 *l.* And of all these conditions regularly, the Executor and no other shall take advantage. But if the condition be such for the matter and substance of it, as is impossible, unlawfull, or the like; there perhaps these words may not make a condition, nor the thing devised conditional, but rather make the whole sentence voyd. Whereof reade *Swinb. part. 4. Sect. 5. at large. Swinb. 136.*

17. Where a Devise voyd or voydable in his exception, may become good by matter *ex post facto*, or not.

If one devise his land to his daughter and heir apparent in Fee-simple, this Devise is voyd; yet if in this case the wife of the Devisor be privily with child of a son which is born after his death, now is the Devise become good, for now she is not heir to her father, *Fitz. 111. Affize. 27.*

If a woman that hath a husband, devise her land by Will during the Coverture, and after her husbands death when she is sole, she do publish and approve it; in this case and by this means the Devise is become good: but if she make and publish it during the Coverture, and after her husband dye and she become sole, this accident without any more will not make the Devise good; the same Law is of the Devise of goods and chattels, *Plow. 344.*

If an Infant within age devise his lands or goods, and publish his Will, and after he comes to be of full age, he doth publish and approve it again; in this case and by this means the Devise is become good: but if the Infant live to be of full age, and do not publish and approve it, *contra, Plow. 344.*

If a Legacy of goods or chattels be given on condition to a man incapable; and before the condition is extant, he doth become capable; in this case, and by this means the Devise is become good. See before at numb. 6. more of this matter, *Swinb. 340.*

18. Where a Devise good in his inception, shall, or may become voyd by matter *ex post facto*, or not.

By a subsequent repugnant Will.

A Devise that hath a good beginning, is sometimes avoyded and overthrown by subsequent matter in the same Will, and sometimes by subsequent matter in another Will, and sometimes by some other accident *ex post facto*: For if a man make a subsequent or latter Devise either in the same or in another Will, so contrary and repugnant to the former, that both cannot stand together, this doth overthrow the former, *Litt. 168. Co. super Litt. 112. Plow. 540. 541. Co. 8. 94. 6. 33.* And therefore if a man do give White Acre to *I S* in Fee, or his white horse to *I S*, and after by the same or another Will doth give White Acre to *I D* in Fee, or his white horse to *I D*, these latter Devises do overthrow the former, *cum duo inter se pugnantia reperiuntur in testamento, ultimum ratum est*: And as a latter Will doth overthrow the former, so the latter part of a Will doth overthrow the former part of the same Will. But if the Devisees be such as they may stand both together, and are not directly repugnant, nor do fight one against another, there the latter shall not overthrow the former, but both shall be received: And therefore if one devise his land to *I S*, and his heirs, and after by the same Will devise a Rent out of the same land to *I D* and his heirs, or *è contra*. So if one devise White Acre to *A* for life, and afterwards give the same Acre to *B* in Fee; in this case the one may have it for his life, and the other may have the Fee-simple afterwards. See before.

By a waving of the estate devised.

If one devise his land to his son and heir in Fee-simple, or devise it to a stranger for years, the remainder to his son and heir in Fee-simple; and the heir after the death of the Devisor doth (as he may) wave the estate given him by the Devise, and claim the land by descent; in this case and by this means the Devise is become voyd. But if the Devise be to the son and heir in Tail, the remainder

mainder to a stranger, there he cannot wave the Devise, and take it in any other manner. And so if a man have onely two daughters (who are his heirs) and he devise his land to them; or have Gavelkind-land, and devise it to all his sons: they may not wave these Devises and take by descent, for by Devise they shall take as joynt-tenants; who otherwise by descent shall take as Parceners, *Plow. 545. Perk. Sect. 569. Litt. Broo. 453; Kitchin 127. Dyer 317, 350.*

If one devise his land to another in Fee-simple, Fee-tail, for life, or years, and the Devisee after the death of the Testator doth refuse and wave the estate devised to him; in this case and by this means the Devise is become voyd. And it seems a verbal waiver is sufficient in this case. So if one give goods or chattels to another, and the Devisee refuse it; by this means the Devise is become voyd, and any waiver or refusal will suffice in this case; for a man shall not be compelled *Nolens volens* to take a thing devised to him, *Litt. Broo. Sect. 482. Perk. Sect. 569. Dyer 61. Co. 9. 140. Plow. 543, 544.*

If a woman sole devise her lands or goods by Will, and after take a husband and dye during the Coverture; by this means the Devise is become voyd. And yet if she survive her husband, and dye unmarried, now is the Devise become good again, *Plow. 348.*

If one devise his land to I S and his heirs, and afterwards I S dye the Testator living; by this means the Devise is become voyd. And in this case no verbal declaration of the Testator, that the heirs of I S shall have it will help; for albeit a Devise of land in writing may be revoked by a verbal subsequent declaration, or by any act crossing or controuling that Devise, yet a Devise becoming voyd by that means cannot be made good by any such verbal declaration subsequent to the same Countermand, *Plow. 50. 346, 344, 341.* So if one give any goods or chattels to I S, and he dye before the Testator; in this case and by this means the Devise is become voyd, and the Executor of I S shall not have it, *See infra at numb. 14.* And yet if a Devise be of land to A for life, the remainder to B in Tail, and A dye before the Testator; it seems the Devise of the remainder doth continue good notwithstanding, *Perk. Sect. 567, 568.*

And if one devise lands or goods to the wife of I S, and afterwards her husband dyeth, and she marry with another man, and then the Devisor dyeth; this is a good devise notwithstanding, and not avoyded by either of these Accidents, *Plow. 344.*

If one devise a Term that he hath to A for life, the remainder to such persons as shall be occupiers of White Acre at the death of A; this Devise albeit in his beginning it be good, yet if the Devisor dye before A, it seems now to become voyd; for he that will take by way of Executory devise, must take as an immediate purchaser, and be capable and known at the time of the death of the Testator, *Per Justice Jones, M. 9. Jac. Co. B.*

If I give to I S 20 l. if he marry my daughter, and she dye before he marry her; in this case and by this means the Legacy is become voyd, *Swinb. 356.*

If I give a debt owing me to I S, and afterwards I receive or release the debt; hereby the devise is become voyd, *Perk. Sect.*

If a man make a Will and give Legacies, and appoint one or more his Executor or Executors, and he or they after his death all refuse to take upon them the Administration: yet in this case the Legacies remain good, and are not become voyd: And in this case the course is to grant the Administration of the goods to him to whom it doth belong, and to annex the Will to the Administration, and then the Administrator is to perform the Will as the Executor ought to do, *Litt. Broo. Sect. 300.*

It is held also that a Legacy of goods or chattels may become voyd by the injurious dealing of the Legatee against the Testator after the Legacy given: whereof read *Swinb. part. 7. Sect. 22.*

And when the thing devised is dead, or spoyled, howsoever by this means the Devise is not become voyd, yet it loseth his effect, and is as if it were voyd, *Swinb. 357.* A Legacy may be extinct and gone by a Contract also, as where the Execu-

H h h h h

tor

13. Where a Legacy shall go to the Executor when the Legatee doth dye before he doth receive it; and where not.

tor gives the Legatee an obligation for the money, otherwise it is as if it were made to a stranger, *Brownl. 2. part. 11. See more supra at numb. 5. Brownl. 2. part. 111.*

In all these cases, when the disposition of the Legacy is pure; and no time is set for the performing of it; or there is a set time for the doing of it, and the Legatee dye before the time: and where the disposition of the Legacy is conditional, and a time set for the doing of it, if the Legatee live till that time, or the condition be performed; in all these cases the Executor or Administrator of the Legatee shall have the Legacy, and the same remedy to recover it that the Legatee himself had, *Swint. 350, 355, 356.* But if the Legatee dye before the condition be performed, *contra*; And yet if in that case the Testator's minde shall appear to be that the Executor or Administrator of the Legatee shall have it, or the condition be to be performed by another, and there be no default in the Legatee: or if the disposition be modal: or the Legacy that was at first upon condition, be afterwards repeated without condition, or it be referred to a condition to be afterwards set down, and none is set down; in these cases the Legacy is not lost by the death of the Legatee, but shall go to his Executor or Administrator: As for Example; If one devise 20 l. to W S to be paid within 4 years after the death of the Testator, and the Legatee dye before the four years expired; in this case the Executor or Administrator after the 4 years expired shall recover the Legacy. If one give to W S 20 l. when he cometh to 21 years of age, and he dye before he come to the age of 21 years, in this case his Executor shall not have the Legacy. But if the Devise be thus, I give to W S 20 l. and I will that it shall be paid him at his age of 21 years, and he dye before he come to the age of 21 years; in this case his Executor shall recover the Legacy, *Broo. Devise 27, 45. Swint. 350, 355. Dyer 59. Swint. 358, 356. Plow. 346.* So if one give to I S 20 l. when he shall be married, and he dye before marriage; in this case his Executor shall not have it. But if one devise thus, I give to W S 20 l. towards his marriage, and he dye unmarried; in this case the Executor shall have and recover the Legacy. So if one do give to W S 20 l. when the Executor of the Testator shall dye; in this case if W S dye before the Executor, the Executor or Administrator of W S shall not have the Legacy. If one devise goods or chattels to I S, and I S dye before the Testator, the Executor or Administrator of I S shall not have this Legacy. See more in *Brownl. 1. part. 33.*

14. Where an Executor upon a Devise to him hath an Election to have the thing devised as Executor or as Legatee. And when he shall have it in the one right or in the other, and what act shall make a declaration of his Election.

When any Chattel real or personal is given to an Executor by a Will, the Executor hath an election given him by the Law to have and take it in the one right or in the other, *viz.* as Executor, or as Legatee: and by his special entry, or seizing of the thing, or some special declaration, his election is to be made. And if the Executor do enter generally (as most do) and never make any declaration which way, or by which right he will have it (as most Executors use to do) he shall be said to have it, and the Law shall adjudge it in him as Executor, and not as Legatee. But if by any subsequent words or deeds he shall declare his minde to be otherwise, he shall be in as a Legatee *ab initio*; And yet if once he do any such act as is proper to an Executor, this is a disagreement to the Legacy *ab initio*; and after that it seems he cannot take as Legatee, but must take as Executor. And if one Executor of many to whom a term of years of land is devised, occupy the same alone, and the rest intermeddle not with the profits thereof, albeit he make no declaration, it is said this is a good declaration of his election to have it as Legatee. But if a term of years be given to the wife of I S, and I S be made Executor, and he enter generally, and after makes his Testament and never speaks of this term; this is no declaration of his Election to have it as Legatee, neither shall the term be so deemed in him but as Executor. But in these cases this must be heeded, that howsoever the Executor hath power to take as Executor, or as Legatee, yet he cannot take as Legatee to prejudice Creditors in their debts; but the same things they so take as a Legacy, if there be not enough besides, shall be said to be Assets in their hands as to the Creditor for the satisfaction and payment of their debts, *Plow. 519, 520, 543. Coe. 10, 47, p. 37, 8. 96. Dyer 277, 367. Park. Sess. 37. 4 373, 575. Brownl. Goldb. 185, pl. 125.*

Assets.

If a man devise that after his Debts and Legacies paid, his wife shall have all the residue of his goods and chattels to distribute for his Sarle, &c. and make his wife his Executor; in this case it is said she hath no election, but she must take as Executor, and cannot take as Legatee, *Dyer* 331.

When a Devise of goods or chattels is well made, the assent of the Executor is necessary to the perfection thereof, for untill then the Legatee may not have or meddle with the thing devised. And this Assent is defined to be the agreement of an Executor or Administrator, that a Legatee shall have the thing bequeathed unto him. And it is either express, *i. e.* when the Executor or Administrator doth by express words agree to the Devise. Or implied, *i. e.* when the Executor doth not by words, but by some overt act declare his assent that the Legatee shall have the thing devised unto him, *Co. 10. 47. 52. March. 137. pl. 209.*

This agreement of the Executor or Administrator is not needfull in the case of a devise of land; for if a man be seized of land in Fee-simple, and deviseth to another in Fee-simple, Fee-tail, for term of life, or years; in these cases the Devisee may enter into the land devised without any leave of the Executor or Administrator: and in truth in these cases the Free-hold or estate is said to be in the Devisee before his entry: and therefore if the heir enter first, the Devisee may enter upon him, and put him out, *Co. super Litt. 111. Perk. Sect. 576, 578, 579. Swinb. 134. 135. Brownl. 1. part. 132.* And in case where land is devised by the custome of a place, if the heir enter first and keep the Devisee out, the Devisee may have a Writ of *Ex gravi querela* against him for his relief: and this Writ is incident to that custome. But if a Devisee enter first into the land devised unto him, and then the heir of the Devisor enter upon him, then the Devisee may take his remedy at the Common Law as in other cases. And with these things the ordinary Executor or Administrator is not to intermeddle. But regularly a Devisee cannot nor may not have or take any chattel real or personal devised to him without the agreement or delivery of the Executor or Administrator, *Perk. Sect. 570. Co. super Litt. 211. Plow. 515. 20. Ed. 4. 9.* And by this assent if the Devise be good (for otherwise an assent will not make it good) the Devise is perfected, and the Legacy executed. And yet if the Legatee have the thing devised in his own hands; or if there be a special clause in the Will giving him authority to take it himself; or it be a Legacy to good and godly uses; or the thing given be like to perish on the ground, being corn or the like, and there be assets besides to pay all the debts; in these cases perhaps the assent of the Executor or Administrator may not be necessary; but the Legatee may take the thing devised without his agreement; otherwise not in any case, *Swinb. 353. Bro. tit. devise 6. 30.* And if a Legacy be given to one of the Executors themselves, he may take it without any assent of his Co-executors, and that before Administration also if he will, *Perk. Sect. 572.*

If there be many Executors, the assent of any one of them is sufficient; and if there be but one, and he be dead, the assent of his Executor is sufficient; or if he dye intestate, the assent of the Administrator *de bonis non administratis* is of the first Testator is sufficient; or the Legatee himself in this case where the Executor dyeth intestate, or where he doth refuse to take upon him the Administration, may take Administration himself, and by publick declaration assent to his own Legacy. And if a man be Executor and Legatee both, he may assent to, and take the Legacy, and yet waive the Executorship, and this assent is good. And therefore if the Legatee of a term of years be made Executor, and he enter and claim and occupy the land by force of the Devise, and dye before Probate of the Will: the Executor of the Legatee, and not the Ordinary, shall have this term; and yet it seems the Executor may not do this in prejudice of a Creditor to hinder him of his debt, *Dyer 372. 367. See Agreement.*

Any agreement in word or deed will suffice to make an assent, and execute a Devise, *Co. 4. 28.* Let Executors take heed therefore; for if an Executor do but agree that the Legatee of a term of years of land shall take the profits thereof, and that but for a time onely; or say to the Legatee, God send you joy of it: or I intend you shall have it according to the Devise, or the like; this is a good assent to execute

15. Assent
Quid.

16. Where an Assent is necessary, or not. And where a man may enter into the lands, or take the goods or chattels devised unto him without the assent or delivery of the Executor. And what shall be said a sufficient Assent to execute a Legacy or not.

A Caveat for Executors.

H h h h h h

cute the Legacy. And if the Executor agree that the Legatee and a stranger together shall take the profits of the land, or the thing devised; this is a good assent. And it seems that whatsoever verbal agreement will amount to an *Assentment*, may make an assent to a Legacy. See *Assentment*. If therefore the Executor agree to the Legacy upon certain terms and conditions; this is agreed to be a good and absolute assent to the Legacy, *Per 2 Justices, M. 37. 38. Ehz. B. R. Co. 4. 18. Nichols* was possessed of a term of a 1000 years, he devised it to E for life, the remainder to I H, and made W husband to E Executor, and dyed; I H devised his interest to I S, and made O his Executor and dyed; after W spake these words, If E my wife were dead, my estate in the land were gone, and then it remains to I H; in this case these points were agreed by the Judges; 1. That the Devise to I H by way of Executory remainder is good. 2. That the Devise by I H to I S is voyd, for it is but a possibility. 3. That an assent to the first Devise is an assent to him in remainder. 4. That if the Executor enter generally, he is in as Executor, and not as Devisee. 5. That in this case W hath made his election to have it as a Legatee in right of his wife by those words. 6. That the assent comes time enough after the death of I H to settle the remainder in O the Executor. 7. But they seemed to encline, that there where the Executor wanteth Assents, he shall not be concluded by an implied without an expreis assent, *March. 137. pl. 209.*

If a term of years be given to the wife of the Testator during the minority of his eldest son, to the intent that she with the profits thereof shall breed up his children, the remainder of the same term to the same eldest son, and she is made Executrix, and she enter generally, but doth alwayes breed the children of the Testator; in this case it seems that this education of the children shall be taken for an assent against her to vest the estate in the eldest son, *Plow. 540.* And if a man possessed of a term of years give it to his wife, if she live so long, and after her decease the remainder of years to I S, and make his wife Executrix, and she enter, claiming to have it onely for her life, the remainder to I S according to the Devise; in this case this is a good assent for the execution of the remnant of the term in I S, *Plow. 516. Perk. Sect. 574.* And if a term be devised to A for life, the remainder to B, and the Executor assent to the Devise of A; in this case this is a good assent to the devise of B, and shall execute the same also, whether the Executor have assents or not, *Co. 8. 93. 4. 66. 10. 47. Perk. Sect. 574.* So if a man possessed of a term of 20 years, devise it to one for 10 years, and after to another for the remnant of the term; or if the Devise be to one for so many years of the term as he shall live, and after to another for the rest of the time: in all these cases an assent to the first Devisee is an assent to the second also. And so also it seems is the Law of a chattel personal, when the occupation thereof is first devised to one, and then the thing to another, *37 H. 6. 30.* And if one that hath a term of years give it to his wife for her life, the remainder to his son, and make her Executrix, and she enter claiming by force of the Devise, and not as Executrix; in this case this is a good assent to execute the Devise to him in remainder, *Plow. 519, 541. Co. 3. 96. 10. 47.*

If one be possessed of a term of years of land, and he devise it to one of his Executors alone for part of the time, and the remainder of the time after to a stranger: and that Executor alone, albeit he enter generally, doth occupy the land himself, and the other Executors do not intermeddle therewith; in this case it seems this is a good assent to execute the Legacy to him in remainder for the rest of the term. And yet if one give goods to one of his Executors for life, and after to a stranger for life, and this Executor alone get the goods into his own hands, and occupy them alone all his life time; it seems this occupation without some assent, will not execute the gift in the second Legatee, *Perk. Sect. 574 575. Fitz. Devise 6.*

If one possessed of a Lease for years, devise it to his Executors, and devise a rent out of it to I S, and the Executors pay the rent; this is a good assent to the whole Legacy. But if he devise a rent, or Common out of it for certain years to I S, and after devise the term to I D; and the Executor doth agree that I S shall put in his cartel, or doth pay the rent to I S, (which is a good assent to the Legacy of I S;) this is no assent nor execution of the Legacy of I D; And yet perhaps if he devise a rent at first to I D for part of the term, and another rent to I S for

for the residue of the terme afterwards; in this case it seems; that an assent to the first is not sufficient to perfect the Devise of the second Legatee. And yet if a Termor, devise the occupation or profits of his land to *J S* for 10 years of his Terme; and after devise the land it self to *J D* for the rest of the term; in this case if the Executor assent to the Legacy of *J S*, this will be a good assent to, and execution of the Legacy of *J D*. *Plow.* 340. 344. *Coo.* 8. 96. *Plow.* 341, 342. 312.

If one possessed of a term devise it to *I S* for life, the remainder to *I W*, and make *I S* his Executor; and *I S* take a release from *I W* of all his right to the land; this is an implicate assent to the Legacy of *I W*. *Coo.* 16. 52.

If a man devise the occupation of a book or any other chattell personall to *I S*, or that *I S* shall have the occupation of any such like thing during his life, and that after his decease it shall go to *I D* for ever, and the Executor deliver the thing to *I S*; it seems this is a good execution of the Legacy to the second Devisee *I D*; and therefore after the death of *I S* he may seise the goods and hold them according to the Devise. *Old N. B.* 80. 37 *H.* 6. 30.

If lands, or any rent, or other profit to be taken out of lands, be devised to a man in Fee-simple, Fee-tail, for life, or years; in these cases the Devisee may enter into, and have and take the thing devised without the leave or agreement of the Executor or Administrator: and so he may whether there be any Executor made or not, and whether the Will be proved or not, for the Ordinary and the Executor have nothing to do with these things. And if the Devisee in any such case be disturbed in the having or taking of such things, he may have the same remedy as men have in other cases. And where the land is devised by custome, if the heire enter before the Devisee, the Devisee may be relieved by a Writ called *Ex gravi Quærela*; but if the Devisee enter first, and then the heire enter upon him, the Devisee may have his remedy at the Common-Law. *Perk. selt.* 576, 577, 578, 579. *Coo. super Littl.* 111.

If lands are given thus; I will that my Executors shall sell my land, and with the money made thereof shall pay 10 l. to my daughter *A*, and 10 l. to my daughter *B*, in this case and for this gift *A* and *B* may either sue the executors in a Court of equity, or have an action of Accompt against them in a Court of Common-Law. *Trin.* 9. *Jic. Lovets case* *Dyer* 151. 152.

If Lessee for years devise his term to Executors for life, the remainder over to *J. S.* for the rest of the term: and the executor entereth and doth assent to the Legacy and dye, and the executor of the executor doth take the profits of the land; and keep out the second Legatee; in this case it seems he may have an Accompt against the executor of the executor for the profits of the land. *Dyer* 277. But if one devise his land to his son and his heirs (except 20 l. a year for seven years to be employed as followeth) and doth appoint his son (being his executor also) to pay that money to his daughters for portions; in this case the daughters may not have an Accompt at the Common-Law, but they may sue the executors in the Spirituall Court or in a Court of equity, and if the executor be dead, they may sue his executor. *Trin.* 9. *Jic. Lovets case.*

If one devise a rent out of his land, and do charge the land with a distresse; the Devisee may make use of that remedy and distrain for the rent: but unless power be given him by the Will to distrain, he may not distrain for it. *Dyer* 348.

If one be possessed of a term of years of land, and devise it to his wife to the end that she with the profits thereof shall breed up his children; in this case this is no Legacy to them, and therefore it seems they have no remedy but in Chancery or some other Court of equity against her, if she refuse to do it. *Plow.* 345.

And in cases of Devises of goods and chattels, as Leases for years, rents out of such Leases, and the like, the Legatee cannot take the thing devised before he have the Assent of the Executor or Administrator thereunto: And therefore, if in these cases the Executor or Administrator refuse to agree to, perform, and deliver the Legacy, the Legatee might have sued him in the Spirituall Court, or in some Court of Equity to compell him thereunto: And the Legatee might not sue for a Legacy in any of the Courts of Common-Law: But now by the new Ordinance he is to sue at the Common-Law, and not in the Chancery. But enquire how he is to

sue at Common-Law, and what the course of practise herein is: And in these Courts and by these means, the Devisee may recover his Legacy against an Executor or Administrator, if he have Assents to pay the debts of the Testator; for otherwise a Legacy is not recoverable at all; but in case where the Executor or Administrator hath once agreed to the Legacy, so as it is executed, it is then so vested in the Legatee, and he hath such a property therein, that he may enter into, or seise and take the thing devised as his own, and if any man keep or take it from him, he may have reliefe as in other cases. *Broo. Non-ability* 18. *Fitz. Excommungment* 13.

If another doth claime by Deed of gift the goods a Legatee doth sue for; this may be tryed in the Ecclesiasticall Court. 37 *H. 6. 9*

If a debt, obligation, or any such like thing in action be devised to another, the Devisee hath no means to recover it, but by a Suit in the Spirituall Court, or in some Court of Equity, to compell the Executor to sue for it himself, or to make the Legatee a Letter of Attourney, to sue for it in the Executors name; for the Legatee cannot sue for it in his own name, unlesse he be made Executor as to that debt. &c. (which is the best course in these cases:) and yet if the Legatee have the Bond or Especialty in his hands, he may deliver it up or cancell it. *Perk. sect. 527. Swinb.*

If a man devise a term of years of land to J. S. and make another his Executor; and the Executor having enough besides to pay the debts doth sell this term in this case, albeit the sale be good, and J. S. have no remedy nor means to recover the term, yet he may sue the Executor for it, and recover the worth of it in damages in Court of Equity. *Plow. 543. 545. And of this opinion were Sir John Walter, and Sir John Bridgman, upon deliberate advise.*

And now having done with the first part of a Testament, viz. a Devise; we come to that which doth concern the second part, viz. an Executor.

18. What person may make or appoint an Executor, and what not, and how.

Any person that may make a Testament, and devise his goods and chattels, may make an executor. See before at *Numb. 4. part. 1.* And a woman that hath a husband, as to the goods and chattels she hath as Executrix to another, and as to her own goods and things in action, viz. debts due unto her upon Obligations, and Especialties made to her alote before, or after her marriage, may make an Executor. *Fitz. Executor* 28. And he that may make an Executor, may make either one, two, three, or more his Executors at his pleasure. *Swinb. 187. Dyer 4. Broo. Executors* 155. 19 *H. 8. Littl. Broo. sect. 180. 3 H. 6. 7. Swinb. 200. 193.*

And he may if he will make one man his Executor for one year, another man his Executor for another year; or one man his Executor untill such a time, and then another his Executor; As one may make A & B his Executors, and that B shall not meddle during the life of A. And a man may make one man Executor for one part of his estate, and another man his Executor for the other part of his estate; or one may make one man Executor as to part of his estate, and die intestate, as to the residue of his estate: Also a man may appoint one to be his Executor, if he will accept it, and if he refuse that, another shall be his Executor. And lastly, a man may make another his Executor upon condition, viz. so as he give Bond to such and such men to perform his Will, or the like: And all these nominations and appointments of Executor are good. See *Brownl. 2. part. 282.*

19. What person may be made or appointed an Executor, and what not, and by what name.

Any person that may be a Legatee, and take by the Devise of goods and chattels, may be an Executor: And therefore it is said, That any person or persons, male or female, of the Clergy, or Laity, children or strangers, friends or enemies, married, or unmarried, creditor or debtor, bond or free, may be an Executor. See at *Numb. 4. part. 2. Numb. 7. Swinb. 222. Fitz. Executors* 47. 87. *Devise* 3. And that a Bastard, an Excommunicate, or an Out-lawed person, may be as able and as absolute an Executor as any other. *Fitz. Executor, 11. 88. Non-ability, 18. Broo. Non-ability, 38.*

And an Infant or child *in utero matris* may be an Executor; but he cannot meddle with the Administration of the goods untill he be of the age of 17. years, and therefore the Ordinary must grant the Administration unto some other, untill that time in trust, and for the benefit of the Infant. *Coo. 6. 67.*

And

And a woman that hath a husband, may be an Executrix to any other person, *Fitz. Executor 24.*

Also a woman may be Executrix to her own husband, and the husband may be Executor to his own wife, and by this means he may recover all the debts due to her upon Obligations, Recognizances, and the like, made to her before or after the marriage, and the goods that were taken away from her before the marriage; all which the husband shall not have but by Executorship or an Administration of her goods and chattels, *Fitz. Executor 24. Broo. Consultation, 5.*

And all these persons that may be Executors, may be Executors by that name as they may be Devisors: And yet if there be two of one name, and the Testator make one of that name his Executor, and doth not say, neither can it be discerned which of them he doth intend, in this case neither of them shall be Executor. See *Alts Capaditis. See before at Numb. 7. Swinh. 292.*

But it is said, that an Heretic, Apostate, Traitor, Felon, Recusant convict, Sodomite, Libeller, Bastard begotten in Incest, or a notorious Usurer cannot be an Executor: *Swinh. 222, 223. Cov. 9. 19.*

And that if a man be for any of these causes incapable at the time of the death of the Testator, when the Executor is to take upon him the Executorship, that he is for ever incapable; but it hath been held by the Common-Law, that a person attainted, may be an Executor. *Broo. Nonability 18. Fitz. Excomungment. 13.*

The most apt and proper words whereby to constitute an Executor, are, I make *J. S.* my Executor, or, I make *J. S.* the Executor of my Will, &c. But an Executor may be constituted by other words equivalent or by implication: And therefore, if a man say in his Will, I will that *J. S.* shall be my generall Administrator, or I will that *J. S.* shall administer all my goods, or I will that *J. S.* shall dispose all my goods and chattels, or I commit all my goods to *J. S.* or I commit all my goods to the disposition of *J. S.* or I make *J. S.* Lord of all my goods, or I make *J. S.* Legatary of all my goods, or I leave all my goods to *J. S.* or I give all my goods to *J. S.* and make no other Executor; in all these cases, *J. S.* by interpretation of Law is made Executor of all the goods and chattels of the deceased: So if a man say, Of all my goods I make *J. S.* and say no more, but omit the word [Executor,] by these words *J. S.* is made Executor: So if one say, I will that *J. S.* shall dispose all the goods that are in his hands, by these words *J. S.* as to those goods is made Executor: So if I deliver goods to *J. S.* to keep untill my death, and then to distribute *ad pias usus*, or for my soul, hereby *J. S.* is made Executor of those goods: So if one say, I will that *J. S.* shall be my Executor, if *J. D.* will not, by this *J. D.* is made Executor in the first place by implication, and if he refuse, then *J. S.* shall be Executor. But if a man make *A.* and *B.* his Executors, and say, I will that *J. S.* shall be a Coadjutor, or helper to *A.* and *B.* *ad distribuendum* or *administrandum bona mea*; or I will that *J. S.* shall be Surveyor, or Suprvisor of my Will; in these cases and by these words, *J. S.* is not made Executor with *A.* and *B.* *Swinh. pars. 4. falk. 17, 18, 19. Dyer 4. 19 H. 8. 8. 21 H. 6. 6. Fitz. Executor 43. Broo. Executors, 98. 73. Fitz. Executors, 113. 121. Briele 999.*

And yet if he say, I will that *J. S.* shall have Administration of my goods, or be Executor with *A.* and *B.* or be Administrator with *A.* and *B.* in these cases and by these words, *J. S.* is made joint Executor with *A.* and *B.* And if one supposing *J. S.* to be dead, say, I will that *J. D.* shall be my Executor, because *J. S.* is dead, in this case and by these words, *J. S.* if he be living is made Executor first; and if he refuse, *J. D.* shall be Executor: If one make *A.* *B.* and *C.* his Executors, and then saith afterwards: And I will that *B.* shall administer my goods alone, or that *B.* only shall administer my goods; it seems in these cases, *B.* only is made Executor, and that *A.* and *C.* are not made joint Executors with him. *3 H. 6. 6, 7.*

In all Cases where a man hath any goods or chattels to administer, and he doth die a naturall or civil death, and dyeth intestate, either in deed *i. e.* doth make no Will at all, nor appoint any Executor, or in Law; *i. e.* that doth make one or more

By what words a man may be made an Executor, and what words in a Testament shall make a man full Executor, or not, but a Coadjutor or Suprvisor; and who shall be an Executor by such words.

Where and in what case an Administration is grantable, or not: And to whom it doth belong to grant it, and to whom it must be granted.

more his Executor or Executors; and he or they so appointed, is, or are such persons, as are not in being; or if they be in being is, or are so uncertainly named, that it cannot be discerned whom the Testator doth intend; or if he is, or they be well named, he is, or they are all incapable by reason of some legal impediment; or if otherwise, they be capable, they do all die before the Will be proved; or if they live, if being cited to come in before the Ordinary to prove the Will, they either refuse to appear, or if they do appear, they refuse to prove the Will, and to take upon them the Administration of the goods & chattels of the deceased; in all these cases, the Ordinary may and ought to grant the Administration of all the goods and chattels of the deceased to him that of right it doth belong unto according to his discretion. *Coo. 9. 39. Plow. 276. Doct. & Stud. 78. 132. Dyer 236. 4 H. 7. 13.*

And if a man make a Will and after the death of the Testator, the Executor prove it, and then dye intestate, the Ordinary must grant the Administration of the goods of the first Testator, not administered in the hands of the Executor to some competent person or persons according to his discretion; but where a man hath no goods and chattels to administer, *i. e.* either he hath none, or if he have, they are none of his, or if they are, there is an Executor named, *in verum naturam*, capable, and well named, and he doth accept, or at least hath not refused the Executorship; in these cases, the Administration ought not to be granted; or if it be granted, it will be void or voidable at the least: And in cases, where the Administration is grantable by the Ordinary and others as before, such persons having power to grant it, may not grant it to whom they please, but as they are bound to grant it, and cannot refuse so to do, so are they directed and appointed to whom they shall grant it; for it is appointed by a special Law, That the Ordinary shall depute the next friends of the Intestate to administer his goods if they desire it: and the Administration is to be committed to the widow, or next of blood, or both to the Intestate, and where there be divers in equall degree, and they all sue for it, the Ordinary may accept them all or refuse some of them, and commit the Administration to the rest only; and if some of them only sue for it, he may grant it to them alone: So that now the Law and course is to grant the Administration to the nearest of kin to the deceased: *Stat. 31. Ed. 3. c. 11. 21. H. 8. c. 5. Littl. Bro. fess. 233. 415. Fitz. Excommement. 13 Coo. 9. 39. 40. 3. 40. Dyer 339. 4 H. 7. 14.*

As 1. to the husband or wife; and if there be none such, 2. to the children, sons or daughters; and if there be none such, 3. to the Parents, Father or Mother; and if there be none such, 4. to the brothers or sisters of the whole blood; and if there be none such, 5. to the brothers or sisters of the half blood; and if there be none such, 6. to the next of kin, Uncles, &c. And if these come in time and desire the Administration, the Ordinary may and must grant it to them, and cannot grant it to any other if they be capable of it as most men are: and if divers of these in equall degree desire it, the Ordinary may grant to which of them he pleaseth; howsoever in this case, it seemes most just and equall to grant it to them all unlesse he have some speciall reason to admit some, and to exclude the rest: and if none of these that are next of kin shall desire it, but suffer the time to slip; in this case, the Ordinary may grant it to whatsoever stranger he please: And yet then perhaps the next of kinne may by Suit get the same Administration revoked, and a new Administration granted to him. See *infra* at Numb. 41.

23. How an Administration may be granted, and what shall be said a good Administration, or not.

An Administration may and must be granted in writing under Seal, for by word of mouth it may not be granted; and it may be granted as well upon condition as absolute: and it may be granted, as well for a part of the estate as for the whole: And therefore, if a man have goods in two Provinces, and he make a Will of his goods in one of the Provinces, and die Intestate for the goods in the other Province, an Administration may be granted for the goods in this Province: Also an Administration may be granted during, or untill a certaine time, or continually. *Dyer, 294. Fitz. Admin. 5. 34 H. 6. 14. Plow. 279.*

And therefore, if a man make a Will and appoint an Executor for seven years after

after the seven years ended, the Ordinary may and must grant an Administration of the goods. So if one do appoint another to be his Executor a year after his death, the Ordinary may and must grant the Administration for that year, untill the power of the Executor doth take place: And all these Administrations are good. See *Brownl. 1. part 5. 2. part 119.*

If an Executor die after he hath proved the Will, and he hath made a Testament, and appointed an Executor therein; in this case, this Executor also shall be Executor to the first Testator, as he is to the second, and he shall have all the benefit, and be subject to all the charge that the first Executor had and was subject unto; and yet the goods of one Testator shall not be subject to the debts of the other; but each of the Testators goods shall be subject to the payment of his own debts only. *Stat. 25. Ed. c. 4. Co. 5. 9. Plow. 86. 34 H. 6. 64.* And if in this case, the Executor of the Executor take upon him the Administration of the goods of the first Testator, he cannot refuse the Administration of the goods of the latter: but he may take upon him the latter and refuse the former. *Trin. 17. Jac. Co. B. Wolfe & Heidens case.* But if the Executor refuse to administer to the first Testator before the Ordinary, or dye before the Probate of the Will, and he hath made a Testament and appointed an Executor therein; in these cases, it seemes the Executor of the Executor shall not administer the goods of the first Testator, but the Ordinary must grant the Administration thereof *Dyer 372.* And yet if all the residue of the goods of the first Testator be given by the Testament to the first Executor after the debts be paid; in this case albeit he die before Probate of the Will, yet his Executor shall be Executor also to the first Testator, or else he shall have the Administration of his goods and chattels granted unto him: And therefore, if A make his Will, and give Legacies to B. and D. and give all the rest of his goods and chattels after debts and Legacies paid to C. his wife, and make her his sole Executrix, and she die before Probate of the Will, or any election made, nor knowing of the Will; and E. sue out Administration of the goods of A. and pay the Legacies to B. and D. and F. sue out an Administration of the goods of C. in this case, the Administrator of C. and not of A. shall have the goods; for the Law doth judge them in C. after the debts and Legacies paid without any election. *Adjudged in Hill. 9. Car. in Dens case.* See *Brownl. 1. part 91.*

If an Executor after he hath proved the Testators Will, die Intestate; in this case, the Administration of the goods of the first Testator not administered in the hands of the Executor must be granted to whom the Ordinary shall think fit: And if the Ordinary please, he may grant the Administration, *de bonis non administratis* of the first deceased, and of the goods of the second deceased to one and the same person: And herein the Administrator must take care that his Administration have speciall words for the granting of an Administration of the goods of the first Testator, not administered; *Broo. Executor 117. 26 H. 8. 7. Co. 1. 96. Dyer 372. Termes of the Law tit. Administration.* For howsoever some hold that by the generall Administration, the Administrator shall have not only the goods of the Executor, but the goods of his Testator also, yet it seems this is not taken to be Law at this day. *Fitz. Administrator. 9.*

If there be two Executors made, and one of them doth refuse before the Ordinary, and the other doth prove the Will, and make a Will himself and appoint an Executor and then die; in this case, it seemes the Executor of the Executor that did prove the Will alone shall have the disposition of all the Estate, and be Executor to the first Testator, and that the surviving Executor shall not meddle therewith, for that his Election by the death of his companion is gone. *Dyer 160.*

And if one make two Executors, and one of them doth make an Executor and dye, and the other that doth survive hath accepted the Executorship; in this case, the surviving Executor shall have the sole disposing of the estate, and the Executor of the deceased Executor shall not intermeddle therewith: And if therefore the surviving Executor die Intestate, an Administration *de bonis non Administratis* of the first Testator shall be granted: And if the Executor of the deceased Executor have any of the estate in his hands, the surviving Executor may take or

23. Who shall administer after the death of an Executor or Administrator, and who not, and how an Executor of an Executor shall charge and be charged.

recover it from him : And if two be made Executors , and one of them is incapable ; in this case , he that is capable shall administer alone *Litt. Broo. selt. 169. Broo. Executor 179. 99. Fitz. Executor 12. 113. Dyer 187.*

If one that is Administrator of another mans goods do make his Will and make an Executor and die ; or do die Intestate , and the Administration of his goods is granted to some body ; in the first of these cases the Executor , and in the last the Administrator , unless he be made Administrator of these goods also shall not meddle with these goods of the first deceased : but the administration of the goods of the first deceased in the hands of the Administrator not administered must be granted again. *Dyer 372. 112. Coe. 5. 9. Goldsb. 182. Plow. 118.*

And hence it is that if the Administrator of my goods have a judgement for a debt due to me , and he dye before execution , and make an Executor , or die intestate , that in this case his Executor or Administrator shall never have execution of this judgement. And the same law is of the Administrator of my Executor in this case. See *Brownlows Rep. 57. 1. part.*

24. Where an Executor or Administrator may accept or refuse the Executorship or Administration , and how , and where he may be Executor after he hath refused or not. And what after intermeddling with the goods of the dead shall be said an Administration , and what not.

An Executor or Administrator may accept or refuse the executorship of the administration at his pleasure ; and therefore he may at any time before he hath intermeddled with the estate as Executor or Administrator refuse it ; and if he be sued by any as Executor or Administrator , he may plead , *ne unquam Executor* ; i. e. he was never Executor or Administrator , and did never administer : and if it be true , he shall by this means avoid the suite : for a man shall not be compelled to take such a charge upon him whether he will or no. *Coe. 9. 37. 37 H. 6. 37. 28. 20 H. 6. 1.*

If therefore there be many Executors , or an administration be granted unto many ; and one of the Executors prove the Will in the name of the rest , or one accept the administration in the name of all the rest , yet the rest may refuse to accept it , and plead in any Suite against them that they are not Executors or Administrators. But as an Executor or an Administrator after he hath once legally refused the Executorship or administration , can never after intermeddle therewith : so after he hath once legally accepted thereof , (that is) hath done any thing as Executor or administrator , and which is proper only for an executor or administrator to do , he can never after refuse it. And his acceptance of part , in this case , will make him chargeable with all , except it be in the case before of an Executor who may accept of the last Executorship , and refuse the first. *Brownlows Rep. 1. part. 82. 2. part. 58. 59. 183. 184. &c.*

If an Executor plead , he did never administer as Executor , yet he may afterwards administer as Executor if he please. *Goldsb. 31. Plow. 2.*

If the Executors being cited to come in and prove their Will , appear before the Ordinary , and refuse to administer and to prove the Will , they cannot afterwards accept it or intermeddle with it. But herein this difference must be observed ; That where there be many Executors named and made , and they being cited some of them only do appear and refuse to accept it : (the rest of the Executors being then living) and after some or one of the rest of the Executors prove the Will , or take upon him the Executorship ; in this case and notwithstanding this refusal , they that doe refuse may afterwards at any time , at least during the life time of their Co-executors that did accept thereof and intermeddle therewith as far forth as either of the rest. *Coe. 9. 37. Fitz. Administration 6. 11. Broo. Administration 32. Executors. 117. Coe. 5. 28. Perk. selt. 485. Dyer 160. 11. Ed. 23.*

And therefore in this case howsoever the Executors refusing shall not be charged in any suite against , all the Executors for any thing due from the Testator , but they may by their plea avoid it : yet the Executors accepting cannot sue for any thing due to the Testator , nor be sued for any thing due from the Testator , but they must sue and be sued in the names of themselves and their Co-executors that do refuse also. And if there be three Executors , and two of them prove the Will , and the third refuse ; yet this third Executor alone may release any debt due to the

e
is
e
ot
is
a
a
n
n
d
e
ce
so
pt
s.
ed
he
or
he
m
pt
rt.
er-
the
er-
ed;
me
ing
or
ill,
e of
orth
Ed.
ged
but
any
but
chat
ill,
e to
che

Q

the
m
on
in
th
ce

w
ce

E
in
an
sh

w
un
ch

pr
th
a
de
T
ge
m
th
as
hi
is
fo
er
3

d
th
E
d
d
d
li
d
th
a
c
c

r
v
f
f
r
r

the Testator. But if there be but one Executor made, and he alone, or if there be many made, and they do all together refuse before the Ordinary to take upon him or them, the administration; in this case the Testator is so far forth said to be dead intestate, and thereupon therefore the Ordinary may grant the administration of the goods of the deceased, and then the Executor or Executors can never after accept thereof, or intermeddle therewith.

And if one or more of the Executors refuse, and the rest accept; if he or they which accept die before he or they that refused accept; it seems in this case they can never afterwards accept it, but the Administration must be granted.

If one be sued as Executor or Administrator, and he plead to the Suit *ne unques Executor*, i. e. he was never executor or administrator, if he have not in truth intermeddled before; this plea is a refusal of the executorship or administration, and therefore he can never afterwards accept or intermeddle with the executorship or administration. See the cases before.

Every intermeddling with the goods of the deceased, or with the office and work of an executor, shall not be said to be such an administration as to amount unto an acceptance of the executorship or administration, and so to make a man chargeable as executor or administrator. *Co. 9. 37. 5. 34. Dyer 105. Kel. 63. Broo.*

And therefore if a man that is an executor or administrator do only lay up and preserve the goods of the deceased; or command another to take away the goods of the deceased from one that hath them in his keeping; or see the deceased buried in a decent manner, and for that purpose use, and if need be sell some of his goods to do it, or make an Inventory of the goods and chattels of the deceased; or prove the Testators Will with his own money; or take his own goods lying amongst the goods of the deceased; or take and use some of the goods of the deceased onely by mistake, or as a trespasser, or by the delivery of another; or take and dispose any of the goods of the deceased, when the executor or administrator doth challenge them as his own & in his own right; or if he redeem any of the goods of the deceased with his own money when they are pledged to the full value, and the day of redemption is past, as neither of these acts will make a stranger an executor of his own wrong; so neither will they amount to an acceptance of the executorship, and make the executor or administrator chargeable as executor or administrator. *Administrator 35. 36. Fitz Administrator 7. Broo. Executor 165. 132 H. 6. 6. Dyer 135.*

Executor of his own wrong.

But if a man that is an executor or administrator shall sue by that name for any debt due to the deceased; or being sued by that name for any debt or duty due from the deceased, shall implead to the Suite, or plead any other plea besides *ne unques Executor*; or shall take into his hands the goods of the deceased, and convert them to his own use, and alter the property by sale, gift, or otherwise, and all this as the goods of the deceased; (and so it shall be intended against him if he do not declare the contrary, that he doth take and use them as his own &c.) or if he deliver the goods of the deceased to Creditors or Legataries in satisfaction of their debts or Legacies; or receive any debt due to the deceased, and give a release for the same; or release any debt due to him before it be paid; or pay any debt due from the deceased, except it be with his own money: any or either of these acts will amount unto an acceptance of the Executorship, and therefore after an Executor or Administrator hath done any such act, he can never after refuse the Executorship or Administration.

Two Executors be made jointly by Will, one of them doth release a debt, and after before the Ordinary refused to administer; It was agreed by all the Judges it was too late, for he had made his Election by the release. *Brownl. 2. part 58. sect. 25.*

If a woman sole be made an Executrix to another, and she marry a husband before she intermeddle with the estate, and then her husband doth administer; this is such an acceptance as will bind her, and she can never afterwards refuse it. *Broo. Executor 147.*

The Executor or Administrator shall have by vertue of his Executorship or Administration all the chattels real and personall of the Testator, as well those that are in possession, as Leases for years of Land, Rent, Common, or the like, Grants what not.

25. What things an Executor or Administrator shall have by vertue of his Executorship or Administration, And what not.

First in respect of the nature of the thing.

of next Advowsons, and Presentations, Wardships of heirs by reason of tenure in *Capite*, or Knights Service, corn growing and cut, trees, and grasse cut and severed, cattell, money, plate, household-stuffe, and the like, as also those that are in action, as right and interest of executions upon Judgements, Statutes, Obligations, Causes of action, and the like; He shall have also all other things that are of the nature of chattels. *Coo. super Littl.* 209. 288. *Park. sect.* 69. *Plow.* 293. *Dolt. & St.* 39. 76. *Perk. sect.* 833. *Coo.* 4. 63. 63. 7. 17. *Kelm.* 118.

And therefore the Executor or Administrator shall have the two years of the heir female that is in Ward; a relief or an advowson that is fallen; and yet if a Bishop have tide to present by the vacation of a Church, and then he dye; in this case the King and not the Executor or Administrator of the Bishop shall present. And if the Lord have a greater estate in the Seigniori than for life or years, it is said the Executor or Administrator shall not have the relief. *Coo. super Littl.* 79. *Dyer* 130. 283. *Dyer* 24. *Broo. Executor* 143.

And the Executor or Administrator of the Lord shall have Fines assessed upon the Tenants upon their admittances in the Lords time. And if I make a Feoffment in Fee, gift in tail, or lease for life, rendering Rent, and the Rent is behind, and then I dye; in this case the arrerages of Rent due to me in my life time shall go to my Executor or Administrator in the nature of a chattell. *Stat.* 32. *H. 8. cap.* 34. *Coo.* 4. 48. *Dyer* 373.

So if a Rent be granted out of land to me in Fee-simple, Fee-tail, for life, or years, and it be not paid to me in my life time; these arrerages shall go to my Executor or Administrator, and not to any other. And so also if a Parson have an annuity in Fee in the right of his Church, and it be behind, and the Parson dye; in this case the Executor or Administrator, not the successor of the Parson shall have the arrerages. *F. N. B.* 120. *L.*

And if I be seised of land and possessed of a stock of cattell, and let it to another for years, and he covenant by the Lease to pay me and my wife, our heirs and assigns 100^l. by the year, during the term; in this case after my death, and my wife surviving me, her Executor or Administrator, and not my heir shall have the payments. *Dyer* 375.

And if one seised of land in Fee make a Feoffment of it to me excepting the trees, and after grant me the trees for years; or if he make me a Lease of the land first for years, and after doth grant me the trees for a number of years, to begin after the end of the term of the land; in both these cases I have the trees in the nature of a chattell, and if I dye my Executor or administrator shall have them. *Coo.* 4. 63.

And if a man grant to me the next Presentation to the Church of *D.* in this case if I dye, my executor or administrator shall have it as a chattell. *Dyer* 283. 34. *H. 6.* 27.

And my wife shall have so much of her wearing apparell as is necessary and convenient for one in her estate and condition: and therefore that shall not go to my Executor. But so much of her wearing apparell as she hath superfluous and more than necessary for her, shall go to my executor or administrator after my death. See *supra* at Numb. 7.

And the charters and evidences that do concern any of my chattels which my executor or administrator is to have, shall go with the same chattels. So also any Charters whatsoever, if they be pledged to me for money, shall go to my executor or administrator untill the money be paid. *Broo. chattels* 12. But otherwise those deeds and evidences that do belong to the heir as incident to the Inheritance, shall not go to my executor or administrator after my death. But matters of trust, and such things as are personall, as offices of trust, wardships by reason of a Tenure in Socage, or *Jure naturæ*, or the like, shall not go to the executor or administrator after the death of him that hath them. So an Executor or Administrator shall not have the grasse and trees growing on the ground no more than the soile or ground it self whereon they grow. *Plow.* 293. *Coo.* 3. 39. 9. 99. So an Executor or Administrator shall not have the Incidents of a house, as glass, doors, wainscot, and the like, no more than the house it self, nor pales, wals, stauks, fish in Ponds, Deere, or Conies in Parks, Pigeons in Pigeon-houses, or the like. *Kelm.* 118. See before at Numb. 7.

If a Lease for years of land be granted to me and my heirs, or to me and my successors, and I dye, my Executor or Administrator, and not my heir shall have this term, *Coo. 10. 87. Litt. Sett. 740. Fitz. Accompt. 56. F.N.B. 120. Brownl. 1. part. 77. 106.* The same law is if a wardship, or the next advowson of a Church be granted unto me and my heirs, or if a Covenant or an Obligation be made to me and my heirs: for in all these cases this is still a chattel in me that shall go to my Executor or Administrator, and he onely shall take advantage by it. And if my heir or successor happen to get the Deed, the Executor or Administrator may recover it from him. And if a Lease be made to me for 20 years without naming my Executors or Administrators or Assigns in the Lease; in this case if I dye, my Executor or Administrator notwithstanding shall have it during the term. And if a Lease for years be made to a Bishop and his successors, and he dye, his Executor or Administrator, not his successor shall have it, *New terms of the Law ut. assigns. Coo. super Litt. 46.* And if a man be possessed of a term of years of land, and grant it by deed, or give it by Will to me and my heirs, or to me and my heirs males: or devise it by Will to A for life, the remainder to me and my heirs; in these cases I shall have these terms of years as chattels, and after my death my Executor or Administrator shall have them, *Coo. 8. 95. 10. 87. Plow. 5. 24.* And if a man grant a rent out of his land to me and my heirs for 20 years, and I dye, my Executor or Administrator, not my heir, shall have this rent, *Litt. Sett. 746.* And if a rent be granted to me, my heirs and executors during the life of I S, and for one half year after, and I dye; in this case the half years rent shall go to my executor or administrator, and not to my heir, *M. 7. Ja. Co. B. Was case. Litt. Sett. 739.* And if I be seized of land in Fee, and make a Lease for years of it, rendring rent, and then devise this rent to a stranger, and the Devisee dye; in this case his executor or administrator shall have it, *Dyer 3.* And if a Lessee for life make a Lease for years absolutely; this in Law is a Lease for so many years, if the life so long live; and shall go to the executor or administrator after his death. *See Brownl. 19. 30. 1 part. Coo. 7. 12.*

If I have a box, chest, or trunk wherein my writings that do concern my inheritance do lye, and the same is open, and not sealed or locked; in this case my Executor shall have it: but if it be sealed or locked, *contra*, for then it shall go to him that is to have the writings as incident thereto. And yet if there be any money, plate, or any other such like thing in the chest also, my Executor shall have that thing, *Broo. Executors 145. 97. Fitz. Executors 111.*

The Incidents of a house, as glass-windows annexed with nails or otherwise to the windows; the wainscot fixed by nails, skrews, or irons put through the posts or wals, tables dormant, furnaces of lead and brasse, and fass in a brew or die-house standing and fastned to the wals, or standing in, or fastned to the ground in the middle of the house; (though fastned to no wall) a copper, or lead fixed to the house; the doors within and without that are hanging and serving to any part of the house, shall not go to the executor or administrator to be divided and sold from the house, albeit the executor or administrator have a Lease for years of the house, and by that means hath the house also. But if the glass be from the windows, or there be wainscot loose, or doors more than are used that are not hanging, or the like: these things shall go to the executor or administrator, *Coo. 4. 63. 21 H. 7. 26.*

If I make a Feoffment to I S of land, on condition that if he pay me, my heirs or assigns, or my heirs, executors or administrators a 100 *l.* such a day, that the Feoffment shall be voyd, and I dye before the time of payment; in this case, if this money be paid at the day, my executor or administrator, and not my heir, shall have it, *Coo. 5. 96. Fitz. Executor 8.*

If one be seized in Fee of lands whereon there are trees growing, and he make a Feoffment of the land to me, excepting the trees, and afterwards he doth sell me trees for ever, and after I dye; in this case my executor or administrator shall not have these trees, as they shall in case where the Feoffor doth grant them to me for years. And if I be seized of land in Fee, and I make a Lease for life or years

of it, excepting the trees, and afterwards I dye; in this case my executor or administrator shall not have these trees, but they shall go in both cases with the land, *Coo. 4. 63. 11. 48.*

If a Lease be made for life or years of land whereon a house is standing, or timber is growing, and the house is prostrate, or the timber is cut or fallen down (by whomsoever or what means soever it be) the materials of this house, and this timber is now become a chattel; and therefore if the Lease be without impeachment of waste, it shall go to the Lessee, and after his death to his Executor or Administrator; but if the Lease be otherwise, it shall go to the Lessor, and after his death to his Executor or Administrator. But if the timber be cut for reparations onely, or the Lessee will imploy the materials of the house to build it again, and the Lease do continue, it may be so imployed, and then the Executor or Administrator of the Lessor may not take it, *Coo. 4. 63. 11. 81. 84.*

If one be seized in Fee-simple of ground whereon trees do grow, and he sell me these trees for money, and afterwards I dye before they be cut; in this case my Executor or Administrator shall have and may cut them, *Coo. 11. 50. Perk. Sell. 58.*

If the Kings tenant by Knights Service *in Capite* be seized of a Mannour whereunto an Advowson is appendant, and the Church become voyd, and the tenant dyeth, his heir within age: in this case the King, and not the Executor or Administrator of the tenant shall have the Presentation. And yet if in this case the land be held of a common person, the Executor or Administrator, and not the Guardian shall have it, *Coo. super Litt. 388.*

In all cases regularly where a man doth sow land, whereof and wherein he hath such an estate as may perhaps continue untill the corn be ripe, if he that doth sow it dye before it be cut and severed, his Executor or Administrator shall have it; as if the husband sow the land whereof he hath an estate in Fee-simple, Fee-tail, for life, or for a certain number of years in the right of his wife, and dye ere it be ripe, in this case the Executor or Administrator of the husband, and not the wife shall have it. And if one that holdeth land for the life of I S sow the land, and I S dye ere it be ripe & cut; the executor or administrator of the tenant shall have this corn. And if tenant in Tail or in Dower sow the land they do so hold, and dye ere it be cut; the executor or administrator, not the issue in tail, nor the heir, or him in reversion shall have it. So if the husband make a Feoffment in Fee to the use of himself for life, and after of his wife, &c. and he sow the land, and after dye; his executor or administrator, not his wife shall have the corn. But if a Feoffment be made to the use of the husband and wife together in Fee, or for life, and the husband sow the land; in this case the wife, not the executor or administrator of the husband shall have the corn. So if a Lessee for years certain sow the land a little before the end of his term, and the term end before it be cut; in this case he that is to have the land, not the executor or administrator of the Lessee for years shall have the corn, *Dyer. 316. Doct. & St. 35. Perk. Sell. 59.*

If there be Tenant for life, the remainder in Fee of a Tenancy, and the Lord grant his Seigniorie for life, and after he in remainder in Fee of the Tenancy dye, his heir within age, and after the Lord dye, and after the Tenant for life dye; in this case the heir, and not the executor or administrator of the Lord, shall have the Wardship. *Coo. 2. 93.*

If one be seized of land in Fee, and make a Lease for years, rendring rent at Michaelmas, or within ten ten dayes after, and the Lessor happen to dye during the term after Michaelmas, and before the ten dayes expired; in this case the heir of the Lessor, and not his executor or administrator, shall have the last half years rent due at Michaelmas, *Hill. 7. Jac. B. R. per Curiam.*

If one grant a Rent in Fee, and grant withall that if the Rent be behind, the Grantor shall forfeit 20 s. *nomine pæna* to the Grantee and his heirs, and the Rent is behind, and the Grantee dye; in this case his executor or administrator, not his heir shall have this money that is forfeit already, *F. N. B. 120. Fitz. Covenant 17.*

Dyer

rd
e,
in
he
li-
he
of
ent
the
ent
his
17.
ly

Dyer 24. So if one make a Feoffment in Fee of land, and the Feoffee doth covenant to do divers things to the Feoffor, *Et quoties defectus fuerit, &c.* that he shall forfeit to him and his heirs § 1. and the Feoffee doth fail and break his covenant divers wayes, and the Feoffor dyeth; in this case his executor or administrator, not his heir shall have and recover all the forfeitures that are past.

If a Bishop, Parson, Vicar, Master of Hospital, or any body politick be possessed of any goods or chattels in their own right; and dye; these shall go to the executor or administrator, not the successor of such a person. And albeit such things be granted to them and their successors, yet their executors and administrators, and not their successors shall have it. But if a Corporation aggregate, as Dean and Chapter, Mayor or Commonalty, and the like, have any goods or chattels in right of their Corporation, and any of the Heads or Members thereof dye; the executors or administrators of such person shall not have them, but they shall continue in succession with the Corporation, *Co. 4. 65. Perk. Sect. 58. Co. super Litt. 46.*

An executor or administrator shall have the benefit of a pardon granted to the deceased, and shall have advantage of any error in any outlawry against the deceased, and have restitution of the goods forfeit thereupon, *Co. 6. 80. Dyer 201.*

The executor or administrator of a woman that hath a husband, shall have by right of his executorship or administration, all Actions, Rights, and Titles to any chattels, and possibilities, and things of that nature which the wife had before the marriage, and which fell to her during the marriage; for these things the husband shall not have by the intermarriage after his wives death, as he shall have all the rest of her goods and chattels, except he have them as executor or administrator to her, as he may be. And if such a woman have any goods or chattels as executrix to another, her executor or administrator, not her husband shall have these also; for she hath these goods in anothers, and not in her own right, *Co. super Litt. 351. Plow. 294. 193.*

If I have any goods or chattels in joynt-tenancy with another, as if a Lease be made of lands to me and another for years, or a horse or other chattel personal be given or granted to me and another; in these cases if I dye, my executor or administrator shall not have any part of these goods or chattels, but the other surviving joynt-tenant shall have them all. But otherwise it is of the goods and chattels that I and another have in Common. And therefore if I and another have goods and chattels in that nature as before, and he or I grant that which doth belong unto us thereof unto a stranger; in this case the stranger, and him of us two that hath kept his part are Tenants in Common of the things; and therefore if either of us dye, the part of him that dyeth in the goods and chattels shall go to his executor or administrator, and not to the other Tenant in Common, *Litt. Sect. 281. Perk. Sect. 55, § 16. Litt. Sect. 320, 321.*

If I have a Judgement for land in a real or mixt action, and for damages recovered in the same Suit, and I dye; in this case my executor or administrator, not my heir, shall sue execution for, and recover the damages, but not for the land. So if I recover damages against another for the detaining of my Charters, and dye; my executor or administrator shall recover the damages, but the heir shall have the Charters, and the heir must sue his *Scire facias* for the Charters ere the executor can sue for the damages, *Fitz. Executor 53. 84. 117.* Also if I recover any debt or damage in any personal action, my executor or administrator shall recover and have this. See more *infra* at numb. 39. But the Administrators of an Executor cannot have a *Scire facias* upon a Judgement given for the Testator, *March. Rep. 9.*

The power and interest which the Executor hath is wholly by the Will. And hence it is that an Executor, whether he be absolute or conditional whiles he is Executor, may do any thing as Executor (except onely sue for debts and duties due to the Testator) as well before the Probate of the Will as he may do after; for before the Probate he may enter into and seize the goods and chattels whatsoever they be, or give power to another so to do; and if any of them be taken or kept from him, he may have an action of trespass, or a replevin to recover them; he may give or sell any of the goods or chattels; he may pay any of the debts due from, and

26. What an Executor may do by virtue of his Executorship. And the power of an Executor, Administrator, or Ordinary.

and receive or release any debts due to the deceased, *Coo. 6. 18. 9. 38. 5. 27. Plow. 280. 9 Ed. 4. 47. 36 H. 6. 7. Fitz. Administrator 2. 6. Brownl. 1. part. 76. 77. 73. 53.* But it is otherwise in the case of an Administration; for inasmuch as his power & interest is given to him wholly by the Administration, therefore he can do nothing untill the Administration be granted. And yet in this case as to the goods taken away before the Administration, the Administration shall have such a relation as to give the Administrator an action for them. But otherwise after the Administration is granted, the interest and power of the Administrator is equal to and with the power and interest of the Executor. And yet it is otherwise of the power and interest of the Ordinary; For howsoever it seems by the ancient Common Law he might seize, preserve, give, grant, and dispose the goods of the intestate to pious uses, yet might he not sue for the goods or debts due to the intestate, no more than he might be sued for any debts due from the intestate; and at this day he may onely keep and preserve the goods of the deceased untill administration be granted, and sue him in the Court of the Ordinary that doth detain the goods from him, and perhaps may sue him that shall take the goods out of his possession; for he may not sell or give the goods of the deceased, nor receive or release any debts; for in case where there is an Executor made that is capable, &c. he is not to meddle at all with the estate untill the Executor refuse: and where there is no Executor that the party is dead intestate, the Ordinary is presently to commit the Administration to the nearest of the kindred; which when he hath done, his power is at an end, for it is doubted of some whether he may repeal an Administration without cause or not; but it hath been clearly held by all, that he may not dispose of the estate afterwards, and that he hath not power to enforce the Administrator to give portions to children out of the estate, and that if he do go about it, either before or after the granting of the Letters of Administration, the Administrator may have a Prohibition, *Coo. 8. 135. 9. 39. Dyer 255. Westm. 2. cap. 20. 31 Ed. 3. c. 11.* And accordingly divers have been granted; And yet notwithstanding it seems this course is usual: and Prohibitions not often granted at this day, *Hill. 13. Ja. Co. B. Henslowes case. Trin. 3. sac. Co. B. Davis case. Hill. 2. Car. Co. 9. Fotherlies case.* An Executor or Administrator may after the death of the deceased enter into the house where the deceased lived, and where he dyed, and where the goods are, and take them away, and justifie it; but he must do it within convenient and reasonable time, as within 30 days after his death, or thereabouts, and in a quiet and fair manner when the door is open, &c. *Litt. Sect. 69. Plow. 281. Broo. Executor 129.* He may keep any of the goods of the deceased, so as he pay or lay out as much of his own money in and about the Administration of the same estate, *Dyer 2.* He may, if he want money to discharge Funerals, or pay debts, sell any of the chattels real or personal whereof the deceased dyed possessed; and that albeit the thing in particular be devised; as if a man be possessed of a term of years *inter alia*, and devise the same term to I S, the Executor or Administrator notwithstanding this devise may at any time before assent given to the Legacy, if he have not assets to pay the debts, sell this term, and the Legatee is remediless. And so he may do also, albeit there be enough besides to pay the debts, and he have no need; but then in this case the Legatee shall have some relief in a Court of Equity against the Executor or Administrator for damages, but the sale is unavoydable, *Plow. 543, 544.* An Executor or Administrator may retain so much of the estate as to satisfy his own debt first, if any be due unto him. And if he hath enough to pay all the Debts and Legacies, he may pay them in what order he will without danger to himself, or wrong to Creditors or Legataries. And if he hath not enough, he may pay them in what order he will, but not without danger to himself. But if any thing be due to himself, he may pay that first of all, and for others that are in equal degree, he may pay which of them he will first, *Plow. 184. 543. Coo. 5. 28.* And for the Legataries, he may prefer which of them he will, or pay one of them his whole Legacy, and pay another a part of his, or not pay him any part of his Legacy if there be no assets to do it. But an Executor or an Administrator may not sell any thing that is given in special to a Legatee to pay another Legacy given to another Legatee, nor

not compell a Creditor or Legatee to take some of the Goods of the Deceased for his Debt or Legacy, whether he will or no, not devise the Goods he hath as Executor or as Administrator, neither can Executors or Administrators make devision of the Goods amongst them. *The addition to Justice Dodridge Treatise* 93. *Kelw. 62. 37 H. 8. 22. Plow. 525.*

An Infant that is an Executor, after the time he is capable, hath as much power as another Executor of full age; for he may sell the Goods, receive Debts, and make releases for the moneyes he doth receive, assent to a Legacy when debts are paid, sue, and be sued as another Executor. And he is only disabled to do any thing to hurt himself; And therefore if he release a debt before he receive it, the Release is void; and if he assent to a Legacy before the debts are paid, the assent is void, and if he do any other act which will be a wasting of the Goods in an Executor that is of full age, it shall not bind him. *Co. 5. 28.*

And it seems, that howsoever an Infant Executor after seventeen years of age, may sell any of the Chattels personall he hath as Executor, yet that after his age of seventeen years, and before he is one and twenty years of age, that he cannot sell a Lease for years he hath in the right of his Executorship; but that such sale is void. *And so was it held by Justice Hutton at Sarum Assises, 21 Jac.*

A Woman covert that hath a Husband, and is an Executrix may do any lawfull act as another Executor may do, but she may not do any thing to prejudice her Husband, as release a debt before it be paid; assent to, or deliver a Legacy before the debts be paid, or the like, and yet the Husband himself may do so. *Broo. Executor* 178. 152. *Fitz. Executor* 55. *Co. 5. 28.*

The Office and duty in general of an Executor or Administrator is to dispose of all the Estate of the deceased wherewith he hath to do. 1. Truly not to convert any of it to his own use, but to the use and best advantage of the deceased nor to labour by any undue practise or means to hinder any Creditor of his debt. 2. Lawfully to pay debts and Legacies in that order the Law prescribeth. 3. Diligently, *Quia negligentia semper habet commitem infortunium*; but more particularly. *Co. 8. 133.*

The first duty and care of an Executor or an Administrator after he had taken upon him the charge of the Administration of the Goods and Chattels of the deceased, after the Goods are laid up, is to see the body of the deceased laudably interred according to his rank and quality; wherein let the Executor or Administrator take this caution by the way, Not to exceed in Funerall Pomp, especially if it be so that the Estate will scarcely reach to pay the Debts; for let his expences be what they will, the Judges (who in this are to determine what shall be allowed) will allow what they please, and they are pleased in such cases to allow but a small matter, and whatsoever the Executor or Administrator doth lay out more, he must bear out of his own Estate, if he have not enough besides to pay the debts. *Dist. & St. 75. Plow. 543. Kelw. 64.*

The second duty and care must be to make an Inventory, i.e. a Schedule containing a true and perfect description of all the Goods and Chattels of the deceased at the time of his death, as of his Wares, Merchandizes, Emblements, and the like, with their apprisement and value, and of none else, and of all debts due to him and from him. *Doff. & St. 35. Stat. 21 H. 8. c. 3. Dyer 166. Swinb part 6. Sect. 6, 7, 8, 9, 10.*

And this must be made by and before two of the Creditors or Legataries of the deceased (if there be any such and they will do it) and two others, or in case they refuse, by and before two other men of the honest Neighbours. And herein let the Executor or Administrator take this caution by the way, not to intermeddle with the Goods before he hath done this; for howsoever he may do any act as Executor before the Inventory be made, yet the Ordinary may punish this upon him except it be done with the Ordinaries license, who in this case may give what time he will for the doing of it; and untill the Inventory be made and put in, it shall be presumed against the Executor or Administrator that he hath Assets in his hands to pay all men; and besides, untill this be done, he cannot deduct to satisfie his own debt first, and bar other men by Plea. But of the other side when he hath made and exhibited a true and perfect Inventory of all the Goods and Chattels, it shall be

K k k k k

presumed

Infants

Woman Co
vert.27. The office,
duly, charge,
of an Execu-
tor or Admin-
istrator, and
of the Ordina-
ry.
First in the
Funerals,Secondly, in
making an In-
ventory.

Thirdly in
Probate of the
Will.

Fourthly in
payment of
Debts and
Legacies; and
the order of
Debts and
Legacies.

Retainer.

presumed against him that he hath so much as is contained in the Inventory and no more, unless more can be proved by Witnesses.

3. The third thing whereof the Executor or Administrator is to take care, is to prove the Will if there be any: and this the Ordinary will compell him to do, but otherwise he may do any thing as Executor, save onely sue actions as well before Probate as after. See Probate infra at Numb.

4. The fourth thing whereof the Executor or Administrator must take care, is to sell and make money of the goods and Chattels, and to receive the debts due to the deceased, and then to pay the Debts and Legacies due to the Creditors and Legataries, wherein the Executor or Administrator must be very cautious and wary. And for this purpose let him observe that all the Debts must be paid before any Legacies be paid or delivered, and if there be not enough besides to pay the debts, any thing given by way of Legacy, may be sold to make money to pay the Debts, and the Legataries must lose their Legacies. And in payment of Debts this decorum must be observed.

1. Amongst persons that are Creditors, the Executor or Administrator himself shall be preferred, so that if any debt be due to him, he may deduct to satisfy himself first, albeit others lose their whole Debt thereby, and especially then when his Debt is in equall degree with other Debts.

2. After the Executor or Administrator is served and satisfied his Debt, then the King is to be preferred, so that if there be any Debt due to him, and he begin his suit for it before any other man can get a Judgement for his Debt against the Executor or Administrator, his Debt shall be paid before any others.

3. After the King is served and satisfied his Debt, then the debts of common persons must be paid. *Coo. 9 88. Plow. 184. 545. Dyer 80. Doff. & St. 75. 76. 77. 78. 132. Stat. 33 H. 8. cap. 39. Coo. 5. 28. 4. 54. 59. 60. 8. 132. Dyer 232. 32. 21 Ed. 4. 21. Broo. Executors 88. 172. Coo. 8. 132. Dyer 32. Plow. 279. 280. Broo. Executors 103. Kelw. 74. Brown. 1. part 53. 73. 76. 77. 80. 104. 103. 2 part 51. 82. 37.*

And these also must be paid in this order or manner.

1. The Debts due by Record, by any Judgement had against the Deceased in any judicial proceeding in any Court of Record.

2. The Debts due by Statutes or Recognizances entred into by the Deceased; for the Debts due upon Judgements must be satisfied before these; *fit judicium prius vel posterius*

3. The Debts due by Obligations, and penall and single Bills, for these are in equall degree, and these are to be paid after Statutes and Recognizances. And yet if the Statute or recognizance be only for performance of Covenants, & no Covenant is broken, an Obligation for the payment of present money shall be discharged before it.

4. The debts due for Rent upon Leases of Land, or grants of Rents; but some say, that Debts due for Rent in the Testators life time (be the Rent reserved upon Leases made by, or without deed for years, or at will) are in equality of degree, with debts due upon Especialties.

5. The Debts due for Servants Wages and Workmen.

6. The Debts due upon Shop-books and verbal Contracts, and yet it is said by some, that Legacies are to be paid before Debts due by Shop books, Bills unsealed, or contracts by word, *Quod non credo, Addition to Just. Dodridge 92.*

And amongst Debts also that are in equality of degree, those that are due are to be paid before those that are not due; and those whose day of payment is already come, before those whose day of payment is not yet come: and yet if the Creditor whose day of payment is already come, do not sue for his Debt untill his Debt whose day of payment is at a day to come, become due, the Executor or Administrator may satisfy which of them he will first.

And amongst Debts that are due, and already to be paid, those that are first sued for, are to be first paid: Or if the Creditors begin their Suits together, the Executor or Administrator may pay which he will of them first, and to pay Debts in any other order is dangerous: And therefore for the purpose, if the Deceased are two severall Debts of 10 l. apiece to two severall Creditors by severall

severall Obligations, and the Executor or Admistrator hath enough onely to pay one of them, he that can first get Judgment and Execution shall first be satisfied, and if the Executor or Administrator do afterwards pay the other his Debt, he must satisfy the first out of his own Estate.

If one that hath a Debt due to him from the Deceased upon a simple Contract, or the like, sue the Executor or Administrator for it, and there be debts due to others upon Bonds and Bills unsatisfied, in this case the Executor or Administrator may not pay this debt, nor may he suffer the Plaintiff to recover in his Action, for if he do, and if he have not Assets besides to satisfy the debts due upon Bills and Bonds, he must satisfy so much out of his own Estate as he hath so paid, or suffered to be recovered from him, for in the case of an Action brought, he is to plead and to set forth these debts upon specialties, and to say, That he hath no more but what is sufficient to satisfy them, &c. and thereby he shall bar the Plaintiff in his Action.

In like manner it is, if one that hath a debt due to him from the deceased upon an Obligation, sue the Executor or Administrator thereupon, and there be debts due to others upon Judgments, Statutes, or Recognizances, and the Executor or Administrator suffer the Plaintiff to recover the debt due upon the Obligation for want of pleading the Judgments, &c. or doth voluntarily pay that debt, and he hath not Assets besides to pay the debts due upon Judgments, &c. In this case, he must pay so much out of his own Estate towards the satisfaction of the said debts due upon Judgments, &c. as he hath paid of the debt due upon the Obligation.

But here it must be noted, that no Judgment or Statute that is discharged, or is left and suffered to lye by agreement to bar others of their Debts, shall be any bar to others that sue for their due Debts upon Obligations, &c. And therefore if any Executor or Administrator shall plead any such Judgment, &c. in bar of any other Debt sued for by any other Creditor, the Creditor may by special pleading set forth this matter of Covin, and avoid the Plea and Bar of the Executor or Administrator.

Covin.

If one Creditor whose Debt is in equall degree, and presently due and to be paid, begin a Suit against the Executor or Administrator for his Debt, and he hath notice that the Suit is begun against him, or the Action is laid in the County where the Executor or Administrator doth dwell, or (as some have said) in London (in both which cases, it seems he is bound to take notice thereof at his perill) and after this Suit begun he doth make voluntary payment of another Debt in equall degree in all respects, for which no Suit is begun, this is a *Dravastavit* in the Executor or Administrator, and if he have not Assets to satisfy him who began his Suit first, he shall be compelled to satisfy so much thereof as he doth voluntarily pay to the other, and that out of his own Estate: And yet an Executor or Administrator may make voluntary payment of any Debt due by Record, as by Judgment, Statute, &c. after such a Suit begun, and justify it.

If two Creditors in equall degree to all purposes begin to sue for their Debts at one time; In this case the Executor or Administrator cannot safely make voluntary payment to either of them, unlesse he have enough to pay them both; but his safest way is to pay him first, that in a due and legall proceeding (for he may not covinously help one of them to a Judgment sooner) can first recover it by Judgment and Execution: And yet if in this case no Suit be begun, the Executor or Administrator may make voluntary payment to either of them in equall degree of his whole Debt, albeit he have no Assets left to pay unto the other any part of his Debt.

If *A* and *B*. be two Creditors in equall degree, and *A*. begin his Suit first; and after *B*. doth begin his Suit, and it hapneth that *B*. *bona fide* without any Covin or agreement between him and the Executor or Administrator, doth get Judgment and Execution first; in this case the Executor or Administrator may make payment to *B*. first of all. But if the Executor or Administrator doth by any Covin and agreement help *B*. to his Judgment and Execution first, and by this meanes he is first satisfied, if there be not enough left to satisfy *A*. he

Covin.

must satisfie him out of his own Estate. If two Suits begin at, or about one time upon two severall Obligations, and the Executor is forced to plead to them both before either of them hath a Judgment, so that he cannot plead the Judgment that the other hath against him, and he hath not Assets to satisfie both the debts sued for, and after the Plaintiffs in both the Suits get Judgment and Execution. *Quest* what the Executor or Administrator may do in this case: And here note by the way, that it is policy for a Creditor that hath cause to sue an Executor, or Administrator, to be doing betimes, and to get Judgment and Execution as soon as he may; for it falleth out in this case, That he that doth first come shall be first served: After all the debts are paid in such order and manner as before, then is the Executor or Administrator to pay and to deliver the Legacies: and herein the Executor may prefer himself so, that if any Legacy be given to him, he may detain and deduct it, albeit there be nothing left to discharge the Legacies given to others, and after he hath satisfied himself, he may satisfie and deliver what Legacies he will, albeit there be not enough to satisfie all the Legatees: or he may pay to each of of the Legatees a part of their Legacy, and deduct a part out of every Legacy where there is not enough to satisfie all the Legacies: But if any particular thing, as a Lease, or a Horse, or the like be given; this must be delivered accordingly, and may not be sold by the Executor or Administrator to pay to others all, or any part of their Legacies: and if there be enough to pay all the Legacies, they must be paid all according to the Will: And it is said by some, that if an Executor or Administrator make no Inventory of the goods, that he must pay all the Legacies, whether he have Assets or not: *Doll: & St: 34. Plow: 545. & Wimb: 110. 114.*

Fifthly, in making an Account.

The last thing an Executor or Administrator is to take care of, is to make an account (for it is held that an Executor or Administrator is not bound in Law or Conscience to make restitution for personall wrongs) wherein this is to be known, that the Ordinary may, if he wil, call the executor or administrator to account concerning the Goods and Chattels of the deceased, either generally or particularly, as the case requireth; and that with, or without the Creditors or Legataries instigation, within a year, or what time he will; unto which account he may call all the Creditors and Legataries; & therein the executor or administrator must shew what he hath received, and what he hath laid out, and prove it in such sort as the Ordinary shall like: And then if it be found he hath faithfully and fully administrated, the Ordinary may acquit him of the burthen, and then he is discharged of all Suits in the Spirituall Court; but this account and discharge will not help nor avail him at all to discharge him of Suits at the Common Law. *Swimb: Part: 6. Sect: 17.*

The Office and duty of the Ordinary after the death of any person within his Dioecesse, is if he hear of any Will made, and any Executor appointed, to cite the Executor, and to compell him to come in and prove the Will, and to accept and take upon him the Administration of the Goods, or to refuse it: and if the Executor refuse, or if there be a Will made, and no Executor appointed, the Ordinary must commit the Administration *Cum testamento annexo* to whom he shall think fit, and take bond of the Administrator to perform the Will. And if there be no will made, he is to grant the Administration of the Goods to the next of kin, if he or they require it; and if not so, to whomsoever besides shall desire it; or if no body seek it, he may grant Letters to whom he will *Ad colligendum bona defuncti*, and thereby take the Goods of the deceased into his own hands: and then it seems he is to pay therewith the Debts and Legacies of the Deceased, so far as the same will reach, in such order as the Executor or Administrator is to pay them. See more of this question in Numb. 29. *infra. Coe. 5. 83. 5. 39. Lis. Broo. Sect: 233. F. N. B. 220. Dyer 232. Doll: & St. 132. Broo. Executor 90. Testament 27. Stat. 31. Ed. 3. c. 11. 13 Ed. 1. c. 19. 21 H. 8. c. 5.*

An Executor or Administrator regularly shall charge all others for any Debt or duty due to the Deceased, as the Deceased himself might have done; and the same Actions

ACTIONS the Deceased might have had, the same Actions for the most part the Executor or Administrator may have also: And therefore he may have an Action of Accedunt, an Action of Trespasse *De bonis asportatis in omni respectu*: An Action of Debt against a Gaoler upon the escape of a Prisoner; a Writ of Error upon the Statute of 27 *Eliz.* an Attaint upon the Statute of 23 *H. 8.* A Writ of Restitution upon the Statute of 21 *H. 8.* If an Action upon the Case upon the Assumpsit of the Testator, An *Indemnitate nominis* when the Deceased's Goods are taken upon an Outlawry against another man of his name: An Action of Covenant for breach of a Covenant made to the Deceased: An Action upon the Case upon the Trover and Conversion of the Goods of the Testator. An *Ejectione firme* for an Ejectment of the Testator out of a Terme. An Action of Debt for the Rent behind in the life-time of the Deceased. An Action of Debt for the Arrearages of an Annuity due to the Testator in his life: And a Ravishment, or Ejectment of Guard for a wrong done to the Deceased. But an Executor or Administrator shall not charge another, or have any Action against him for a personall wrong done to the Testator, when the wrong done to his person; or that which is his, is of that nature as for which Damages only are to be recovered: And therefore an Executor or Administrator cannot sue another for the beating or wounding of the Deceased, or for a Trespasse done to him in his Cattle, Grass, or Corne, or for a Waste done by his Tenant in his Lands; for these are said to be personall Actions, which dye with the person according to rule, *Actio personalis moritur cum persona*. See for this *March. 923. 13. pl. 33. Plow. 181. Co. 11. 90. Wils. 2. c. 12. F. N. B. 117. Dyer 324. Co. 11. 41. Co. 6. 80. Co. 9. 86. Stat. 9 H. 6. c. 4. Bro. Executor 161. Co. 5. 27. 7 H. 4. 6. Co. 4. 50. Bro. Executor 169. Bro. Executor 122. Co. 9. 85. See Action Dyer 114. 322. 69. 12 H. 8. 10. Brownl. 1. part 101.*

If the Testament be kept from the Executor, he may have remedy to recover it in the Spirituall Court: So if the Goods of the Deceased be kept from him, he may sue these for them if he will, or he may sue in any Court of Common Law. And if there be a Will, and an Executor made, or two Administrations granted together, he that is rightfull Executor or Administrator may sue the wrongfull Administrator for the Goods in his custody. *36 H. 6. 7. Co. 8. 135.*

If one grant a Rent out of his Land for life, provided that it shall not charge his person, and the Rent is behind, and the Grantee dieth; in this case, the Executor or Administrator of the Grantee may have an Action of Debt for these Arrearages. *Co. super Litt. 146.*

If any Rent or Arrearages of Rent be due to me upon a grant of Rent out of any Land to me, or reservation of Rent upon any Estate made by me of Land; in these cases, my Executor or Administration may have an Action of Debt for this Rent, or he may distraine for it, so long as the Land chargeable with the Rent, and out of which it doth issue, is in his possession that ought to pay it, or in the possession of any one that doth claime by or under him. *Co. 4. 50. Stat. 32 H. 8. cap. 37.*

If any of my Household Servants do convey away and eloyne or destroy any of my Goods, any Executor or Administrator may have a speciall Commission out of the Chancery, to enquire of, and to punish it. See *Stat. 33. H. 6. c. 1.*

And in case where a man doth sue as Executor or Administrator, he must in his Action name himself, as he is; *2. c.* if he be an Executor, he must name himself so; and if an Administrator, he must name himself so: And if there be many Executors, and some accept, and some refuse, if they bring any Action, they must be all named in the Writ: And yet if one Executor have Goods in his possession, and he alone sell them, perhaps for this Contract he may bring an Action for the money in his own name: So also if the Goods be taken out of his possession alone, it is said he alone may sue for them, but the safest way in these cases, is to sue in the names of all the Executors; for the possession of one of them is said to be the possession of all of them. *Co. 5. 33. Bro. Trespasse 346. Fide. Executor 14.*

18. Where and how an Executor or Administrator shall charge others in respect of the Estate of the Deceased, and what actions & remedy he may have against others and what not, and how.

Personall Actions.

29. Where & how an Executor or Administrator shall be charged by others, and what Actions and remedies may be had against him, or not, See *Browne*. Rep. 18, 19. 22, 53, 2. part. 39. 81. 139.

An Executor or Administrator regularly shall be charged by others, for any debt or duty due from the Deceased, as the Deceased himself might have been charged in his life-time, so far forth as he hath any of the Estate of the Deceased to discharge the same. *Coo. super Litt.* 209. 5. 17. *Dyer* 14. 23. 112. *Doll.* & *St. Bro.* *Discent* 53.

And therefore if a man bind himself by Obligation or Covenant to pay money or do any such like thing, and do not bind his Executors or Administrators by name; in this case the Executor or Administrator may be sued and may be charged as far forth as if they were named. And yet where the Covenant is but personal, as where one doth make a Lease for years, and the Lessor doth Covenant to pay the Quit-rents, but he doth not say during the terme; by this it seems the Executor or Administrator of the Lessor shall not be charged. An action of the case lieth against him upon an Assumpsit, or the simple Contract of the Testator, especially where the ground of the Assumpsit is a true debt, a *Rationabile pars bonorum* lieth against him; a *Detinere* lieth against him for the Goods delivered to the Deceased, if the Executor or Administrator do still continue the possession of them: Also an action of debt lieth against him for arrearages of account found upon the Deceased before Auditors. *Coo* 9. 86. *Plow.* 182. *F. N. B.* 121. 3 *H. 6.* 35. 11 *H. 4.* 45.

The Executor or Administrator of the Father that hath levied Aid of his Tenant for the marriage of his Daughter, shall be charged with it, and the Daughter may sue for it. *Stat.* 25 *Ed.* 1. c. 11.

The Executor or Administrator of a Guardian in Chivalry that doth commit Waste in the Wards Lands, shall be charged and may be sued for the Heire for it. *F. N. B.* 56.

If a man possessed of a term of years, devise it to another, and the Executor or Administrator of the Devisor before the assent to the Legacy, doth commit Waste in the Land in Lease; in this case he shall be charged with, and may be sued for this Waste by him in Reversion: But if the Executor dye, his Executor shall not be charged with it; for it is a personall wrong that dieth with the person. *Coo* 5. 12. *Coo* 8. 94.

If a Bishop grant an Annuity out of his Lands to *I. S.* for life, and dye, in this case it seems the Executor or Administrator of the Bishop shall be charged with the Arrearages due in the Bishops time. *Dyer* 370.

If a Lease for years be made rendring Rent, and the Rent is behind, and the Lessee die; in this case the Executor or Administrator of the Lessee shall be charged for this Rent. So also if Lessee for years assigne over his Interest and dye, his Executor or Administrator shall be charged with the arrearages before the assignment, but not with any of the arrearages due after the assignment. *Broo. Executor* 127. *Coo* 3. 24. 22.

The Executor or Administrator of a Customer or Controller shall be charged upon a Taile of the Exchequer shewed to the Testator. *Broo. Executor* 157.

The Executor or Administrator shall be charged for a Ravishment or Ejectment of Ward by the Deceased. *West.* 2. c. 35.

The Executor or Administrator may be charged in the Spirituall Court for Tythes due from the Deceased: but he may not (as it seems) be sued in any Temporall Court for them. *Trin.* 7 *Jac.* B. R. F. N. B. 51.

The Executor or Administrator of a man that recovereth a debt upon a Judgment had by the Deceased, shall be chargeable with restitution, if the Judgment be reversed for Error. *Curia* 21 *Jac.* B. R.

An Executor or Administrator shall not be charged for any personall wrong done by the Deceased, and therefore no action may be brought against him for any such cause, as because the Deceased did burn the Deed of the Plaintiff, suffer a Prisoner at his Suite to escape, cut down his Trees, eat up his Grasse, beat or wound the body of the Plaintiff, defame him in his name, or the like; for all these are said to be personall actions that dye with the person, neither is there any remedy to be had against the Executor or Administrator in equity in these cases, neither shall he be charged in any action of Account for any Receipt or Occupation by

by the Deceased. And yet perhaps an action of the Case may lie in this Case; neither will an action of Debt lie against him upon the simple contract of the Deceased, but an action of the case only. Neither will an action lie against an Executor or Administrator upon an arbitrement made in the life time of the Deceased, albeit it be made in writing. Neither will any Action lie against any Executor or Administrator for costs given in the Star Chamber or Chancery against the Deceased in a Suit there, but when the party dieth the same is lost; and where a man doth sue an executor Administrator in a Suit, he must charge him as he is, viz. if he be an Executor he must sue him by that name, if an Administrator, then by that name. And where there be many Executors and have all accepted they must be all sued; but if some of them have refused, perhaps the suit may be good enough against the rest. *Adjudge Hill* 40 Eliz. B.R. *Bowyers case*, *Hill* 77 a. B.R. per 3 Justices. Co. 9. 39. 40 Broo. executor 78. 136. 156. Fitz. Brief 341.

But otherwise one Executor cannot be charged without his companions, except it be in the case of Summons and severance, and in some special case where one alone doth the wrong, and the like, as where one Executor alone doth detain the deeds from the heir; for in this case he alone may be charged. See more *infra* at Numb. 39. *Brown* 1. part 18, 19, 22. 53. 2 part 39. 81. 139.

All the Executors where there be more then one, be they never so many, in the eye of the Law are but as one man; in which respect the Law doth esteem most acts done by or to any of them, as acts done by or to all of them. And therefore the possession of one of them of the goods and Chattels of the Deceased is esteemed the possession of them all; payment of Debts by or to one of them, is esteemed a payment by or to them all; the Sale or Gift of one of them, of the goods and Chattels of the Deceased, the Sale and Gift of them all; a Release made by or to one of them is a Release made by or to them all; and the assent of one of them to a Legacy the assent of them all. 21. Ed. 4. 25. 4 H. 7. 4. 16 H. 7. 4. Broo. executors 66. 30. 65. 9 Ed. 4. 12. Fitz. executors 10. *Brown* 1. 2. part 58.

And therefore if there be two Executors and one of them deliver up the Obligation to the Debtor whereby he is bound, the other Executor shall not recover him in a detinue. So if two Executors have Lands or Goods in Execution, and one of them release all his interest, this is a totall discharge of the Execution, *Adjudge M.* 39, 40. Eliz. B.R.

And yet if in this Case there be any practice between the Executor and the Creditor in this matter, and there be not Assets besides to pay all the Debts and Legacies, here perhaps the other Executor may have remedy in equity against his co-executor and the creditor. But how the Law is of Administrators, *Quere*; for some think that one of them also may sell Goods, release Debts, plead to Actions, or the like without the other. *Goldsb.* 141. 54. Others of a contrary opinion, and that because they have but one entire authority given them, that they must act together and not asunder, but Administrators have by the Administration as much interest as an Executor hath, and therefore we conceive he hath as much power as an Executor hath. *Crompt. Jac.* 45, 4 H. 7. 4.

If one Executor attorn to the Grant of a Reversion or a Rent, this is as good as if they did all attorn and bind all the rest, as in case of assent to a Legacy; for in this case the assent will bind all the rest, albeit there be not enough to pay the debts besides the Legacy given away by assent, but his assent shall not hurt his co-executors in a *Devastavit*. *Dyer* 210. Co. 4. 31. *Addition to Just. Dodridge* 4.

If one Executor appear to an action sued against them all, or plead a Plea to it, this for the most part shall be said to be the appearance and plea of them all, and shall bind the rest. *Goldsb.* 141. Pl. 54. Co. 9. 38. *Dyer* 1210.

If two Executors sue together, and one of them is summoned and severed, in this case he that is summoned may before Judgement release the duty, but if the other prosecute to Judgement first, and then he that is severed acknowledge satisfaction, this will not benefit the defendant, nor barr the rest that are plaintiffs in the Judgement. And if 3 executors sue, and 2 are summoned and severed, and the 3 recover and

30 What Act one Executor or Administrator alone may do; And where the act or laches of one may prejudice or barr his companion, and where not.

31. What act one Executor may do to another, And what remedy or action one Executor or Administrator may have against another or not.

and dye; in this case the other two shall have Execution. *Dyer* 310.210.16 H.7.4. See more at *Numb*, 27. *supra* 1. *Brown*. 2 part 58.

One Executor or administrator cannot give or sell any of the Goods or chattels of the deceased to another Executor or Administrator; and therefore they may not make Division of the goods amongst themselves; and regularly one of them cannot sue another of them. And therefore if one keep, give, or sell all the goods; release debts, or the like, in the disturbance of the Execution of the Will, or due Administration of the estate, it seems the other hath no remedy against him, except it be in the Case of Coven before; But if all the residue of the Goods and Chattels after Debts and Legacies paid be given to one of the Executors alone, and after the Debts and Legacies paid, the rest do detain it or any part of it from him, in this case perhaps he may have some remedy against them. 27 H.8.21.6 H.7.5. *Plow*, 343. *Fitz. Executors* 6.

If the Debtor make his Creditor, and another his Executors, and the Creditor doth refuse the Executorship, and the other doth accept it; in this case the creditor may sue the Executor for this Debt: But if both prove the Will, and the Debtor die, the surviving coexecutor cannot sue the Executor of the debtor for this debt. And if one make a woman and two others his Executors, and a creditor before she doth accept of the Executorship doth marry her; in this case he may sue the other Executors for this debt; but if she have accepted of the Executorship first *contra*, 11 H.4.83.

32. Devastavit

Quid
What shall be said a Devastavit and wasting of the goods of the deceased by an Executor, or administrator, and how he shall be charged thereupon.

A *Devastavit* or Waste in an Executor or Administrator is, when he doth misemploy the estate of the deceased, and misdeemean himself in the managing thereof against the trust reposed in him. And this may be done divers wayes, as

1. When the Executor or Administrator doth bestow more upon the Funerals of the Deceased then is meet, having respect to his degree and Estate.

2. When he doth pay Legacies in money, or assent to Legacies given in other things before the debts are paid, and hath not enough besides to pay the debts.

3. When he doth not pay the debts in that order & manner as is before set down, but doth pay them first he should pay last, and he hath not enough to pay them all.

4. When he doth release a debt or duty due to the Deceased before he doth receive it, or when the Goods of the Deceased being taken from him, he doth release to him that doth take them the action whereby he may recover them.

5. When he doth sell the Goods of the Deceased much under value, especially if it be with covin, as to his near Friends, to his own use, to have money underhand, or the like, but otherwise to sell them under value, especially where he cannot conveniently make more of them, is no waste. *Plow*. 543. *Coo*. 532. *Doff. and St.* 75 *Perk se*. 488. 570 *Kelw*. 59.

All these and such like acts as these are said to be a waste in an Executor or Administrator; and being discovered against him by the return of the Sheriff (or as some think by inquest of Office) it will produce this effect, to make the Executor or Administrator chargeable for so much as he hath misemployed and wasted *de bonis propriis*, so that any creditor may charge him for the debt due to him from the Testator as for his own proper debt, and for so much the Execution shall be made against him upon his own body, Lands, and goods; And yet so, as one Executor or Administrator shall not be charged for the Waste of another; for if there be many Executors, and one of them doth onely commit the Waste, he onely shall be punished for this Waste. *Dyer* 185. *Coo*. 5. 32 *Old B. of Entries* 11. *Dyer* 210. *Doff. & St.* 78.

And the Executor or Administrator if he do commit a Waste in the gift or sale of goods, shall answer it alone; for he to whom the goods are given or sold shall not be punished for it, neither shall the executor or administrator of the Executor or administrator be punished for it after his death. And howsoever the Husband shall be charged in a Devastavit for the Waste of himself or his Wife where she is an Executrix whiles they both live together; yet if a Woman Executrix take a Husband, and during the marriage he or she doth commit a Waste, and after she die; in this case it seems the Husband shall not be charged for the Waste himself or

his Wife did. See *queere* of this. For if a void administration be committed and the Administrator do waste the goods, and after the Administration is committed to another, in this case the first Administrator may be charged by the creditors for the waste done in his time. But an Executor or administrator may lawfully sell or convert the goods of the deceased to his own use, so as he convert the money to the use of the deceased in payment of debts, or the like, and pay so much of his own money, as the goods so converted to his use are worth, and these acts are not esteemed a waste in him. Also he may sell any special Legacy that is given, and this is no waste in him, howbeit it is a wrong to the Legatee if there be assets to pay Debts besides. And when he hath enough to pay all the Debts and Legacies, then he may dispose of the whole estate how he will without any prejudice to himself at all. See more *Brownl. 1 part 24. 33. 116. 2. part 81.*

An Executor of his own wrong is one that is neither lawfull Executor nor Administrator, and yet doth take upon him to do and act such things as are onely fit for, and proper to an Executor or Administrator, as to take the goods of the deceased into his own possession, give and sell them, pay the Debts of the deceased therewith, release the debts due to the deceased and the like. *Terms of the Law, Keltw. 59. 93. Dyer 105. 157. 255. Co. 5. 32. Broo Executor 162.*

And a man may make himself such an Executor by any such intermeddling with the office and work of an Executor as followeth; 1. By proving the Will with the money of the dead, but to prove another mans Will at my own charge, will no more make me chargeable, as Executor of mine own wrong, then to bury the deceased in a decent manner out of his own estate. 2. By a seising, gaining, keeping and using of the goods of the deceased as a mans own, especially if he convert them to his own use, sell or otherwise dispose them, and every colour of Title will not help in this case; for if a man make a Deed of gift of all his goods and chattels to another, and dieth intestate, and this in truth is fraudulent and in trust, and the Donee after the death of the Donor doth dispose of these goods and Chattels in this case and by this means, he shall be Executor of his own wrong. *Goldsb. 116. pl. 12. Brownl. 1. part 103. 2. part 384. 185.*

And yet if the Deed of gift be *bona fide* in satisfaction of a just debt, and the goods be no more then the Debt, it may be otherwise: but if the goods be much more then the debt, there it seems he shall be charged so for the overplus, and that whether he have them in possession or not; and so was the opinion of Justice Jones, at *Gloucester*. Affises. 9 *Car.* 4f the Ordinary grant Letters *ad colligendum & vendendum* the goods of the deceased that are like to perish, and 1. s. to whom the Letters are made, under colour thereof doth take and sell the goods, hereby he may make himself chargeable as Executor of his own wrong: for the Ordinary hath no such power himself, and therefore he may not give that power to another. If a man that is next of kin procure a beggar, or a stranger to take out an Administration, and then to make him a deed of gift of all the goods for a small matter, he may be thus charged for the overplus of the worth of the goods more then he gave. So if a Debtor procure such an administration to be taken out, and then get a Release of his debt from the administrator, this may make him chargeable as Executor of his own wrong for so much as his debt doth come unto. *Star. 43. Eliz. cap. 8. Plich. 7 Jac. Co. B. per ch. Justice.*

And yet a man may take away his own goods that were in the hands of the deceased without danger. And every having and possession of the goods of the deceased will not make a man executor of his own wrong: For if a man die in my house, and have goods there, and I keep them until I can well be discharged of them, this will not make me chargeable, as executor of mine own wrong. *Trin. 17 Jac. per chief Just.*

So if I do onely lay up the goods of the deceased to preserve them in safety for him that shall have right to them, this will make me no more chargeable then if I take an Inventory of all the goods of the deceased. *Co. 5. 34. Keltw. 63.*

So if another man take the goods of the deceased and sell them to me or give them to me, howsoever this will make him chargeable as executor of his own wrong, yet

33, Executor of his own wrong who shall be said to be so. And what act shall make him so to be accounted. And what act such an executor may do, and how he shall be charged or not.

yet this will not make me chargeable so, neither will every disposition of the goods of the deceased make a man executor of his own wrong, for if a man sell some of the goods of the deceased (where there is need) to help forward a decent Funerall of the body of the deceased: this is no such disposition as to make a man chargeable thus. So if I deliver the wife of the deceased her necessary wearing apparel, or if I be wife to the deceased and take it my self. So where I take any of the deceaseds goods into my hands by mistake, supposing them to be mine own, or under colour of Title, as when I have a good deed of gift or sale of them without any fraud or coven: or under a good authority, as when I take them upon a Warrant from the Sheriffe that hath processe out of the Exchequer to take them, or as a Trespassor onely, as when I kill or otherwise abuse the Cattel; such an intermeddling with the goods of the Deceased will not make a man chargeable as Executor of his own wrong, neither may I be so charged in these cases. *Kel. 63. 52. 33 H. 6. 21. 32. H. 6. 6. Dyer 167, Coe. 5. 34. 20 Ed. 4. 17. Fitz. Executor 122.*

The Third way by which a man may make himself chargeable as Executor of his own wrong, is by delivering of the goods of the deceased to creditors in satisfaction of their Debts, or by selling any of the goods of the deceased to pay the Debts of the deceased, and paying the same with the money made thereof; but to pay the deceaseds Debt with a mans own money will not make him chargeable so. *See the cases before.*

The fourth way by which a man may make himself so chargeable, is by receiving any of the Debts due to the deceased. *Dyer 166.*

The fifth way by which a man may make himself chargeable so, is by releasing any Debts or duties due to the deceased.

The sixth way, by delivering any Legacies given by the deceased in kind, or by paying any Legacies, except it be with a mans own money. *Dyer 166.*

The seventh way, by taking a mans Legacy given to him before the Executor have accepted of the executorship and assented to the Legacy.

The eighth way, by suing as Executor to the deceased, for any debt due to the deceased.

And the ninth way by taking upon him to sell the Lands of the Deceased as his Executor. In all these cases, and by all these and such like means, a man may make himself an executor of his own wrong: so that if an Executor after he hath legally waived the Executorship, or an administrator after his Administration is repealed and revoked, intermeddle with the estate in any such manner, he may be charged as executor of his own wrong: and if a woman take more of her wearing apparell then is necessary and convenient for one of her rank and condition, without Legacy of the husband and licence of the executor, she may be charged thus. *Dyer 105. Dyer 166. 33 H. 6. 31.*

And if a man under colour of an Administration that is not good, or of a Commission *ad colligendum bona defuncti* that is not good, or of a Will when in truth there is none at all, or no good Will, do take upon him to intermeddle with the goods and to dispose of the estate in manner as aforesaid, by this means he may make himself chargeable thus. And in these Cases, and by these means, such persons that do so intermeddle, do make themselves to be accounted in Law Executors; but Executors by wrong onely and not Executors by right. And therefore such persons have not the favour nor power of lawfull Executors, as to bring any action for Debt due to the Deceased, to deduct and pay themselves any Debt due to themselves first of all, and to bar other Creditors, and the like. And for so much as they have so disposed and mis-employed, and no more, they make themselves chargeable to any Creditor or Legatee of the Deceased that shall sue them as far forth as a lawfull executor is chargeable. *Dyer 255. 166. Coe. 5. 34. 9. 39. Coe. 5. 34. Plow. 148. 145. 33 H. 6. 31. Dyer 210. Plow. 184. Coe. 5. 33.*

And albeit, he that doth thus be a Creditor, yet this will not help him; for a Creditor may not enter upon the Goods of the Deceased, and pay himself first, and if hee do so, if there bee a lawfull Executor or administrator made he may sue the Creditor; and if there be no Executor or Administrator made

made, the Creditor may by this means make himself chargeable to other Creditors as Executor of his own wrong, for so much as he hath taken into his own hands: And then a man shall be charged the rather in these Cases, and by this means when there is no Executor made, or if there be an Executor made, when he doth refuse to take upon him the Executorship, nor any Administration granted; for when a man dyeth Intestate, and a stranger taketh and useth the goods of the deceased as his own, albeit he pay no Debt or Legacy, nor do any other act as Executor, yet when no other man taketh upon him the Administration, this intermeddling shall make him chargeable as Executor of his own wrong; for in that case the Creditor hath no other remedy: But in case where there is an Executor made, and he doth prove the Testament, and doth take upon him the Administration of the goods, and then a stranger taketh out of the hands of this Executor, or getteth into his own hands all or some of the goods of the deceased, and useth them as his own, this will not make this stranger Executor of his own wrong, for now there is a lawfull Executor against whom the Creditor may have his remedy; and the Executor shall have his remedy for these goods against the stranger; for they are and shall be accounted Assets in the hands of the Executor still, notwithstanding the stranger hath the possession of them: and yet in this case also where there is a rightfull Executor, if a stranger shall take the goods into his hands, claim to be Executor, pay debts and Legacies; and receive debts, and intermeddle as an Executor; in this case, perhaps, and by this expresse Administration as Executor, he may be charged as Executor of his own wrong, albeit there be a lawfull Executor: and if a man die intestate, and a stranger intermeddle with the estate as before, and then the Administration is granted to another; in this case the stranger may be charged by any creditor or Legatee as Executor of his own wrong for his intermeddling before the Administration granted; for the rightfull Executor or Administrator shall be charged with no more then what doth come in to his hands. And if an Administration be granted afterwards to any one that hath so intermeddled with the goods before; this will not purge the wrong done before; and therefore in this Case a Creditor may charge him as Executor of his own wrong, or as a lawfull Administrator at his election, *Coo* 5. 33. *Kelw* 59. *Pascb* 39 *Elizabeth*. *Coo* B. *Bradbury versus Reynolds*. See more, *Brownl* 1. part 103. 2. part 184. 185.

The Administrator, *durante minori etate*, is a speciall kind of Administrator, and is in case where an Infant under the age of 17 years (for at that age an Infant is capable of an Executorship) is made an Executor, and the administration of the goods (as the manner is in that case) is committed to one or more of the next friend or friends of the Infant during his minority, which is untill he be of the age of seventeen years; he that hath such an Administration granted unto him is such an Administrator. And he is sometimes generall, *i.e.* when his administration is granted to him *ad opus & usum* of the Infant onely. In the first case, he hath as large a power as another Administrator, and therefore he may assent to a Legacy, albeit there be not Assets to pay Debts; he may sell any of the goods and chattels of the deceased, or give them away or the like, as another Administrator may do. *Coo* 5. 29. 6. 27. 9. 27.

But in the last case it is otherwise; for such a speciall Administrator can do little more then the Ordinary himself, and therefore he may not sell any of the goods or chattels of the deceased, except it be in case where they are like to perish, for funerall expences, or for payment of Debts, nor may he assent to a Legacy where there is not Assets to pay Debts &c. And this administration is *ipso facto* determined when the executor doth come to the age of seventeen years: And therefore if it be granted during the minority of four Executors, and one of them die, or come to the age of seventeen years, now is the Administration determined: And if the Executor be a woman and she take a husband that is seventeen years of age or upwards; in this case it seems the Administration is determined: and therefore also it is, that if such an Administration *durante minori etate* be granted after the Executor is seventeen years of age, the Administration is void, See more of this *Brownl* 1. part 31. 46, 47, 80. 101. 2. part 83. 148.

34. Administrator *durante minori etate*, what he is and his power and when it shall end.

35. Where an Administrator once committed by the Ordinary may be afterwards revoked; and what shall be said a Revocation of such an Administration, or not; and what acts done before shall stand in force, or not.

It hath been held that the Ordinary after he hath granted Administration of the Goods of a man Intestate to another, may afterwards without cause revoke the same and grant it to another, at his pleasure; and that if the Ordinary grant Letters of Administration to one, and after grant Letters of Administration to another, of the Goods of the same man, that hereby the second Letters of Administration are *Ipso facto* countermanded, albeit there be no words of Revocation in them. 4 H. 7. 14. *Lit. Broo. Sect. 330. 34. H. 6. 14. Dyer 339. Broo. Administrator 7.*

But it seems the Law is otherwise, and that after the Ordinary hath granted the Administration according to the charge and direction given him by the Statute, that he cannot afterwards revoke it, and grant it to another without cause; i.e. unlesse the first Administration be illegally granted, as when it is granted to a stranger, and not to the next of kin, or the like, or unlesse the first Administrator cannot, or will not administer; for in these cases he may without doubt grant the Administration to another. And yet in these cases where there is a former Administration granted regularly, all acts that the first Administrator doth lawfully execute and do as Administrator, as sale of Goods, payment or receipt of Debts, making Releases, and the like, are good, and shall bind the next and succeeding Administrator. And therefore, if the Ordinary after the death of a man Intestate, doth grant the Administration of his Goods to a stranger, and the next of kin doth sue by Citation to have it repealed, and the first Administrator hanging that Suit in the Spiritual Court, doth sell the Goods of purpose to defeat the second Administration, and after the first Letters of Administration are revoked by sentence, and the first sentence annulled, and the Administration is committed to another; in this case the second Administrator cannot recover these Goods or have any remedy for them. And yet perhaps if there be any fraud in the case, an Executor may have relief upon the Statute of 13 *Eliz.* But if the first Suit and sentence be by appeal avoided, then all that the first Administrator doth is void, and the second Administrator may recover the Goods notwithstanding the sale: And if the first Administration be upon condition, all the acts of the Administrator doth before the condition broken, are good; and therefore if he give or sell the Goods, the subsequent Administrator cannot avoid it. See the *Stat. 21 H. 8. c. 5. Coe. 6. 18. New Book of Entries 38. Plow. 281. Coe. 6. 18, 19. Dyer 339. Coe. 6. 19.*

If a man dye Intestate, and have not *Bona notabilia*, and the Bishop of the Diocese grant Letters of Administration to one, and after the Arch-bishop doth grant Letters of Administration to another; in this case the effect of the first Administration is suspended untill the other be repealed and declared by sentence to be void. If there be a Will, and it is concealed, and thereupon an Administration is granted, and after the Will is produced and proved; in this case the Administration is *Ipso facto* determined, and all the acts the Administrator hath done *ab initio*, are become void. See more in the next Question. See more *Brownl. 2. part 83. Coe. 8. 135. Plow. 281. 9 H. 5. 5.*

36 What Acts done by one Executor or Administrator, may be avoided by the subsequent Executor or Administrator, and what not.

If a Will be made by an Ideot, and an Executor appointed therein, and the Executor take upon him the Administration, and after the Will is avoided for the weakness of the Testator; in this case it seems that all the Acts the Executor doth before the avoidance of the Will are good and not to be avoided by the Administrator. *Dyer.*

If there be a Will made, and an Executor appointed, and the Ordinary cite the Executor to come in, and prove the Will, and he doth not come, and thereupon the Ordinary doth grant the Administration to another; in this case all acts done by the Administrator are good, and shall bind the Executor, if he may, and shall afterwards take upon him the Executorship. But otherwise it is where the Ordinary doth grant the Administration before the Executor be cited to appear, or before the time given him to take upon him the Administration; for in this case, nothing that he doth shall bind the Executor. 3 H. 7. 14.

When there is an Administration granted, and it is afterwards upon a Suit by condition only repealed; in this case all acts done by the first Administrator are good and shall bind the subsequent Administrator. *Coe. 6. 18, 19. Plow. 282. Coe. 8. 143. 139.*

But

But in case where the first Administration is upon a Suit by appeal by sentence annihilated and declared void, there all acts done by the first Administrator are void, and shall not bind the subsequent Administrator: And therefore if the Ordinary of the Diocese grant an Administration that doth belong to the Metropolitan to grant (in which case the Administration is void) all acts done by the Administrator are void, and may be avoided by the succeeding Administrator. But when the Administration doth belong to the Ordinary of the Diocese to grant, and the Metropolitan doth grant it (in which case it is only voidable) in that case, all acts upon and by virtue of the first Administration before the second Administration, are good.

If an Administration be granted to a stranger, and afterwards it is revoked and granted to the next of kin; in this case all lawfull acts done by the first Administrator before, and hanging the Suit, are good and unavoidable by the subsequent Administrator; and yet perhaps if the first Administrator waste the Goods, it may be he may be charged for this by the subsequent Administrator; or by a Creditor: *Wilson versus Packman. M. 37. 38 Eliz. B.R.*

Where the Executor by the Will is not to administer untill a certain time; in this case the Administration of all the Goods is to be granted untill that time; and all acts done by such an Administrator before that time are good, and shall bind the Executor. So where an Executor is made, or an Administration is granted upon condition, which is after broken, so that the Executorship or Administration is determined; yet in this case all acts done by him before this time are good. *Plow. 281, 282. Co. 6. 19. 34 H. 6. 14.*

If there be a false and a true Will, and the Executor of the false will prove this Will first, and afterwards the Executor of the true Will doth disprove and avoid the first Will; in this case also he may avoid all acts the first Executor doth. See more in *Boownl. 2. part 80. 91. 2. part 147. 4 H. 7. 13. Plow 282.*

The same Bars and Pleas regularly, that a man may have to actions brought by the Deceased himself in his life, a man may have to bar the action and Suit of his Executor or Administrator after his death. But an Executor or Administrator may have besides the same Pleas and Bars to Actions the Deceased might have had, as *Non est factum*; *Per Durasse*, *Non Assumpsit*, and the like; divers other Pleas and Bars to Actions in respect of his Estate and condition as Executor or Administrator: For if he never meddle with the Goods and Chattels of the Deceased, and yet he be sued as Executor or Administrator, he may plead *Ne ungue*, i. e. he did never intermeddle as Executor or Administrator; and if this be found for him, this will bar the Plaintiff: And if he do intermeddle and take upon him the Administration, he may plead if the case be so, that he cannot recover the Goods of the Deceased; for he shall be charged for no more then what he can get in his possession. Or he may plead that he hath fully administered all the Goods and Chattels of the Deceased, and hath nothing left to administer; or he may plead, that he hath paid so much of his own money as the Goods in his hands do amount unto. Or if he be sued for Debts due by Obligations, or such like Especialties entred into by the Deceased, he may plead that there are Debts due, and yet to pay on Judgments had against the Deceased, or that there are Debts due, and yet to pay on Recognizances or Statutes entred into by the Deceased, and that he hath no more then enough to satisfy them: Or he may plead that there are Judgments had against him for other Debts of the Deceased in equal degree with the Debt sued for, and that he has no more then enough to discharge them: so as these former Debts, on, and for which these Judgments were had and Statutes given, be *bona fide* due, and the Judgments, Recognizances, and Statutes in truth continued for the same; for if there be any fraud in the case, viz. that either the Judgments, Recognizances, or Statutes, were at first entred into, or are afterwards continued of purpose to deceive or delay others of their due Debts, when either the Debt is satisfied, or compounded for lesse, or the like; in these cases, this Plea will not serve; but in this matter being disclosed by the Plaintiffs pleading he will avoid it. *Co. 5. 33. Dyer 30. 80. Co. 8. 132. 134. 21 H. 6. 19. Dyer 2. 27 H. 8. 6. Co. 9. 108. 2 H. 4. 21. Brownl. 2. part 118, 19.*

37. What shall be said a good bar in Debt, or other Action brought by, or against an Executor or Administrator, and v. not.

And

And if he be sued for a Debt due upon a simple Contract or promise of the Testator, he may plead there are Debts to pay due by Obligations and other Especialties entred into by the Deceased; and that he hath no more then enough to satisfie those Debts, and this will bar the Plaintiff in his action: And therefore if an Executor or Administrator plead a Judgment in Bar of an action of Debt upon an Obligation, he must shew also that the Suit whereupon the Judgment was had, was upon an Obligation; for if it were on a simple Contract, it is no Bar. And if the Executor be sued for Debt on an Obligation, he may plead he made voluntary payment of other Debts due upon Obligations, or gave new security for them in his own name before the Suit began, and that he hath no more then enough to satisfie them. But to plead such a voluntary payment or giving of new security after Suits begun upon this Obligation now in Suit is no good Plea.

If an Action be brought against an Executor or Administrator upon an Especialty for money, it is no good Plea in Bar of this action to plead a Statute or Recognizance with Defeasance to perform Covenants when there is no Covenant broken.

If a Suit be against an Executor or Administrator for a Legacy, it seems it is no good Plea to plead a Bond with Condition for performance of Covenants, or for the doing of any other collaterall thing that is contingent only, and not yet broken. It is no good Plea in an action for an Executor or Administrator to say, that the Deceased was Out-lawed. See more *Brownl. 142. pl. 57. 141. pl. 54. 1. part 19. 75. 50. 80. 2. part 118, 119. 153. Curia Trin. 37. Eliz. Trin. 39. Eliz. B.R.*

38. Where and in what case an Executor or Administrator shall be charged by his own act or pleading upon his owne Goods, and where execution shall be *de bonis propriis* & where not.

An Executor or Administrator may make himself chargable of his own Goods, either by omission, as when he being sued upon an Obligation, or the like, and there is a Judgment against him or the Deceased in force, and he hath but enough to satisfie that Judgment, and he doth not plead this in Bar of the present action, but doth suffer the Plaintiff to recover against him; in this case he must satisfie this second Debt out of his own Estate; or by Commission, and that either by doing, as when he doth any act that is a waste in him, and thereupon a *Devastavit* is returned against him, for in this case he must answer so much as he hath wasted out of his own Estate; or by saying, as when a Suit is against, and he doth plead such a false Plea therein as doth tend to the perpetuall Bar of the Plaintiff in the action, and yet it is of a thing that doth lye within his perfect knowledge, as when he doth plead he is not Executor, nor did ever administer as Executor, and upon tryall of this Issue against him it be found he is a rightfull or wrongfull Executor; in this case he must satisfie this Debt out of his own Estate whether he have assets or not, and the Execution had upon the Judgment had in this Suit shall be *De bonis propriis*. *2 H. 6. 12. Dyer 185. 80. Coe. 9. 90. 94. 9 H. 6. 57. 34 H. 6. 45. Broo. Executor 141. 105. Lit. Broo. Sect. 29. Kelt. 61. Broo. Executors 164.*

And if an Executor or Administrator be sued, and he plead to the action *plene administravit*, and upon tryall it is found against him; in this case if he have any of the Goods of the Deceased left in his hand, the execution shall be of them, but if he have none of the Goods of the Deceased left, the execution shall be, and he shall be charged for so much as is found to be in his hands *de bonis propriis*.

But where he is sued upon a promise made by the Testator, and he plead *non assumpsit* to it, and where he sued upon a Deed made by the Testator, and he plead *non est factum* to it, or the like; and these Issues upon tryall are found against him: or when he shall confesse the action, or suffer a Judgment to go by default against him, or plead any vaine Plea; in all these cases he shall not be chargable of his own Estate, neither shall the Judgment and Execution in these cases be *de bonis propriis*, but *de bonis Testatoris* only for the Debt, and *de bonis propriis* for the Costs: And yet if an Executor or Administrator shall entreat a Creditor to forbear his Debt untill a day, and then promise to pay him, by this promise he hath made himselfe chargable as for his owne Debt, howbeit it shall be allowed him upon his Account.

But

But in all these cases, and such like, where a man shall be charged of his own Estate, and the execution shall be *de bonis propriis*, it seems the Judgment is alwaies *de bonis Testatoris*, and the course is this, the first Execution is against the Executor *de bonis Testatoris*, and not *de bonis propriis*: And after a *Devastavit* returned by the Sheriff against the Executor or Administrator, and not before, a new Execution is directed to the Sheriff to levy the Debt *de bonis Testatoris*; and if there be none of them to be found in his hands, then to levy them *de bonis propriis*.

And therefore if an Executor or Administrator be sued by a Creditor, and the Executor or Administrator plead a *Plenè administravit* generally, or plead specially that he hath no more but to satisfie a Judgment or the like, and upon tryall this Issue is found against him, and it is found he hath in all or part enough to satisfie the Debt; in these cases the Judgment is *de bonis Testatoris*, and thereupon an Execution is (as in other cases) to levy the Debt *de bonis Testatoris* in the hands of the Executor or Administrator, and for the Costs *de bonis propriis*. And upon the return of the Sheriff a speciall Execution doth issue forth to levy the money *de bonis Testatoris*: *Et si constare poterit*, that he hath wasted the Goods, then that he shall make the Execution *de bonis propriis*. And hereupon also the Plaintiff may if he will have a *Capias* against the body, or an *Elegit* against the Lands of the Executor or Administrator, and no other course of proceeding can or may be had against the Executor or Administrator in this case. *Atworths case*, Mich 38, 39 Eliz. 34 H. 6. 45. 46 Ed. 3. 9. *Fitz. Executor* 9. *Coo.* 5. 32. 8. 134. *Dyer* 185. 32.

An action of Debt was brought against two Executors, and one of them did appeare and confesse the action, and the other made default, and thereupon Judgment was given to recover against them both *de bonis Testatoris* in their hands, and Execution accordingly: and upon this Execution the Sheriff did return a *Devastavit* against the Executor that made default only, and hereupon a *Scire facias* went out against him alone, and afterward an Execution against him alone *de bonis propriis*. See more in *Brownl. 2. part. 24.* 33. 50 76. 78. 116. 2. *part.* 187. *Dyer* 210.

Assets in this case is said to be where one dieth indebted, and maketh his Executor, or dieth intestate, and the Executor or Administrator hath sufficient in Goods or Chattels, or other profits to pay the Debts or some part thereof; this is said assets in his hands, and for so much he shall be charged. *Termes of the Law. Coo. super Lit.* 374.

All those Goods, and Chattels, Actions, and Commodities which were the Deceaseds in right of action or possession as his own, and so continued to the time of his death, and which after his death the Executor or Administrator doth get into his hands, as duly belonging to him in the right of his Executorship and Administration, and all such things as do come to the Executor and Administrator in lieu or by reason of that, and nothing else shall be said to be assets in the hands of the Executor or Administrator to make him chargeable to a Creditor or Legatee. And herein these things are to be known.

Assets, *Quid.*

37 What shall be said to be Assets in the hands of an Executor or Administrator to charge him or not.

1. That Assets in the hands of one of the Executors shall be said to be assets in the hands of all the Executors. *Ke/w.* 51.

2. That Assets in any part of the World shall be said to be Assets in every part of the World: and therefore if that point be in issue, and it appear that there is Assets in the hands of any one of the Executors, or in any County or place whatsoever, the Jury must find that there is Assets. *Coo.* 6. 47.

3. All Goods and Chattels of what nature or kind whatsoever that are valuable, as Oxen, Kine, Corne, &c. shall be esteemed Assets. But such things as are not valuable, as a Presentation to a Church, and the like, shall not be accounted Assets. *Coo. super Lit.* 388.

4. All the Goods and Chattels that come to the Executor or Administrator in the right of their Executorship or Administration, and that there are by Law given to them by vertue thereof in the right of the Deceased (for which, see before

before (at Numb. 25.) and which are in possession shall be esteemed Assets in his hands. And therefore if a Feoffment be made to the use of the Feoffor for life, and after to the use of his Executors and Assignes for twenty years; in this case it seems this twenty years shall be said to be Assets in the hands of the Executor of the Feoffor. And Goods pledged to the Deceased and not redeemed, or the money where-with it is redeemed, when it is redeemed, shall be said to be Assets in the hands of the Executor or Administrator. And if the Deceased doth appoint that the Executors shall sell his Land to pay his Debts, the money that is made of the Land when it is sold, shall be said to be Assets in his hands. *Coo. super Lit. 388. 5. 34. Dyer 362. Kelw. 63. Coo. super Lit. 44. Dyer 362. 20 H. 7. 4. Broo. Assets 12. See before Numb.*

5. All the Goods and Chattels in action or in possibility at the time of the death of the Deceased that are afterwards recovered, and are gotten in possession into the hands of the Executor or Administrator when they are so recovered, are esteemed Assets in his hands. But they are never accounted Assets untill they are recovered and come in possession; and therefore if there be Debts owing to the Deceased upon Statutes or Obligations, or otherwise, these are never esteemed Assets in the hands of the Executor or Administrator untill he hath recovered them. *Coo. super Lit. 124. 5. 31. Broo. Assets 24. Dyer 264. 121. 2 H. 4. 21. Coo 6. 58 Kelw. 63. Dyer 362.*

So likewise if there be debt or damages recovered by a Judgment had by the Deceased, but no execution is done untill execution be made; this shall not be esteemed Assets in the hands of the Executor or Administrator.

So if the Executor bring an action of Trespasse against another *De bonis affectatis in vita Testatoris*, and he have a Judgment for damages; in this case untill he hath recovered it by execution, it shall not be esteemed Assets in his hands. And if the Judgment be erroneous, and the execution avoidable; in this case albeit it be recovered and gotten in possession, yet it shall not be esteemed Assets. And therefore if one sue another and recover against him as Administrator of *I. S.* and after a Testament made by *I. S.* is produced and proved, and thereby an Executor is made; in this case the money recovered by the Administrator shall not be said to be Assets in his hands as to any of the Creditors, because the Executor may recover it from him, or the Debtor will have it again. And if the Executor or Administrator do never recover and get the thing into his possession, he shall never be charged, especially there where he hath done his best to get it and cannot. If one covenant to make a Lease for years to the Deceased his Executors or Administrators, and after his death the Lease is made to the Executor or Administrator accordingly; in this case this Lease shall be said to be Assets in his hands, and he shall be chargeable for so much to any Creditor. And whatsoever the Executor or Administrator must be forced to sue for by the name of Executor or Administrator being recovered, shall be esteemed Assets in his hands. *Curia Mich. 13. B. R. Coo. 1. 98. Plow. 84. 292. Coo. 5. 34.*

6. Albeit the thing be extinct and gone as to the Executor and Administrator himself, yet it may have his being and be accounted Assets as to the Creditors and Legatees. And therefore if an Executor or an Administrator have a Lease for years of Land in the right of the Deceased, and afterwards he doth purchase the Fee-simple of the Land (whereby the Lease is drowned) yet in this case this Lease shall continue to be Assets as to the Creditors and Legatees still. *Coo. 1. 87. Broo. Leases. 63.*

And if the Debtee make the Debtor his Executor, or the Debtee dye Intestate, and the Administration is committed to the Debtor; in these cases this Debt shall be said to continue, and shall be esteemed Assets for so much as to other Creditors. And if a Woman Executrix have Goods worth twenty pounds, and she marry with one of the Creditors to whom twenty pounds is owing; in this case it seems the Husband may not retain the Goods to pay himself, but they shall be Assets to other Creditors. And yet if the Debtor make the Debtee his Executor, he may retain so much as to satisfie his own Debt, and that he doth so retain shall not be said to be Assets in his hands as to any other Creditor.

And

And if *I. S.* have goods to the value of 20*l.* and he is bound to *B.* and *C.* in 20*l.* a piece, and he dieth intestate, and after *D.* doth administer, and then *B.* dyeth and maketh *D.* his executor; in this case *D.* may retain this to satisfy his own debt, and it shall not be said to be assets in his hands as to any other. *Barnett's case, Hill. 8. fud. Plow: 184.*

7. The goods and chattels of other men in the hands of the executor or administrator that were in possession of the deceased, if he had no right to them, or if he had, and they do not belong to the executors, will not make the executor or administrator chargeable; for these shall not be esteemed assets in his hands. And therefore if the goods of another man be amongst the goods of the deceased, and these come all together into the hands of the executor or administrator; these goods that are the goods of another shall not be said to be assets in the hands of the executor or administrator. And if the executor doth receive a rent that doth belong to the heir, this rent shall not be said to be assets in his hands: and hence it is that if the deceased were outlawed at the time of his death, that his goods and chattels are not to be accounted assets, for they are none of his. *Kelw 63. Co. 6. 58. Dier. 362. Doffi & St. lib. 2. cap. 3.*

8. If an executor of his own wrong, to whom 20*l.* is owing, doth enter upon so much of the goods of the deceased as is worth 20*l.* intending to pay himself; this shall be esteemed assets in his hands to make him chargeable for so much to any Creditor or Legatee. *Co. 5. 30. Dier 2:*

9. If the deceased have goods worth 20*l.* and owe 20*l.* to *A.* and 10*l.* to *B.* and he compound with *A.* for 10*l.* in this case he shall be said to have assets, and be charged to pay the debt of *B.* also. *27 H. 8. 6.*

10. If a man have a Lease for years worth 20*l.* *per annum* at the rent of 5*l.* and he die; in this case not the whole value of the land, but so much as is above the rent shall be said to be assets in the hands of the executor or administrator. See more in *Brownlows: Rep. 1. parts 33: 76. 2 parts. 47.*

If an executor have goods of 20*l.* value, and he take up an obligation of the testator of 20*l.* and pay the money, now the property of this is in him, and this is not assets to any other. So if he give his owne body, or another for him to the creditor of the Testator for 20*l.* But a promise to pay the 20*l.* will not discharge the Assets; *Goldsb: 79. Pl. 15:* If one devise his land to his Executors for years, this is Assets in their hands. But if he devise that they shall sell his land; it is not assets till it be sold; and the money received for it shall be Assets. *Brownl. 2 parts. 47.*

The Probate of a Testament is the producing and insinuating of it before the Ecclesiasticall Iudge, Ordinary of the place where the party dyeth, or other that hath power to take the same. And this is done in two sorts, either in common Form, *i. e.* upon the oath of the executor or party exhibiting it upon his credulity: that the Will exhibited is the last will and Testament of the party deceased, which is the ordinary course; and this the Ordinary may accept if he will. Or *per testes, i. e.* Which is when over and besides his oath he doth also produce witnesses or maketh other proof to confirm the same, and that in the presence of such as may pretend any interest in the goods of the deceased, or at the least in their absence after they have been lawfully summoned to see such a Will proved if they think good. And this course is used only where there is a suspicion of the Will, and the Caveat is entered, or where there is a feare of contention and strife between the kindred & friends of the party deceased about his goods; for a Will proved in common form may be called into question at any time thirty years after; and when the Will is thus exhibited into the Bishops Court, the same is to be kept by his Officers, and the Copy thereof in parchment under the Bishops Seale of his office to be certified and delivered, which parchment so sealed is called the will proved. *Swinsb. 261. 264.*

The probate of the will (as having respect to the goods and chattels) is in some respect necessary; for howsoever as touching any free hold of lands devised it is not all material, and howsoever the Executor before Probate may receive and release debts and do most other acts as Executor, yet he cannot sue for any debt due to the Testator. *Co. super Litt. 292. Perk. Sect. 481.*

40. Probate
Quid.
Quotuplex.

41. Where the
Probate of a
Will is neces-
sary, and
where not; &
by and before
whom.
And in what
time it must
be proved;

And if the Executor delay the Probate, the ordinary may by process compell him to come in and accept or refuse of the Executorship. And when it is proved it must be proved by the Executors or one of them at least; and if all the goods of the deceased be within the same Diocess wherein he lived and dyed, the Executor must prove it before the ordinary of the Diocess, or before his lawfull Commissary or Deputy, or before the Archdeacon or his deputy or Commissary (as their composition is) or if the goods be in a Peculiar, then before him that is Judge of that Peculiar; or if the goods be within two Peculiars then before the Ordinary of the Diocess wherein these two Peculiars lye. But if there be *bona notabilia* in the case, viz. that the Testator have goods or chattels at the time of his death of the value of 5l. or more lying in two or more Counties, or have good debts upon Especialties (as some say) for otherwise they follow the person; or have any (Especialties as other say) lying in other Counties for debt, so that there be of goods and chattels or good debts to the value of 5l. in any other Diocess then that wherein the Testator led his life and dyed, then the Probate doth belong to the Arch-bishop of that Diocess wherein it is, unless the Ordinary of the same diocess have the Probate by composition between him and the Metropolitan; for otherwise there must be severall Probates for the goods in every Diocess (as anciently was used in these cases.) But if a man dye in his journey in another Diocess, and have more then 5l. goods about him, this shall not be said to be *bona notabilia*, but the Will may be proved before the Ordinary of the place where the deceased lived and his Estate doth lie. And except it be in cases where men have *bona notabilia*, the Officers of the Courts of the Metropolitans are not to cite men out of their own Diocess; and to discover this matter, it is the duty of the Ordinary of the Diocess, when any man comes to prove a Will, to give him an Oath, and examine him whether he know of, or doe believe, there are any goods to the value of 5l. lying in any other Diocess at the time of the Testators death, and if he hear of any to dismiss them to the Prerogative Court, and to give them notice of it. Also in some places, the Lords of mannors have the probate of all the Wills within their Mannor by custome of the place; and in those places it must be proved there, and not elsewhere. And when an Executor is bound to prove the Will before the ordinary as before, the ordinary may give him what time to doe it he doth think fit, and when he doth prove it, the Ordinary doth take an Oath of him to administer the goods faithfully, and to take bond of him also if he please; but this some doe omit. For the Fees of Probate, See Stat. 31 Ed. 3. 4. 21 H. 8. 5. Perk. Sect. 491, 492, 486. Co. 9. 36. Fitz. testament. 5. 3. 5. Plow. 280. Stat. 23 H. 8. cap. 9. 21 H. 8. c. 5. See before at num. 21. Swinh. part. 6. Sect. 11. Stat. 23 H. 8. cap. 9. Fitz. Testament. 4. 5.

The old Statutes concerning Executors are, Westminster. 2. 23. 4 Ed. 3. 7. 9 Ed. 3. Stat. 1. 3. 25 Ed. 3 Stat. 5. 5. 33 H. 6. 1. 21 H. 8. 4. 43 Eliz. 8.

See more in Chattels:

CHAP. CLVI.

Of Tillage and Tiles.

Tillage and husbandry. And Houses decayed, Tiles.

For Tillage and Husbandry: See Statutes, 4 H. 7. 12. 19. 21 Jac. 18. 35 H. 8. 13. 27 H. 8. 23. 5 Eliz. 2. 39 Eliz. 1. 35 El. 7. Co. 4. 38. 31 H. 8. 18, 19. 33 H. 8. 26. 35 H. 8. 4. 39 Eliz. 13.

For Tiles how they are to be made, See 17 Ed. 4. 4.

CHAP. CLVII.

Of a Parson and Vicar, his Parsonage or Vicarage, and the Profits belonging to them. Of Tithes, and their Kinde. Of the nature of Tithes, and how they are grantable. Who must pay Tithes at this day, and to whom, and who are capable of receiving and retaining of Tithes, and by what Title, and how. Of what things Tithe is to be paid, and of what not, and out of what Land, and how. When, where, and how Tithes payable must be paid and set forth, and when the Parson, &c. may take them? Who must pay Tithe that is to be paid, and may be sued for it? And to whom the Tithe must be paid? Which way the Owner of Tithes, and such like things, may recover them being detained. In what case, and how a person or place may be quit and discharged of Tithes; and what shall be a good discharge, or not? Of other Profits which the Parson and Vicar doth claim. What Tithes the Parson, and what the Vicar shall have.

Of a Parson and Vicar, his Parsonage or Vicarage, and the Profits belonging to them.



He Parson at first was he that had the Charge of a Parishi Church, and was called the Rector of a Church; but he is most properly so called, that hath a Parsonage where there is a Vicarage endowed.

The Vicarage is a certain Portion of the Parsonage allowed to the Vicar for his Maintenance. And this Portion in some places is a sum of money certain: In other places it is a part of the Tithes in kinde, and commonly the smaller Tithes; but in some few places the Vicar hath part of the great Tithes also: And he that hath the right to, and possession of this, is called the Vicar; and he that hath the other part is called the Parson, who in some Parishes is the Minister of the place, one they call a Clergy-man or Minister; and in other places he is a Lay-man, where it is an Impropriation.

The Profits and Fruits of a Parsonage or Vicarage, belonging to the Parson or Vicar, are his Glebe Land, (if there be any) Oblations, Obventions, Offerings and Tithes.

The Glebe is that Portion of Land, Meadow, or Pasture, that is belonging to, and parcel of the Parsonage or Vicarage, over and above the Tithes.

Oblations, Obventions and Offerings seem to be but one thing, and that which was called meerly Spiritual. The Oblations were said to be such things Real or Personal as were offered to God and his Church, by Testament or otherwise; and Obventions did include Oblations, and other things now unknown and lost amongst us; and of this nature it seems the Mortuary is: And the other Profits are the Tithes.

M m m m m 2

of

Of Tithes, and their kinds

What they
are.

Their kinds.

Tithes are a certain part of the fruit or Lawful increase of the earth, Beasts, or mens labours, which in most places, and of most things, is the tenth part, and hath been by the Law given to the Ministers of the Gospel, in recompence of their labour in the execution of their Office.

There are three sorts of Tithes. Some of them are Predial, that is, such as come in, and arise yearly of the fruit and profit of the earth: such as are Wood, Corn, Grain, Hay, the seed of Rape, Parsley, Hops, Saffron, Wood, Flax, Hemp, darnel or cockle, Fennel, Annise, and the like. Such are the fruits of Trees, as Apples, Pears, Plums, Nuts, Cherries, Wardens, Grapes, Mast, Acornes, and the like. Such also (as is before said) are Herbs, as Rue, Sage, Mint, and the like.

Some of them are Personal, and they are such as arise and grow due by the profits that come by mans honest labour and industry in some personal work, Artifice or Negotiation, as by buying, selling, Merchandizing; or by the labour of handicrafts men, such as are Carpenters, Masons, Fishers, Fowlers, Hunters, and the like. So offerings are said to be personal Tithes.

And some Tithes are said to be mixt, such are the profits of some things that arise partly from the labour and care of men, and partly from the earth where the things are fed, of this sort are Cattle, as their young Calves, Lambs, Kids, Roes, the Wool of Sheep, Milk and Cheese of Cowes; so the Eggs and Chickens of Hens, Geese, Ducks, and Swans, and the like.

Amongst Predial Tithes, some of them are said to be greater, as Wood, Corn, Hay, and the like. And some of them are lessor, as the Tithe of Herbs, Flax, Hemp, and the like. And all these of the one sort and of the other, the dispute is under the names of Tithes of Harvest Fruits, of Woods felled, and preserved to grow again; of Wood not in use nor apt for Timber, but for Fire; of Trees planted for fencing of Grounds, in Fields, Pastures, and Hedggrowes; of Turves growing in fennish and moorish Grounds; of pasture ground, of Hay, of Wool, of Lambs, of Calves, of Pigs, of Colts, of Milk, of Cheese, of Fruits, of Trees, of Seeds, Hemp, Flax, onions, Rape, of Pot-Herbs, of Mast of Beech or Oak, of Milks driven by wind or water, of Parks, Warrens, Pools, ponds, of Wild Beasts under custody, &c. of Dove-Cotes or Dove-Houses, of Bees, of Fowlings, of Huntings, of Fishings, of Swans, of Geese, of Eggs, of Crafts and Manual occupations, of Trade by water, Merchandize, &c. And about all these things especially are all the Questions and cases that follow concerning this subject.

Portion of
Tithes what.

A portion of Tithes are Tithes that were at the first separated and given by the Devotion of a Parishoner, and were not derived out of the Parsonage. And therefore cannot be swallowed up againe by the Parsonage, as a vicarage may be, but it will be distinct still.

Of the nature of Tithes, and how they are grantable.

Tithes by our Law were accounted an Ecclesiastical Inheritance, and collateral to the state of the Land out of which they come, which of common right are to be paid out of all lands, Meadows and Pastures, and whithof their proper nature originally were due only to Ecclesiastical persons by Ecclesiastical Law, and till they were severed, were esteemed merely Ecclesiastical for the substruction whereof, no remedy was given by the Common Law. Neither can any unity of possession extinguish or suspend them, but they remain still in esse, and might be devised or let to any spiritual person. And if a Parson impropriate had inclosed another of part of his Glebe, or had made a Lease of it to him, yet he should have had Tithe thereof still, so that a man might have had Tithe against his own Feoffment, for they were not claimed in respect of any ownership in the Land, but *ex debito*, by the Law of God. So if a Parson purchase Land within his Rectory. And after lease the Parsonage, the Lessee shall have Tithe of this new purchased Land. And a Lay-man by the Common Law,

Law, could not have had an Inheritance descendable and grantable of Tithes as of other Temporal possessions, neither will they pass by the same words in Grants as other Temporal possessions will do. And therefore if one grant a ground *cum proficuis & commoditatibus eidem pertinentibus*, the Tithes will not pass by this. But now the Law is changed herein, for they and other Ecclesiastical Duties, especially such as came to the Crown by the Statutes of 27 H. 8. 31 H. 8. 1. Ed. 6. are by those Statutes, and the Statutes of 32 H. 8. and 1. & 2 Phil. & Mar. in the hands of Laymen Temporal Inheritances, and are of the nature of other Land; it shall be accounted Assets in the hands of an Heir. The wife shall be endowed of it, the husband tenant by the courtlesie for them. real actions may be brought, and they have all other incidents of Lay-Inheritances. *Cook* 11. 14. *Dier* 43. *Cook* 1. 3. *Cook* upon *Litt.* 5. 159.

By way of agreement Tithes may pass for years without deed, but not by way of lease without a deed. But a lease may be for one year of Tithes without deed. *Hughes Rep.* 354. See *Grants*.

Who must pay Tithes at this day, and to whom, and who are capable of receiving and retaining of Tithes, and by what Titles, and how.

Tithes by the Common Law are due of common right out of all things; and every man at this day. Alien and Denizen, is bound to pay the same, that cannot shew a special exemption and freedom, by composition, custome, prescription, or some act of Parliament. So the Kings have paid no Tithes sometimes for their Lands in their own hands. So neither the Lord Protector nor his Patentees are to pay Tithes for some of their ancient Forrests. Lands that lye in no Parish, or between to parishes; this is not to pay Tithes. And so the Vicar in some places doth pay no Tithes to the Parson, so long as his Vicarage Land is occupied by himself. *Cro. Jur.* 60. *Cook* 2. 44. *Broo. Dismes.* 10. And it is said, if a Bishop had held Land discharged of Tithes, and made Feoffment or Lease of it, that his Lessee or Feoffee shall not pay for it. *Cook* 2. 44.

And as to the persons to whom, and capable of receipt of Tithes, albeit by the common Law anciently, no Lay-person was capable of them, save only by way of discharge; as where a Parishioner had compounded with the Vicar or Parson for his owne Tithes, yet at this day any man may have them as other Lay-Inheritances; and Lay-men (as they call them) as well as clergy men, have them. And to make Clergy men capable of them, there were heretofore many things required, as Examination and Allowance by the Bishop, subscription to the Articles of Religion, Institution and induction into the parsonage or Vicarage, to which the Tithes belong. But in these things the Lawes are changed at this day. And therefore it seems such a person once capable of Tithes, cannot be made incapable afterwards, as heretofore, unless it be where he hath one Benefice of 8l. a year, and he take another; for in this case it seems he shall lose the first. But for this, see the Statutes of 21 H. 8. 13. 28 H. 8. 13. *Cook* 4. 79. & 6. 20.

Pluralitie.

A Parson or Vicar may have Tithes out of his Parish, by a special Prescription. Or he may prescribe to have a sum of Money for tithes within his Parish of any certain man there in lieu of Tithes. And another man also may have Title to a portion of Tithes by Prescription. *Bro. 85. Cook* 11. 19. *Book of Entries. N. B. f. 9. Cook* 2. 45. *Cook* 4. 49. And a man may have his own Tithes of the Parson by agreement between them, for the Parsons life; or how they please.

Prescription.

Of what things Tithes is to be paid, and of what not, and out of what Land, and how.

For Answer to this Question take these Generall rules 1. A man shall pay Tithes of his ground whether he doe manure it or not. 2. When a Parson doth any thing which by Law he is not compellable to doe, which doth turne to the benefit of the Parson, there he shall not have Tithes of the thing in lieu whereof this is done.

Marsh.

See. 1.
Of Trees and
Woods.

32 H. 8. 7. And so it is to be paid for, and out of all things within (not without) the Parish; that arise, grow, and happen from year to year by the Act of God alone, or by the Act of God and man together: But more particularly, all Lands are to pay Tithe of what nature soever it is, Errable Meadow, or Pasture.

All sorts of Trees, but Timber Trees are to pay Tithe (that is) their tenth of increase, living or dead, used or sold by the owner, for the body, Branches, Bark, Fruit, Root, and Branches that grow out of the Root. And within this Rule all Fruit-trees, as Apple-trees, Pear-trees, Nut-trees, Walnut-trees, and the like, are to yield the tenth of their increase of fruit yearly; and if they be cut down, the tenth of the body, whether sold or kept; and if they be pared, the tenth of their parings, whether sold or kept. So Tithe is to be paid of the fruit, body, bark and branches of all other Trees not apt to Timber, as Willows, Sallows, though they be above twenty years growth, or of any age whatsoever, and were never cut before: So also Tithe is to be paid of *Silva cedua*; that is, Under-woods, and Coppices felled and preserved to grow again, and which by good Husbandry may grow again. And of all these things the Parson is to have the tenth part, as the owner hath, and at the time when the owner doth receive his nine parts.

For Wood cut
for his own
use.

But of the Under-woods of Coppices, parings of Fruit-trees, or other Trees cut onely for Mounds, or for Plough-geer, for hedging and fencing of the Corn-fields or other grounds within the Parish, or for fuel for the maintenance of the Plough or Pale, no Tithe is to be paid for it, although the Vicar have the Tithe Wood, and the Parson the Tithe of the places inclosed. Nor is Tithe to be paid of Under-woods, which are digged up by the Roots: Nor (as it seems) for the Wood of Coppices or Trees that a man doth cut or spend in his own house-keeping, though he spend much; by *Hobard Chief Justice*. But if the Parson can alledge a special custome for it, he may have Tithe for this also, *M. 4 Jac. B. R. March 58. pl. 89.*

Timber.

But for Timber Trees, such as are Oak, Ash, and Elm, which are esteemed Timber after they are twenty years old in all Countries; and Beech, Horse-beech, Hornbeam, Maple, Aspe, and Hazle, any of which may be, and are esteemed Timber in some Countries, as the usage of the Countrey, or the plenty or scarcity of other Timber there, is; for these, either living or dead, for their bodies, branches, bark, roots, or germines that grow out of them no Tithe is to be paid at all, in any case; but Tithe is to be paid for all this Timber-wood, if it be cut within twenty years after the first planting of it: No Tithe shall be paid of Aspe in any Countrey, *Brownl. 161.*

For the opening whereof (in relation to Wood and Trees) further; these things are to be known.

1. If the Parson have Tithe of the Fruit of a Tree, and the same year the owner doth fell the Tree, and make it into Billets or Faggots; in this case the Parson shall not have Tithe for the Tree; for it is a Rule, That he must not have Tithe of one thing twice in one year. 2. Beech in a Countrey where there is abundance of it, is not to be accounted Timber, nor to be Tithe-free, 16 *Jac. Co. B. Pinders case*. 3. Cherrytrees in *Buckinghamshire* have bin adjudged Timber and Tithe-free, *Pasche, 17 Jac. B. R.* 4. If a man lop a Tree under twenty years growth, and after suffer the body to grow past twenty years growth, and then lop it again; in this case no Tithe shall be paid for it, though it were not Tithe-free at the first cutting. *Ca. B. by the whole Court, Brownl. 1 part. 33.* 5. If Wood be cut to make Hedges, which is not tithable, and there be a little remaining or left of it, no Tithe shall be paid for this remnant. 6. If Wood be cut down and employed for Hop-poles, where the Parson or Vicar hath Tithe Hops; in this case he shall not have Tithe of the Hop-poles. 7. If a great Wood doth consist for the most part of Under-wood, which is tithable, and some great Trees of Beeches or other Wood, grow scattering amongst them; in this case Tithe may be paid, and must be, unless the usage be otherwise of all both great and small together. And so if a Wood do consist for the most part of Timber-trees, and there is some small parcel of Under-wood or Bushes growing in the same Wood: No Tithe shall be paid for this Under-wood or Bushes. *Trist. 19. Jac. B. R. Adjudg. 16 Jac. in C. B. Leonards case.* 8. No Tithe is to be paid of Common of Estovers, the Wood that he burns in his House. For Wood cut for

House

house-boote hedg-boote, plough-boote cart-boote, and fire-boote. *Goldsb. Pl* 93.

See for all these matters, within this point of trees and wood, *Cook Rep.* 11. 48, 49. 81 *Plow.* 470. *Brownlow's Rep.* 1 Part. 94 2 Part. 150. *D. & St.* 169. Where and how this is to be paid and delivered, See more in *Chap. 5. Sect. 1.*

No Tithes are to be paid of Mines or Quarries, Iron, brass, Tin, Lead, Coals, Stone, Tile, Brick, Lime, Gravel, Marle, Chalk, Clay, and the like, which a man doth find and make in his own Land, for they are parcel of the inheritance, and the Parson or Vicar hath tithes of the grass and corn upon the ground; and it is a rule, the Land must not pay a double Tithe; and besides it is not a yearly profit. *Register* 51. *Fitz. Nat. Brev.* 53. 9 *Brou. Dismiss.* 18.

No Tithes regularly are to be paid for houses of habitation, nor of any rent, reserved upon any demise of them, for tithes are to be paid of things that renew yearly by the Act of God. Of Houses.

But by a special custome, or by an act of Parliament, as in *London*, where the Parsons have 2s. 6d. out of every pound rent in lieu of Tithe, there it is good enough, *Cook* 11. 16. *Fitz. Nat. Brev.* 53. 37 *Hen.* 8. *Ch.* 12

If any barren heath, or waste ground, that is barren in his own Nature, and that cannot be fitted for husbandry without an extraordinary charge, although it may pay Tithe of wool, or Lamb, or other things, or the Tithe that it formerly paid, yet it shall pay no Tithe of corn for seven years after they have by their Husbandry improved it, and made it fit for tillage. But if a wood be grubbed up, and made fit to plough, this must pay Tithe presently. So if it become barren by a sudden accident, of inundation, or the like, or by being overgrown with bushes or the like, and it be reduced, this must pay Tithe presently. *M.* 11. *Jac. C. B. Sharringtons Case. Dier.* 170. 2 *Ed.* 6. *Ch.* 13. Of barren heath & waste ground.

Tithes are to be paid for all new Corn-mills, be they wind or water Mills; and for fulling, Paper, or Apple-mills that are common and publick mills; and whether they be driven by wind or water, some Tithe or other is to be paid for them. But for an old corn mill, that no tithe was ever paid for, no Tithe is to be paid, except personal tithe, as for a trade of profit, and so it will be for the other Mills. But see how it is to be paid *Chap. 5. Sect. 1.* Of Mills:

Tithes are to be paid of turves that grow in fennish and moorish grounds, when they are used for firing. Of Turves:

Tithes shall be paid of heath, furs and broom, unless the owner can prescribe, or make good a special custome of payment of milk and calves, &c. of the cattel kept upon the ground, *M.* 29 *El. B. R. Adjudge.* Of heath, furs, and broom.

Tithe is to be paid of the grass growing on the ground whether it be cut for hay or eat by cattle, to be set out according to the custome of the place. And as to this kind of Tithe these things are to be known. Sect. 3. Of grass, cut or eaten. Rate-Tithe:

1. A Rate-Tithe is to be paid according to the custome of the place for the feeding of Sheep and all other Cattel, (save only Oxen that labour, and the young cattel that are bred for Oxen or Cows) as for horses and Cattel that are fatted; for tithe must be paid for these, for the pasture and profit of the cattel, whether they go on the Common or elsewhere.

2. If two Parishes together have Common because of vicinage, and the cattel of the one side do stray to the other side, and there abide; in this case no tithe shall be paid for this to the Parson of the parish where the Cattel do stray, but to the Parson of the other parish. So if sheep stray out of one into another parish, and there Eane, no tithe is to be paid for this to the Parson of that place; but if they go there by the space of one Month or more, for this a rate-tithe must be paid to that place where they are for a month together. And so in all cases where sheep go awhile in one, and another while in another parish. *Trin.* 7 *Jac. B. R. Brou. Dismiss.* 16.

3. If sheep after they be shorn dye before Easter next following, it is said no tithe shall be paid for their wooll unless the parson or vicar that claimes it, can alledge a speciall prescription for it. So no tithes are to be paid of the pelts or fells of sheep which die of the rot without a special prescription for it. *Trin.* 3 *Car. B. R. Aston's Case.*

4. Tithe

- Grounds let.** 4. Tithe must be paid for all the grounds within the parish; and therefore if the grounds within the parish be let, or the herbage there be sold to a stranger out of the parish, the Tithe must be paid to the Parson, and that by the Owner of the Cattle, unless the course there be otherwise.
- Agistment or tack of cattel.** 5. It seems tithe is to be paid for the Agistment, that is, tacking in of cattel of strangers in the parish. And that to be paid by the owner of the land that took them in, and not by the owner of the cattel; for the Parson may not know the owner of the cattel, 17. *fac. B. R.* But if there be any custome against it, this may prevent it, and make it payable by the stranger.
- Horses.** 6. No tithe is to be paid for the herbage or feeding of riding horses, that the Parishoner doth use for his own riding. And if a man let out his pasture Lands, reserving the pasture for one horse to ride about his own affairs, or for husbandry, no tithe shall be paid for the pasture for this horse. But if a man keep or breed a horse or horses in his pasture to sell them, there a tithe shall be paid for the horses pasture. *H. 15 fac. B. R. Hides Case.*
- Plough cattel.** 7. no tithe is to be paid for the grass eaten by the working Oxen or Horses about Husbandry, that are used in the parish about Husbandry. But if the Parishoner use them to other purposes within the parish, or for husbandry without the parish, it may be otherwise. *M. 8. fac. Co. B. in Baxters case.*
- Sett. 4. Cowes and barren cattel.** 8. No tithe shall be paid for the feeding of Cowes that give Milk, nor for barren and dry cattel that are bred for the plough or paille, whether they feed in the inclosed or in the common grounds of the parish. But if a man keep cattel until they are ready for the pail or the plough, and then sel them, and make profit of them, in this case he is to pay Tithe for them; for if the owner feed his ground with cattel that bring no profit to the Parson, he must pay tithes for them. *M. 8. fac. Co. B. Baxters Case. Trin. 9 fac. B. R. The whole Court.*
- Strangers renting within the parish.** 9. If a stranger feed a ground within the parish with his cattel that do bring no profit to the Parson or Vicar, he is to pay tithe for it. And therefore it seems reasonable, that though it be his own ground that is the stranger, and he feed them with his own cattel that do work in another parish, that he should pay as a stranger that doth rent a ground within the parish.
- Esmouth or after-pasture.** 10. No tithe is to be paid of the Esmouth or after-pasture, after the grass is mowed and tithe hath been paid of it, unless by covin there hath been more grass left than is usual. Nor is there any tithe to be paid for the herbage of the cattel that eat up the same grass, unless there be some Fraud in the case. *Pasch. 17. fac. Co. B. Adjudg. M. 6 fac. Co. B. Smiths Case.*
11. No tithe is to be paid for the grass or herbage of the studs, or meers of ground at the lands end, and adjoining to the errable Land, where the land it selfe doth pay tithe.
- And so if lands lye fallow every second or third year, the owner shall pay no tithe for the pasture of this land, nor for feeding upon the stubble, albeit it bee fed with barren cattel. *Pasch. 7. fac. Co. B. Adjudg.* And yet if he keep it lay beyond the course of Husbandry, in this case he is to pay tithe again.
- Rakings of stubble.** 12. No tithe is to be paid for the herbage of the ground whereon corn hath been sown that hath paid tithe, no more then for the rakings of the stubble, *Pasch. 7. fac. Co. B. Adjudg.*
13. If a man bring in a flock of Sheep to dung the land, and they come by night only and lye there, no tithe is to be paid for this; but if they feed there half their time, they will be tytheable.
- For the time when and how these tithes are to be paid and done, see in Chap. 3. *Sett. 1.*
- Sett. 5. Of corn sown.** Tithes also are to be paid of all such things as come in yearly by the blessing of God, and the industry of the party together. And therefore Tithes must be paid of all kind of corn sown upon the ground; as Wheat, Rye, Barly, Beans, Pease, and the like, to be set out after the custome of the place. So also tithe must be paid of Plants, Herbs, and seeds of Woad, Saffron, Flax, Hemp, and the like. *Brownl. 1 part. 149 Pl. 75.*

And as to this, these things are to be known:

1. No Tithe is to be paid for the after-rakings, or stubble of corn, when Tithe hath been paid for the corn it self, unless it be where there hath been fraud in cutting it over long:

2. No Tithe is to be paid for the course corn, as Vetches, Tares and the like, which is eaten up by the cattel that do the husbandry there, whether it be eaten green or ripe, or eaten upon the ground where it groweth or elsewhere, unless the Parson have a speciall custome for it.

3. If corne be sowed where woad was sowed, or where other things grew, the tithe shall be paid of this, and in its own kind also. So if Woad or other things be sowed where corne had been sowed, the owner of the Soile must pay his Tithe, and pay it in kind of that which groweth there, as he doth in the change of wheat, beans, barley, &c.

4. If the Soile of an Orchard be sowed with any kind of grain, the parson will have tithe of it; although hee have tithe of the fruit of the trees, for they are of several kinds.

Tithes also must be paid of the calves of Kine, Lambs of Sheep, young Pigs of Sowes, Colts of Mares, Kids of Goats, &c. Also of the Cheese and Milk of Cowes, Sheep, and Goats, and of the Wool of Sheep, & of the Eggs and young of Hens, geese, Ducks, &c. and of the Honey and Wax of Bees, and for dry Cattell, and fat Beasts sold and killed, and according to the course of the place.

Change of grain.

Sett. 9. Of cattell and fowle.

But for the further opening hercof these things are to be knowne.

1. If the Parishioner have but nine Pigs, or six calves, the Parson can have no tithe in kind that year, without a special custome to warrant it, as in many places there is; for these things are intire, and not divideable as wool is. And therefore the Parson must have his Tithe *pro rata*, either in money the same year, if there be any custome for it, or in kind the next year, and so reckon both the years together. *M. 7. Jac. Co. B.* And if a parishioner have but one Cow, or milk his Cow every second day; so that he can make no cheese, in this case the custome of the place is to be observed, so that something be paid; otherwise no custome in this case will bind, so for calves, colts, and kids when they are under the number of Tithe in kind; and if there be no custome in it, the Parson must have the tenth when ever it comes.

2. It hath been said that no tithe is to be paid for dry cattell bred for the plough or pail, unless they be sold away before they be put to that use; for tithe must be paid for such cattell and for fattening cattell sold or killed after the custome of the place: *M. 17. Jac. B. R. curia, M. 2 Jac. B. R. Webs Case.* And though at first they were bred for the plough or pail, yet if after fattened and kild, or sold, Tithe must be paid for them. *M. 8. Carols, by three Justices.*

Dry cattell.

3. Tithe must be paid of the locks and flocks of Wool, after the Wool made up, if they be more then ordinary, and left deceitfully, otherwise not.

Locks of wool

4. Where sheep be removed from one Parish to another, each Parson must have *pro rata*, but under three dayes no rate is to be paid, as for example, If forty sheep yeild eighty pound of Wooll, and these have been fed and lyen all the year in one place; in this case the parson of that place must have all the tithe; if the sheep were there but half the year, then he is to have but forty pound of the Wool; if three months only, then but twenty pound of the Wool; and so ratably for four or five months more or less. And the Parson in whose Parish the sheep lay and fed but one month he shall have only the tithe of the twelfth part of the Wool: and if the sheep feed all the year in one parish, and lye in another parish, the tithe shall be divided betwixt the parsons. And if sheep come from one place, and be shorne in a place where they were not before, it seems the tithe must be paid where the sheering is, unless it appear to be paid to the Parson of the place from whence they came. And so of the young of cattell, lambs, calves, pigs, colts and the like, where the dam was removed from one place to another, a rate tithe must be paid to the Parson according to the times of their abode in the several places, from the times of their engendering by the month rate. *Broo. Dismes 16.*

Rate tithe for wool of sheep, and of young cattell.

5. If any have cattell titheable feeding in any wast place, not commonly knowne to be in any Parish, yet the tithe thereof is to be paid, and to be paid to the Parson of

N n n n n

the

the place where the owner of the cattel doth dwell.

6. When the tenth part of the milk is paid, there must be no tithe paid of the cheese which is made of the other nine parts of the milk. And so where tithe is paid for the cheese, no Tithe is paid for the milk.

No Tithe is to be paid for Cattel fed for the use of the house, but if he feed to sell he must pay for them. *Goldsb. 147. Pl. 66.*

But see more of this, and when, and how this is to be paid and delivered in *Chap. 5. Sect. 2.*

Sect. 7.
Of Parks, warrens, pools and Dove-houses.

Some tithe is to be paid of Parks, Warrens, Pools, Ponds, and Dove-Houses, and for Coneyes, Pigeons, and Fish. And some would have Coneyes in a Coniger, fish in a pond, or several fishing in the nature of Predial Tithes, and that the tenth of the profit is to be allowed.

But for the opening of this, take these things.

Coneyes, Fish, Pigeons.

1. That where the things bring in a certain profit, and without much charge, as Coneyes, fish, and Pigeons, there is great reason the Parson or Vicar should have the full tithe of them, and in these cases a division may be easily made. But Fish in a River are not titheable but by custome.

2. the Pigeons are a sensible loss to the Parson in the destruction of Corn, and good reason then the Parson should have some profit by them.

3. In some cases, as where Gentlemen have turned their fields into Conigers, and laid down their tillage, the loss of the Parson hath been notorious, and the case grievous hurtful to the Parson and Commonwealth, profitable to none but the owner of the Land; these cases deserve no favour.

Fera Natura.

4. We conceive the Parson will have no remedy in this case by Law; and that in all these cases there is no thing to be had but what the custom or usage yeilds; for Deer and Coneyes being wild, are not reckoned a mans own till they are caught. It is held for law, that Conies are not Titheable but by Custome. And therefore where Parsons have sued for them the Judges were wont to grant a prohibition: *March. f. 36. Pl. 87.* And a man is to pay Tithe of nothing whereof he hath not a property, except only the personal Tithe which is a small matter: When Pheasants Partridges, Swans and such like wild things of profit become tame, it seems they must pay tithe, but not otherwise. And for such things of pleasure as are of no profit, as Hawks, Hounds, Apes, Thrushes, Poppingjays and the like, no Tithe shall be paid of these.

Matters of pleasure.

Personal tithe. Trades and labours.

Some Tithe hath been by usage paid in the nature of personal Tithe for mens Trades and labours. So Fishers, Fowlers, Hawkers, and the like, not such as Fish, Hunt, and Fowle for pleasure, but such as make a Trade of, and get by Fishing, Hunting, and Fowling, have paid. So Carpenters, Masons, and all handicrafts men have paid; so Merchants, Mercers, Drapers, and all Tradesmen; so men-servants and maid-servants have paid some small matter in the nature of an offering, as the tenth of their clear gain once a year to the Parson: and this to be paid still according to the custome of the place.

And for any other things or for things titheable out of any Land, which by the Lawes, by any Priviledg, Prescription or composition ought to be discharged, no tithe is to be paid. But Custome may make a thing Titheable that otherwise is not Titheable. *March. 65.*

See more of this, and how these Tithes shall be paid, *Chap. 5. Sect. 3.*

When, where, and how Tithes payable must be paid and set forth, and when the Parson, &c. may take them?

FOR answer to this Question in the general, the Law saith, that all Tithes and Church duties are to be yeilded and paid according to the usage and custome of the place where they are to be paid. *Stat. 27. H. 8. 20. 32 H. 8. 7* And for predial Tithes, the tenth part of the profits are to be set forth and divided from the nine parts in the place where they grow, before the owner taketh away his part thereof: and the owner is to send to the Parson, who is to send his servant when the tithe is to be severed, and see that it be justly done; and then the law doth give him a reasonable time.

time to take it away. But the Parson cannot Tithe himselfe or take his owne Tithe without leave of the owner, and if he doe so, an Action of Trespas will lye against him by the owner of the land. And if Tithe be once set out and divided, the Parson not the Parishioner must look to it, for he must bear the loss of it, if any come to it. And this setting out of the Tithe the Law saith must be effectual; and therefore if the owner set out his tithe, and then take it away again, this is not a good payment of his Tithe: and if the owner sell the whole to another before the tithe be set out, with an agreement to deceive the Parson; this is fraud, and not allowed for a good payment in Law. And this must be heeded as to the manner of Tithing, that the custom of the place is to be observed; for in some places the custome is to leave the Tithe in grass in swathes, in other places in windrowes, in other places in grass-cocks, in other places in hay-cocks, and either way it is good. So for the time when, and place where, the custome of the place must be followed, but the parson shall have reasonable time to take it away. *Broo. Trespass* 125. *Cook* 2 Part *Instit.* 610. *Brownl* 2 part. 9.

To give to the Parson the Tenth Acre of wood in a Coppice, or the tenth coard (if the coards be equal) is a good payment and setting forth of this Tithe, especially if it be the custome of Tithing wood in the Countrey. Of trees and wood.

The Tithe of the Mast of Oak and Beech, if it be sold, must be answered by the tenth penny; if it be eaten by Pigs, the tenth of the worth thereof must be answered. And the most reasonable way of payment for any thing sold, is to pay the Parson the tenth penny of the money made thereof.

The payment of Tithes and Church duties in the City of London, which is 2 s. 9 d. in the pound of the rent of their Houses, is to be made according to the usage there. Of houses in London.

The Tithe of the new corn-mil must not be the tenth penny of the rent, But the tenth measure of the Corn, or the tenth tole dish, if there be not custome in it. But the Millard for his Fulling-Mil, Rape-Mil, Paper-Mil, Iron, Powder, Lead, Edge, Copper, and Tin Mills; and so for an ancient Corn-Mil, is to pay only personal Tithe as for a Handicraft or Faculty. *Pasch.* 17. *Jac. Johnsons Case.* *Fitz. Nat. Brev.* 41. *G. Cas.* 2. 44. And if a rate tithe be paid for two Mills in one house, and one of them is made a Corn-Mill; in this case Tithe shall be paid in kind for this Mill. And if one pair of Mill-stones be turned into two pair of Mill-stones, now both of them must pay Tithe, and the privilege is lost. *Brownl. Rep.* 1. Part. 31. See 1. Of Mills.

The Tithe of the Hay, may be set out and delivered in swathes, windrowes, or cocks as the custome of the place is. Of grass, cut, or eaten.

The Tithe fruit of Apple-trees, Pear-trees and the like trees are to be set out and delivered when they are newly gathered, and if then the Owner do not give the Parson notice and set them out, and they be by his means lost or impaired, the Owner is chargeable to the Parson in treble damages. Fruits of trees as Apples, &c.

The common course of setting out and delivering corne by the common Law, is by the tenth shock, cock, or sheaf; but if the custome of the place be otherwise, the Parson must sit down by it; and if there be a custome to put the corn into shocks, and that every shock be ten sheaves, and that the Parson must have the tenth shock; it must be done by two Justices, *B. R.* But without a special custom binding the owner of the Land, he is not bound to set the Parsons part of the corn up an end in shocks: *Smiths Case.* *Co. B. the Court.* Of corn sown

The tithe seeds and herbs of gardens and fields, as Rape, Hemp, Flax, Parsley, Fen-nel, and the like, and of Sage, Mints, Onions, Leeks, and the like, either of the seed, or of the Herb before the seed time; this must bee paid at the time when the owner doth receive in his nine parts thereof. Of seeds and herbs.

The time when the calves and Lambs are to be paid and delivered, is when they are weanable, and able to live without the Dam, and unless there be any custom herein against the Parson, at this time all these young things are to be delivered. And if the owner sell any calf or lamb, in most places the Parson is to have the tenth penny of the money and so he must, if there be nothing in the custom against it. See 1. Of calves and lambs.

And if the owner kill a calf in some places, the Parson hath the right shoulder, and

And the custome must be yielded to as reasonable, if any thing though never so little, be paid for it, otherwise not.

Of milk and
cheese.

The Tithe of Milk and Cheese is to be paid in the season thereof, and so long, and so soon as either of them is taken by the parishioner.

Bees.

The tenth measure of Honey and the tenth weight of Wax, not the tenth Bee, nor the tenth Swarm of Bees is to be paid for Bees.

Of hens, ducks
wild and tame

The Tithe of Chicken and Eggs, of all kind of tame Birds or Fowle, as Swans, Hens, Ducks, Geese, they are to be delivered and paid, or that which is paid for them, according to the custome of the place. But for wild Swans, Geese and Ducks, if they be taken in, and from a certain and known place, they are said to be titheable as Predial Tithes; but if from incertain and unknowne places, they are said to be as personal Tithes. But I suppose no Tithe is to be paid in either case.

Self. 3.
Personal
tithes.

For personal Tithes, which is for Trades, Crafts, and manual Occupations, and the profit made thereby. It is provided by a special Law, that all such as use trading, buying and selling, handicrafts (except common Labourers) shall pay their Tithes, as they were used to be paid forty years before the Statute of 2 Ed. 6. and as of right they ought to be paid. And for this the Parishioner doth use at or about Easter (in most places the usual time of payment for smal Tithes) to pay a small sum of money to the Parson or Vicar. And according to the custome of that place men are to pay, for without a custom for it nothing at this day is to be paid for this: by three Judges *Co. B. 17. 7ac.*

And for all, or any of these things, in case where the Owner may let or sell the thing of which the Tithe is to be had, the best way is to let the Parson or Vicar to have the tenth penny made by the sale, as they have generally of grounds let to strangers out of the Parish; in which case the Parson hath commonly, and must have, if there be no custome against it, the tenth penny of the Rent.

But in no case the Parson or Vicar may take his Tithe before the same be severed from the nine parts and Tithed. And if the owner will not cut his corn till it be spoiled, the Parson is remediless. *12 Ed. 4 D. & St. 189.*

Whom must pay the Tithe that is to be paid, and may be sued for it? and to whom the Tithe must be paid?

Self. 1.

FOR answer to the first part of this Question, take these things.

1. That generally he that receiveth the nine parts, is to pay the tenth part to the Parson. And yet if a man that is owner of a Coppice, or other such like thing, and he cut it and sell it all; in this case the Seller must answer the Parson for his tithe and not the buyer. And therefore if *A.* cut the graft of his ground, and put it all (not setting out Tithe) in a rick in the ground, and three months after he sell it away to *B.* in this case *B.* cannot be sued for this tithe. *Hill. 16. 7ac.* by chief Justice, in *Ash. fields Case.* And if one sell Underwoods standing, the buyer, not the seller must answer the Tithe. But the Tithe due for sellers before the sale; the seller must answer for this.

Executor.

2. If a Parishioner dye before he pay his tithe, his Executor, if he have Assets, must pay it.

3. If a Parishioner let or sell his ground or herbage, it is said the Parson may sue the owner of the ground, or the owner of the Cattel, at his choise, which is reasonable, if the usage be not against it.

4. If Cattel be pawned or pledged, the Gagee must pay tithe for them. But if I deliver my goods to *H.* to be redelivered to me I must pay Tithe for them.

And for answer to the second part of this Question, these things are to be known.

1. The Tithes must be paid to him that hath right to them, be he Lay-man, as an Impropiator, or a Clergy man (as we have called them and) be he parson or Vicar of the place.

2. The rule generally is this, that the Tithe must be paid to the parson or Vicar of the Parish wherein it ariseth, and not to the Parson or Vicar of another Parish.

3. The Tithe hapning in the time of the vacation, the succeeding Parson is to have it, but they that gather it in may keep up so much thereof, as to pay them their charge

in the collection thereof, and to Ministers that did serve the Cure there. And if one be put into a place, and then he is removed, and another is put in, the first of these shall have the Tythes that hapned in the vacation time, *Hil. 18. Jac. Woods Case.*

4. If any man have Cattel Tytheable feeding in any waste, or place which is not certainly known to be in a Parish, the Tythe thereof shall be paid to the Parson of the place where the Owner of the Cattel doth dwell.

5. If a man living in the Parish of *A*, being a common Fisher, Fowler, or Hunter, and Fish, Fowle, or hunt in the grounds of *H* in *B*, and take fish there, if this were free and without reward in *H* then it is a personal Tythe that must be paid to the Parson of *A*. But if *H* had money or reward for this, then it is said *H* must pay the Parson of *B*. as for a predial Tythe.

6. Personal Tythes are alwaies to be paid to the Parson or Vicar of that place where the person that is to pay the Tythes doth dwell.

*Which way the Owner of Tythes, and such like things,
may recover them being detained.*

FOR answer to this, we are to know, that by the ancient Law of the Nation, Tythes were not recoverable by any man in any place but in the Spiritual Court, and thereby no person but such as they called Spiritual persons, or Clergy men, and this Ecclesiastical Court is gone, But they are now recoverable by all sorts of men alike, and in these waies, First for Predial Tithes, such as are the Tythe of Wood, Grass, Fruit, Hay, and the like divideable things; if these be not duly and truly divided and set forth, as before is shewed they ought to be, the Parson or Vicar may sue for them in any of the Courts by an Action of Debt, wherein he shall recover treble damages upon the Statute of *Ed. 6.*

But for lesser Tithes of Wool and Lamb, and the like, no Action will lye upon this Statute, nor for money given to the Parson in lieu of them. But for the one and the other, the party grieved may at this day sue in the Chancery, or in the Exchequer, or before two Justices of the Peace, who in most cases for all Tythe, Offerings, Oblations, Obventions, rates for Tythes, and all Arears thereof, are to give relief. *Stat. 27. H. 8. 20. 2. Ed. 6. 13. 32. H. 8. 7. Cook upon Litt. 159.*

And if the Tythe be once severed and set forth, and they be after taken away by the owner of the Land or a stranger; in this case the Parson may have an Action of Trespass against him. *Bro. Dismes 6. Brownl. 2 Part 30.* Ministers put in by Authority of Parliament and now put out by the death of him that was ejected, And such who having been presented since the first of *Aprill 1653*: and are not approved by the Commissioners for Appropriation, and are therefore put out, may be relieved for their Arears by the Commissioners for putting out of Scandalous Ministers by the new Ordinance. *August. 29. 1654.* Also all such as those Commissioners doe put in, they may helpe them to their dues.

*In what case, and how a person or place may be quit and discharged
of Tythes: and what shall be a good discharge, or not.*

Spiritual persons were some of them formerly discharged of Tythe by their Order. But there are no such discharges now; but a discharge of Tythes may be at this day by the custome of a County, or by a Prescription, or by a Composition, which at first was made by and between the Parson, Patron, and Ordinary, and another, or by an alteration of the place out of which the Tythe doth come, or by an Act of Parliament, and by a unity of possession. *Coo. 1 part 33. 2 & 3 Ed. 6. 13. 32 H. 8. 7. Cook 44. Brownl. 2 part 20.* Or by priviledg, as certain Religious Orders, Templers, and others of which there are none with us. And therefore no such discharge can be amongst us at this day. *Brownl. 2 part 33.* Or they may be suspended for a certain time, and revived again. Of all which see examples in the cases that follow.

A man may be discharged of payment of Tythe by a custom or prescription: Wherein these things are to be known.

1. Custom

See. 1.

By Custome
or prescrip-
tion.
And what is
good or nor.

1. Custom and Prescription do differ but little; custom goes to a place or County, and prescription to a person.

2. A Custom applied to a Country to pay no Tythe in some cases, as the Custom for the Wild, being forty Parishes in *Sussex*, to pay no Tythe, is good. But generally such a Custom is not good, and a prescription to pay no Tythe, nor any thing in lieu of it, is not good, nor will it discharge, though nothing can be proved to be paid within the time of memory. *D. & St. 171. 167. Bro. Prescrip. 92. Cook. 244.* And yet one may shew a discharge of his Land another way which will amount to the payment of no Tythe, nor nothing for it.

3. But any man may prescribe *de modo decimandi*; i. e. to pay money or other thing in lieu of the Tythe in kind for a Manor, Farm, or piece of Land; and if he can prove this time out of mind, this will discharge him. *Cook 1. 44. 45.* And therefore a Prescription to pay 4 d. or any other sum of money for all his Tythe whatsoever, or all his Tythe Hay, or all his Tythe Corn in such a Farm or such a Close, is good. If one Prescribe that he is to put the Corn of the ground in Hillocks or Cocks, &c. and that for this the Parson is to have no Tythe Corn every second year, or is to have no Tythe in some part of the ground, this is good. So if he prescribe to pay the tenth fleece of Wool, and for this to be discharged of the Tythe of the locks; this is a good prescription. *36. 37. Eliz. Co. B. Jeps case.* But if one prescribe because he doth pay Tythe Hay, he is to pay no Tythe Corn; or because he payeth Tythe Corn, he is to pay no Tythe of his Cattel; this is not good. *Smiths case Hill 8. Jac. B. R.* So if one prescribe to be discharged of Tythes in one place, because he payeth Tythes in another place; or to be discharged of Tythes of Lambs, because he payeth Tythe of Wool; or to be discharged of Tythes of other Cattel, because he payeth 12 d. for a Cow; these are not good prescriptions. *Flem. woods case, 7 Jac. Co. B.* If a custom be alledged, that the Parson shall have but the tenth sheaf of Wheat for the Tythe of all manner of Corn and Grain; this is not a good custome. *Mich. 11. Jac. Co. B. Jacks case. 38. Eliz. Co. B. Adjndgd.* So a Custom was alledged, that the owners of a Farm had been used time out of mind to take back 30 sheafs of their Tythe Corn again after it was set out, to their own use; This was disallowed. Custom to pay Tythes in kind for sheep, if they continue in the parish all the year, but if sold before their time, but a half penny for every sheep so sold, it was held no good Custom. But a Custom to pay no Tythes of lopping or wood for fire, Hedges, &c. is a good Custom, *B. R. March 79. pl. 128.*

4. A Prescription to pay a shoulder of a Buck or Doe, when they are killed, in lieu of all the Tythe of a Park, is good, and will discharge the Park. *3. 7 & 37. Eliz. Shipdams case.* And although after the Park be discharged, and converted into tillage or hop round, yet it is held that the Parson shall not have Tithes in kind, but the discharge shall continue. *M. 5. Jac. Co. B. Adjndg. M. 11. Jac. Co. B. Cowpers Case.*

5. A Prescription to pay a less part then the tenth part, may be good and binding.

6. A Prescription that if one have less then seven Lambs, he shal pay but 1 d. a piece for them, is good. *Curia 7. Jac. B. R. Patches case.*

7. A Prescription to be discharged of Tithes for every house in *London*, in lieu of 1 d. of the rent made of the house, is good. *Cook 11. 16.* And so for any other thing that may be conceived to have a reasonable Commencement, the Law will admit it.

8. One may prescribe, that he, and all those whose estates he hath in the Manor of *Dale* in *Dale*, time out of mind, have paid to the Parson of *Dale* for the time being a certain Pension yearly for the maintenance of Divine Service there, in satisfaction of all the Tithes arising and growing within the Manor of *Dale*; and prescribes further, that he and all those whose Estates he hath in the said Manor, time out of mind, have been used in regard of the said pension so paid to the Parson, to have all the Tythes happening and arising within the said Manor or any part of it; viz. of all the Lands held of the said Manor or any parcel of it; this is a good Prescription, and may have a reasonable beginning thus, That the Lord was seized of all the Manor before the Tenancies derived out of it, and by some good Composition or Grant between him, the Parson, Patron, and Ordinary, it was granted to him in lieu of this money, which must be intended because time out of mind it hath been so paid. *Cook 7. 45.*

See 2.

7. 45. But without some special matter alledged, a Lord cannot prescribe after this manner in him and all those, &c. generally.

9. A Prescription to pay money for the Tythe of Milche beasts is good. But a Prescription that for the payment of Money for Milche beasts, he should be discharged from the payment of money for other beasts, or to be discharged of Tithes for all Agistments in the Land is not good. *Goldsb. 147. pl. 66.*

10. *A modus decimandi*, cannot be laid as to offerings and such like personal things *March 81. pl. 131.* Also a Parishioner may be discharged of Tithe by Grant or an agreement with the Parson; if he be a Spiritual Person, he may discharge it for his life; if he be an Impropriator, he may discharge it for all the time he hath the Parsonage. But a Spirituall Person cannot by his agreement bind his successors. And payment of a sum of money in lieu and recompence of Tithes for sixty yeers, or thereabouts is held a reasonable time to make a prescription. *Cook upon Litt. 14. Crompr. Jur. 77. Dyer 7. 9.* Tythe may be discharged by the alteration of the place or thing out of which the Tithe is to come. For the opening of which take these things.

1. If one prescribe to be discharged of payment of Tithe Hay for such a ground, or the Tithe Corn of such a ground; and the owner change the nature of the ground, the Pasture into Tillage, or Tillage into pasture; in these cases the prescription is gone. *Hill. 7. Jac. B. R. Shiptons case Adjudged.* But if the prescription be general, 4 d. for all manner of Tithe arising in such a ground, there the alteration will not hurt the prescription. So it is if one prescribe to pay the shoulder of every Buck and Deer of his Park for all manner of Tithe of the Park, and the whole Park be after disparked and sown to Corn, it is said the Prescription is gone, and that Tythes must now be paid in kind; but if any part of it remain a Park, and the rest only be sowed, it is otherwise. 36, 37 *Elix. Shipdams Park in Norfolk.* So it is said, If all the Parks be suffered to fall down, which is a disparking in Law of the Park, yet the same doth not destroy the manner of Tithing, for the same may be a Park, again. But some doubt of this. And a difference hath been taken, where a Prescription runs to so many Acres of Land certain for in that case the *modus* continueth: and where to the Park in the name of a Park, in which case it is gone if it be disparked. *Pasch. 19. Jac. Co. B. Pools case, and in Brownl. Rep. 1 Part Pasch. 10. Jac. Co. B. 35.* It is doubted whether the Tithes be not gone in both cases; and held, that if a man can prescribe for so many Bucks, that this Park is discharged, and if it be disparked, that the prescription is not gone. If a man have a *modus decimandi* for Hay in Black-acre, and he sow the same acre 7 years together with Corn, this doth not destroy the *modus decimandi*, but the same shall continue when the same is made into Hay again. *Hughes Rep. 194; pl. 278.* But the Parson will have Tythe in kind when it is sowed with Corn, &c.

Self. 3.
By an alteration of the place or thing out of which the Tithe doth come, or by other alteration. Whether gone or not.

2. And if two Fulling Mills be under one roof, and a rate-Tithe be paid for the Mills (which is a kind of prescription) and after the Mills are altered, and made into one Corn-Mil, in this case the prescription is gone, and Tithe shall now be paid in kind. So if there be but one pair of stones in the Mil, and after there is another pair of stones put in the Mil; now Tithe must be paid in kind, and the manner of Tithing is gone. *Brownl. Rep. 1 Part Pasch. 10. Jac. 31.*

3. If I have the Tithe of the Hay of a close, or all manner of Tithe there, and the owner of the ground turn it from Meadow, to Tillage, or to hops, or the like, or turne it from Tillage to pasture, the Tithe is not gone, but shall be paid in kind as it falleth. So if one turne wood-ground into Meadow or Tillage, the owner shall pay Tithe in kind, and Tithe is not lost hereby; only if it fall out to be within the case of barren heath, he shall pay for seven years no more then was paid formerly for it, See it before. *Pasch. 18. Jac. B. R. Courts in Baxters Case.*

4. If one be to day a sum of money for the Tithe of a piece of ground, and the ground be after turned to houses and gardens; in this case the manner of Tithing doth continue. *Cook 11. 16.*

5. If one turn his pasture into a Coniger, and make coney-borrowes in it, the Tithe will not be gone. But I conceive, it doth continue as it did for the manner of Tithing as before, and no new manner of Tithing, See before Tithe of Coneyes. *M.*

13. *Car. B. R.*

6 If

6 If the Vicar keep the Glebe in his own hands, it is said, That so long he is to pay no Tithe to the Parson impropriate. But if he lease it to another, then the Lessee must pay Tithe to him, and if he sow the Land, that he must pay Tithe as other men. *Brownl. Rep.* 69.

Suspension.

7. If a Parson impropriate keep his Glebe in his own hands, he cannot pay Tithe to himself. But if he sell or let it to another he shall pay Tithe as other men. And if a Parson purchase Land within his Rectory, no Tithe is to be payed for this while it is in his own hands. But if he after lease the Parsonage; his Lessee shall have Tithe of this new purchased Land. And if he make a Feoffment or Lease of the purchased Land, his Feoffee or Lessee must pay Tithe again. *Cook upon Litt.* 139, 11. 14. *Bro. Dismes* 17. *Dyer* 43.

And if one purchase a Parsonage and a Manor in the parish discharged of Tithes, and then lease part of the demesnes of the Manor; it is said the Lessor shall have Tithe of this part. *Bro. Dismes* 17. *Sed quare* of this.

8. If Land lye in a Forreft in any parish, and is Tithe-free, and the Forreft be if Forrefted, now it shall pay Tithe in kind. *Crompt. Jur.* 52. *Lord Ch. Baron at Sarum Affizes.*

The alteration of payment (as if in stead of the money to be paid, another sum, or Tithes in kind have been paid for twenty years past) will not destroy the prescription. *Cook upon Litt.* 14 *Dyer* 7.

See, 4.
By Act of Par-
liament and
unity of pos-
session toge-
ther. Whether
gone or not.

Lands may be discharged from payment of Tithes by Act of Parliament, as by a unity of possession of the parsonage, and Lands which did pay Tithes, or by an appropriation or otherwise, in the hand of Religious and Ecclesiastical persons, (as they were called.) So that now at this day by the Statute of 31 H. 8. 13: Such a unity in the said Religious houses and persons will be a discharge to all Patentees from the payment of Tithes of Lands that came to the Crown by the same Statute. But then this unity in the said Religious persons must have been *justa*, obtained by Right; for if either the Parsonage, Vicarage, Tithes or Lands had come or been united to their houses by disseins, or other tortious and unlawful Acts, this had not been a good discharge within the Statute.

2. It must have been *equalis*, there must have been a Fee-simple both in the Lands out of which the Tithes were to be paid, and in the Parsonage or Vicarage in them; for if the Abbots, Priors, or other religious persons had held but by Lease, that had not been such a unity as the Statute intended.

3. It must have been *libera*, free from the payment of any Tithes, for if their Farmers or Tenants, at wil or years had paid Tithes, that had not been a sufficient unity to have discharged the Land 4. And lastly, It must have been *perpetua*, time out of mind. And then for the infinite impossibility, and impossible infiniteness that such Immunities and discharges, that such religious persons and houses had before time of memory could not be known; such unity had been a good discharge of the Lands in their own hands. And if the Monastery were built in the time of memory, or appropriated within the time of memory, and Tithe were paid before this, it will not serve turne to discharge it:

And at this day such an unity is a good discharge for the Kings patentees, with the Statute of 31 H. 8. But such Lands as came to the Crown by the Statute of 27. H. 8. of dissolution, must at this day pay Tithes, although the Lands in the hands of such religious persons or houses were discharged from the payment of Tithe; for the privileges being personal privileges, were extinguished by the Statute of Dissolution, and there are no words in that Statute to save them: *Stat.* 31 H. 8, 13 7 H. 4. 6. 32 H. 8. 7. *Cook* 11. 14. 2. 42. *Dyer* 278. 349. 277.

Of other Profits which the Parson and Vicar doth claim.

There are some other small profits which Parsons and Vicars claim as belonging to their Parsonages and Vicarages beside Tythe, and money in lieu of Tithe, as Mortuaries, Oblations, Obventions, &c. And as to Mortuaries these things are to be known 1 That no Mortuary is to be paid, but where it hath been used to be paid.

2 There

2. There shall be but one Mortuary paid, and no more.
3. No person that doth keep house must pay them.
4. No Woman that hath a Husband shall pay them.
5. No children must pay them.
6. Where they are to be paid, they must be paid after this proportion, viz. He that dieth having goods under ten marks shall pay nothing; for Goods above that value, and under thirty pound, but three shillings four pence; for Goods above thirty pound, and under forty pound, six shillings eight pence; for goods above forty pound, how much ever it be, but ten shillings.
7. All this account must be made onely out of the Goods remaining after debts paid.
8. The Parson of the place where the party dwells, not of the place where he dieth, must have it. 21 H.8.6. 26 H.8.15.

There is no more to be said for Obventions, Oblations, and Offerings, which seem to be all one, but that they by the Law now in force are to be paid as formerly they have been. 31 H.8.7. 27 H.8.20. 2, 3 Ed.6. 13: Co.11. 16.

Oblations, Obventions, and Offerings.

What Tithes the Parson, and what the Vicar shall have.

IN this, these things are to be known.

1. Of meer Right the Parson is to have all the Tithes if there be no Endowment of the Vicarage. *Hughes Rep. 64.*
2. In this, Custom is much regarded, for albeit the Composition be, that he shall have *Garbs*, yet if he never had any more but Hay, he shall have no more now, Adjudge.

3. The Vicar cannot have Tithes, but by Donation, Composition, or Prescription, for all the Tithes *de jure* appertain to the Parson. *March 11. pl. 29.*

4. If the Composition be, that the Parson shall have all the Tithe-corn, and the Vicar all other Tithes; and one sow his errable with Saffron, the Vicar not the Parson will have it. *Vicar of Farnham case, Co. B.*

5. That which the Vicar and his Predecessors have received time out of minde, that he shall have.

6. The Vicar will have Tithe of Saffron, of Land newly sown with Saffron, albeit the Land were sowed before with Corn forty years together. By Justice *Popham. Goldsb. 150.*

7. It is commonly held, That if the Vicar be to have the Tithes of all the Crofts in such a place, that yet he shall not have the Tithes of the Crofts, parcel of the Parsonage; and if he be to have the Tithes of all the Dove-houses of the place, yet he shall not have the Tithes of the Dove-houses belonging to the Parsonage.

8. If the Vicar by the Endowment, be to have the Tithe-hay of all the Meadows in such a place, yet he shall not hereby have any more but the Tithes of those that were Meadows at the time of the Endowment, and not of those grounds that were made Meadow since the Endowment. By Baron *Denham* a difference was taken where an Endowment is Local, as where the Vicar doth claim to have all the Tithes in such grounds, and he hath always had the Tithe of that place, and it hath never been sowed, and he hath no Tithes, but the small Tithes of the rest of the Parish by the Endowment, yet if it be new sowed, he shall have the Tithe of the Corn: But if he be to have the small Tithes generally, and he hath always had Tithes in such a place, and it was never sowed, and now it is sowed to Corn, in this case he shall not have the Corn. 8 Car. at *Sarum* Assises.

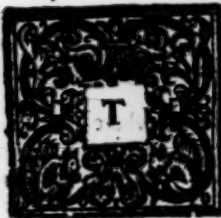
9. If a man hath a *Modus decimandi* for Hay in *Black-acre*, and he sow it seven years together with Corn, the Parson will have the Corn so long. And the Vicar the Hay, or the *Modus decimandi*, or Hay in kinde, if he be endowed of it. *Hughes Rep. 194. pl. 274.*

See more of this in Service of God, and the old Statutes for Tithes. *Pro Clero 7. 1 Rich. 2. 14. 5 Hen. 4. 11. 27 Hen. 8. 20: 28 Hen. 8. 11. 32 H.8. 7. 37 H.8. 12. 2, 3 Ed. 6. 13.*

CHAP. CLVIII.

Of Title and Toll, of Counties and Towns.

Title of Entry,
what:



Title of Entry is properly where a man hath a lawful cause to come upon, and enter into a thing which another hath, but hath no Action to recover it. As when an Estate is made upon Condition, and the Condition broken, or one hath aliened in Mortmain, or die without any Heir so that the Land Escheat; in these cases, the party that is to enter for the Condition broken, or the Lord of whom the Lands are held which are aliened, or in which the Tenant died, is said to have a Title of Entry. But this word is sometimes taken more largely and applied to the Right or Title a man hath to Land by any means whatsoever; and then it is said to be a just cause of possessing that which is our own: For the Law doth put a difference between Title of Entry, and Right of Entry; for Title of Entry is said to be where no wrong is done, as in the cases before. But Right of Entry is where a wrong was done before, as where a man hath wrongfully entred into my Lands, or taken away my Goods, by Disseisin, or the like; in this case I may have an Action, and sometimes an Entry also; but in the other, there is onely an Entry given. And where the Law gives an Action onely, as the onely Remedy to reduce the possession, there it is called a Right of Action, but where an Entry, there a Right of Entry. *Plow. 555. Finch's Ley 105. Co. 10. 48.*

Of Toll:

See. v.
Toll, what.

Stallage.
Pickage.
Cranage.
Pedage.
Passage.
Pontage.
Pavage.
Murage.
Tronage.
Pessage.

This word Toll in a general sense, doth signifie any manner of Custom, Subsidy, Prestation, Imposition, or sum of money, demanded for carrying out or bringing in of Wares, to be taken of the buyer; and is sometimes used for a liberty to buy and sell within the Precincts of a Manor; and so it seems to be but as a Fair or Market: Sometimes it is used for a Tribute or Custom, to pay a little sum of money for a conveniency of passage, or some other thing. As where it is claimed for the setting up of Stalls in Fairs or Markets, which is called Stallage, or for the digging of the ground there for that purpose, which is called Pickage, or for drawing up of Vessels out of a Ship into a Wharf, which is called Cranage, or for going over such a place on foot, called Pedage, or for passing over a Ferry with Man or Beasts, which is called a Passage, or for passing over a Bridge, which is called Pontage, or for the paving of a City or Causeway, which is called Pavage, or for the making of a Wall in time of War, for defence of the Nation, which is called Murage, or for the weighing of Wool, which is called Tronage, or for a Passage with Wares, which is called Pessage: But this word is most properly taken for a payment used in Cities, Towns, Markets, and Fairs, for Goods and Cattles brought thither to be bought and sold. *Co. 8. 46, 47. 11 H. 6. 19. 9 H. 6. 45. Kelw. 138. 145. Fitz Toll. 138. 7 H. 4. 4.*

As touching all these things, this is to be known.

Property.

1. That these payments are not incident to Fairs or Markets, but they may be without them; for the sale is good there without payment of Toll, and the Property altered. *Curia. B. R. Hill. 17 Jac.*

Prescription:

2. They were at the first by the Kings Grant, and now are claimed, and may be had by Prescription.

3. It is held the Lord Protector may by his Prerogative create such a Toll, a small sum of money to be paid for this.

4. But by Custom or Prescription, it may be claimed not onely for sale of Goods, but for a standing in the Fair or Market.

5. The sum demanded must be a sum Incertain.

6. It

6. It is said it hath been adjudged, That he that hath a Toll in a Market or Fair, *Distress*, by Prescription or Grant of the King may distress for it. *Trin. 38 Eliz. B.R. Huddy and Wheelhouse.*

7. This Toll for sale in a Fair or Market, is to be paid always by the buyer, unless there be a Custom to the contrary, for then it must be paid as the Custom hath been.

8. Toll is not to be paid for the things a man doth buy for his own expenses, unless the Custom be otherwise.

9. Nor is it to be paid for Goods brought into the Market or Fair, unless he sell it, without a special Custom. See for all these things, *9 Hen. 6. 45. 28 Aff. pl. 53. 2, 3 Ph. & Ma. 7. 31 Eliz. 12. West. 1. 30 Fitz. Toll. 138. 7 H. 4. 44. 13 H. 4. 14. See Fair and Co. 2 part. Inst. 220, 221: Where most of these points are agreed to be Law.*

10. Murage, which is a reasonable sum taken for Toll of every Cart, Wain, Horse laden coming to that Town, for the inclosing of the Town with Walls of defence for the safeguard of the people, in time of War, from Insurrection, Uproar or Tumults. This Portage, Pavage, Keyage, and the like payments are due, either by Grant or Prescription

11. But if a Wall be made, which is not defensible, nor for safeguard of the people, then ought not this Toll to be paid. *Co. 2 part. Inst. 122.*

Of Towns and Counties.

For Towns, there are these Statutes following.

For *Barwick*. *22 Ed. 4. 8. 1 Jac. 28.*

For *Stanes*. *1 H. 8. 9.*

For *Cambridge*. *34, 35 H. 8. 24.*

For *Bristow*. See *1 April. 1650.*

For *Newcastle*. See *9 H. 5. 10. 21 H. 8. 18.*

For *London*. See *De Gavelt, 28 Ed. 3. 10. 1 H. 4. 15. 35 H. 8. 10. 14 Decemb. 1649. 4 May, 1649.*

For *Norwich*. See *33 H. 8. 16. 1 Ed. 6. 6. 5, 6 Ed. 6. 24. 1, 2 Ph. & Ma. 14.*

For *Durham*. See *5 Eliz. 27. 21 Eliz. 29.*

For *Lancaster*. See *Alt, 25 June. 1649.*

For the County and Sheriff of *Northumberland*. See *23 H. 6. 7:*

Barwick.

Stanes.

Cambridge.

Bristow.

Newcastle.

London.

Norwich.

Durham.

Lancaster.

Northumberland.

CHAP. CLIX.

Of Transportation, and Importation.



Or Transportation of Gold, Silver, Money, &c. See *9 Ed. 3. 1, 2.*

38 Ed. 3. 3. 3 R. 2. 3. 5 R. 2. 2. 2 H. 4. 5. 1 H. 6. 6. 2 H. 6. 2. Of

Iron, see 28 Ed. 3. 5. 19 H. 7. 5. Crompr. Jur. 111. Of Brasse, see

33 H. 8. 7. Of Cloath, see 50 Edw. 3. 7. 17 R. 2. 3. 4 Ed. 4. 1.

3 H. 7. 1. 5 H. 8. 3. 33 H. 8. 19. 8 Eliz. 6. Of Corn, see 17 R. 2. 7.

4 H. 6. 5. 1, 2 Phil. & Ma. 5. 21 Jac. 15. 4 H. 6. 5. 3 Ed. 4. 2.

5, 6 Ed. 6. 14. 1, 2 Ph. & Ma. 4. 5 Eliz. 5. 13 Eliz. 13. 35 Eliz. 2. 7. 21 Jac. 21:

3 Car. 4. 34, 35 H. 8. 9. Of Wool, Lead, Tin, Leather, and Fullers Earth. See

14 R. 2. 2, 5, 6, 7. 38 Ed. 3: Stat. 1. 6. 2 H. 5. 2. 14 H. 6. 5. 7 Ed. 4. 3. 3 H. 7. 12

8 H. 6. 22. 20 H. 6. 4. 5 Eliz. 21. 8 Eliz. 14. 18 Eliz. 8. Alt, 8 August, 1651.

and 19 Jan. 1647. 1 Jac. 22. 28 Ed. 3. Stat. 2. 3. 31 Ed. 3. 9. 36 Ed. 3. 11. Of

Sheep, see 3 H. 6. 2. 8 Eliz. 3. Of Butter and Cheese, see 3 H. 6. 4. 18 H. 6. 3.

Of Victuals, see 25 H. 8. 2. 1, 2 Ph. & Ma. 5. Of Bell-Metall, see 2, 3 Ed. 6. 37.

Of Thrumes or Woollen-yarn, see 3 H. 6. 23. 33 H. 8. 16. 13 Eliz. 11. Of

Horses, see 5 Eliz. 19. 11 H. 7. 13. 1 Ed. 6. 5. Of White Athes, see 2, 3 Ed. 6. 27.

O O O O O O 2

Of

See 1: *Transportation and Importation.*

Of Beer, 3 Jac. 11. Of Fish, 5 Eliz. 5: 13 Eliz. 11. 39 Eliz. 9. Of other things, 35 Eliz. 11. 39 Eliz. 14. 6 H. 4. 4. 3 Ed. 4. 4. 22 Ed. 4. 8. 1 R. 3. 12. 2, 3 Ed. 6. 26, 37. 5, 6 Ed. 6. 15. 1 Eliz. 13. 5 Eliz. 7. 22, 33. *Aff*, 9 October 1651.

For Importation, See 4 Ed. 4. 14. 1 R. 2. 12. 19 H. 7. 21. 28 H. 8. 4. 5 Eliz. 7. 35 Eliz. 11. 39 Eliz. 10, 13. 11 Ed. 3. 37. 38 Ed. 3. 11: 27 Ed. 3. 1, 5. *Aff*, 20 August, 1649. 20 September, 1649. *Aff*, 9 October, 1651.

See Ships and Shipping.

CHAP. CLX.

Of Trespass.

Sett. 1.
1. Trespass,
what it is.

How many
kinds of it
there are.



He word Trespass in our Law is commonly taken for a wrong or offence done by one man to another. And so it is sometimes against the person of a man, and sometimes against that which is his: And both these kinde of wrongs do sometimes lie in not doing somewhat a man ought to do, and sometimes in doing what a man ought not to do. These wrongs are also some of them accompanied with a kinde, or at least with a colour of violence, and some of them are done

without any violence, and consist rather of matter of fraud or negligence: For remedy against the last kinde of offences the Action of the Case is provided; and of this we have written largely in *Chap. 13, &c.* But the remedy that is given for injuries done with force, or colour of force, is by this kinde of Action, of which we are now to treat in this place. And so Trespasses are either extraordinary and greater or ordinary and less: The great Trespasses are killing or wounding a man, pulling down or firing of Houses or Mills, or throwing down of Park-walls or Pales, the burning or destroying of a Frame of Timber prepared for a House, or burning a Cart laden with Goods, or burning of a heap of Wood prepared for Coal, cutting out the Tongue of a Beast, cutting off the Ears of a Man, barking of Fruit-trees, breaking and cutting down, or destroying the Heads or Dams of Ponds or Pool where are Fish, and such like. The lesser are the beating of a man, entering into his Close, taking away his Goods, or the like. Both these are also either to the person of a man, or to that which is his. Of the lesser wrongs done to the person of a man; there are four kinds, or five degrees, whereof we shall speak in this place.

Sett. 2.
Menacing, what
it is.
Assault, what it
is.
Battery, what
it is.
Maim, what it
is.
Imprisonment,
what it is.

Property.

Menacing or threatening (which is) where one doth threaten to do another any hurt. Assault (which is) where one doth unlawfully set upon and attempt to beat another, but doth it not. Battery (which is) when one doth unlawfully beat another. Maim (which is) where one doth by any violent act offered to another, take from him the use of any of his principal members of his body, whereby his strength is impaired, and he made more unfit to serve the Commonwealth. Imprisonment (which is) where a man is restrained of his ordinary and lawful liberty, that he cannot go about his business, as at other times. The wrongs that are done to that which is a mans (that is) his Goods, they are to his Goods animate or inanimate. Animate, either reasonable, as Wife, Child, Servant, Tenant, Ward, or the like; unreasonable, as Beasts, Fish, or the like. His inanimate good is either his Land or Plate, Household-stuff or the like. These Trespasses are also done either with pretence of Title, by which the Property is altered, or without pretence of Title. They are also said to be Local (that is) annexed to a place, as cutting of Trees, Grass, digging of ground, or the like; or else they are transitory, as the beating of a man, carrying away his Goods, spoiling of Writings, or the like. And for remedy against these kinde of wrongs, this Action or Writ is appointed. *Fines Ley* 203. 198. *Co. 1 part, Inst.* 57. 126. *Old N.B.* 48. *Crompt. Jur.* 33.

2. Writ of Tres-
pass, what it is.

The word Trespass is sometimes used for the Writ of Trespass, which is where any Trespass is done by one to another, which is supposed to be done with force and arms; and

and by this the Plaintiff shall recover damages, according to the wrong done to him; and the Defendant found guilty of this offence, is (*rigore juris*) to pay a Fine to the Keepers of the Liberty, and to be imprisoned till he pay or compound it. And this Writ must always suppose the wrong to be done, *Vi & armis*, *Finches Ley* 198. *Old N. B.* 48.

All persons, men, women, and children, not disabled to sue in any Action, may, having such a wrong done unto them, as for which this Action lieth, have this Action for their relief. 3. Where, and in what case this Action lieth, or not.

The Church-wardens of a Parish may have this Action against him that doth break or take away any of the Parish Goods, belonging to the Church, as the Communion Cup, Table-cloth, or the like, in the custody of the present or former Church-wardens: But no Parishioner can have this Action for these Goods. And for a wrong done to the Church, by breaking the Bells, Walls, or the like, or to the Church-yard, by cutting of Trees, eating of Grass, or the like, he that is Parson of the Church by Institution and Induction, not the Church-wardens, must have this Action. *Broo. Church-wardens.* Self. 3. 1. In respect of the party wronged, and who may have this Action, or not, and how.

Tresp. 289. *F.N.B.* 90. 21 *H.7.2.*

The Master of an Hospital may have this Action for the Goods of the House, taken away in his own, or in his Predecessors time. *F.N.B.* 89. Master of an Hospital.

Executors may have this Action for the Goods of the Testator, taken out of their possession; and so may the Ordinary for the Goods he hath as Ordinary, and are taken out of his possession. But otherwise it is for the Goods taken away from the deceased; and yet the Executor shall have an Action of Trespass, *De bonis asportatis in vita testatoris.* *F.N.B.* 92. 117. Executors.

For any the least beating or imprisonment of my Wife, we together may have this Action: But if it be such a beating, as whereby I lose her company or service, I alone without her may have this Action. So for any the least hurt done to my servant, he may bring this Action; but unless it be such a hurt as thereby I lose his service, I cannot bring this Action. 20 *H.7.5.* 22 *Aff.* 16 *H.7.11.* *Co.* 3. 113. 10. 130. 5. 108. *Old Book of Entries*, 555. Husband and Wife. Master and Servant.

If two men hold Land jointly, and Trespass be done upon the Land, one of them alone without his companion cannot sue, for the Defendant will avoid the Sute by Plea. *Old Book of Entries*, 557. 587. Jointenants.

One that hath but a bare possession of, and no good Title to Land, may have this Action for a Trespass done upon the Land against any one that hath no right, but not against him that hath right. *Plow.* 431. 546. 3 *H.6.32.* 12 *Ed.4.8.* 4 *Ed.4.73.* And yet he that hath a Right or Title to Land onely, either by Descent, Condition broken, or a Lease made to him, and he hath not made his actual Entry into the Land; in this case he may not bring this Action for any Trespass done upon the Land. *Kelw.* 163. *Plow.* 144. He that hath the possession onely.

He that hath but the Herbage of a ground, may bring this Action for wrong done to him in the Grass of the ground, but not for cutting or spoiling the Trees of the ground. *Dyer* 285. 5 *H.7.10.* Herbage.

It hath been said, That the Lessee for years cannot have this Action against his Lessor, for taking his Cattle by way of Distress upon the Land, though there be no cause of their taking. *Finches Ley* 199. 5 *H.7.10.* *Bro. Tresp.* 220. But I doubt of this. Lessee for years.

All persons, Male or Female, Lunatick, persons under age, and others that do any such wrong, for relief against which this Action is given, may be sued in this Action. *D. & St.* 25. *Hob. Reb.* 176. Not onely he that doth the wrong, but he that is accessory to it before or after the thing done, may be charged as principal by this Action; inasmuch as he that doth command, perswade, procure or incite another to do a Trespass, before it be done, especially if he be present at the doing of it, or doth participate with it after it is done, is a Trespasser, and the party grieved may have this Action against them all, or any of them for it. *Co. upon Litt.* 57. *Broo. Tresp.* 113. *D. & St.* 25. 12 *H.7.15.* *Dyer* 244. 2. In respect of the person that doth the wrong, and who may be sued in this Action, or not.

And therefore if a man do a Trespass to my use, and I do afterwards agree to it, in this case I am a Trespasser, and may be sued for it. *Broo. Tresp.* 256. So if I without authority had in the time of the War, as a Commissioner with others joyned to summon

Master and
Servant.

summon a man to appear before us, and then the other Commissioners without me had imprisoned, and made him pay a Fine. It seems I shall be accounted a Trespassor in all this. By Justice *Termine* at *Gloster Assises*, 1649. If the Master lock a man up in a Chamber, and give his man the Key, and charge him to keep it, and he knowing of the unjust imprisonment, keep him there, he and his Master both may be sued in this Action for this; and yet if the servant knew not of it, he shall not be charged, 22 *Ed.* 4. 45. And if a servant do a Trespass by the Masters command, both of them may be sued in this Action. But if the servant do more then he is commanded, as if his Master send him to distrain, and he after he hath taken the Distress doth abuse it, or the like; in these cases the Master shall not be charged for any more then what he gave command to do, but the servant shall be charged with the whole. 21 *H.* 7. 21. *Dyer* 365. And if my servant of his own head, without any knowledge or command of mine, doth a Trespass to another man, I shall not be chargeable with it. 13 *H.* 7. 15. *Kelw.* 3. As if the Sheriff make a Warrant to his Bailiff to arrest the body, or attach the Goods of *J. S.* and the Bailiff attach the Goods, or arrest the body of *J. N.* In this case no Action will lie against the Sheriff, but against his Bailiff for this. *Mich.* 7 *Jac.* Co. B. If many come to do a Trespass, and they are all present when the Trespass is done, and some of them do onely look on, and do nothing, yet they be all charged as Trespassors, if they do not declare their dissent to it. But if some of them fall into the company accidentally, *contra*; for they may not be sued. *Hab. Rep.* pl. 69.

If one command his servant to do a Trespass which he doth, and then dieth before Action brought; in this case the Master may be sued notwithstanding. 17 *H.* 4. 19.

If a Court, or Judge of a Court meddle with, and admit of Sutes in Matters wherewith they have nothing to do, nor have colour of Jurisdiction; as if the Court of *Common Pleas* meddle with matters of the Crown, the Leet or Justice of Peace with Actions between party and party, or the Court of a Manor with Land without the Manor; in these and such like cases where the Court, or Judge, or Justice of Peace, shall send out any Proces or Warrant to arrest, or do any execution, and the party is thereupon arrested, or any execution is done, he may have this Action, not onely against the party, or Ministerial officers that do make the arrest, and do execution, but also against the Judicial officer that doth send the Warrant or Proces: But if the Judge or Judicial officer have Jurisdiction of the cause, and do onely mistake in the manner and order of proceeding; as if in the Court of a Manor where they should hold Plea by Plaint, if they do hold Plea by Writ, or a *Capias* is awarded in the *Common Pleas* without an Original, or a *Capias* is awarded against a Duke, or such a person against whom a *Capias* doth not lie, or Proces doth issue out in an unjust Sute, and the Sheriff or Officer doth execute this, or a Justice of Peace doth send a Warrant to carry a man to Gaol for Felony, without any Information or Examination; in these and such like cases the party grieved may not have this Action, either against him that doth execute, or him that sent the Warrant; And yet it is said, That if a Justice send a man to Gaol without Examination, that he may have this Action against the Justice *Mich.* 8 *Jac.* B. R. And yet if in this case the Proces or Warrant come from a Court of Justice, it seems no Action will lie against the Judges of the Court, for a Court cannot be sued: But if a Justice of Peace shall send his Warrant to an inferior officer to carry *J. S.* to Gaol, because he doth not pay him a Debt of ten pound he oweth to him, or to *J. O.* and the officer doth execute this Warrant; in this case *J. S.* may have this Action against the Justice of Peace and Officer both. Co. 10. The case of the *Marshalsey*. 8. 6. 22 *Ass.* 64. *Plow.* 394. *Kelw.* 129. 98.

If a Justice of Peace send a general Warrant to arrest a man, and express no cause in it, and the Officer execute it; it is said this Action will lie against the Justice onely, and not against the Officer, *M.* 8 *Jac.* B. R.

If the Sheriff have a *Capias ad respondendum* against me, and make a Warrant to his ordinary Bailiff to arrest me, and he doth so, and the Sheriff doth not return the Writ this Action will lie against the Sheriff, not against the Bailiff for this. But if the Bailiff which

which made the arrest, were the Bailiff of a Franchise, *contra*. 20 H. 7. 1. 2 H. 7. 22. If a Plaintiff in any Sute bring an unlawful Warrant to the Sheriff, and shew him the party, and require him to arrest him; or bring him a good Warrant, and shew him the wrong party, and require him to arrest him; in both these cases the party grieved may have this Action against them both. So also for any thing done against the Goods of the Defendant by the Plaintiffs mis-information, *Broo. Tresp.* 307. 99. *Officer*. 8. No Action will lie against an Heir, Executor, or Administrator for a Trespass done by the Ancestor or Testator, *Actio personalis moritur cum persona*. See *Imprisonment*.

A Servant or Ward may have this Action against their Master or Guardian, if they do abuse them. 28 H. 6. 25. If many men do a Trespass to me, I may sue all, some, or any one of them at my pleasure, *Co.* 81. 59. If a man force another man to strike me; or thrust him upon my ground, for this wrong I may have this Action against him that did force, but not against him that was forced. *Hob. Rep.* pl. 176. *Motes* case, 2 *Car.* By Chief Baron at *Sarum* Assises. If I deliver another my Goods to keep to my use, and he give or sell them to a stranger; in this case, though I may have this Action, or an Action of the Case against him, yet I may not have either of them against the stranger, *Lit. sect.* 70. *Co.* upon it. And yet if my servant shall sell or give away my Goods to a stranger, and he take them away without delivery of my servant; it is said in this case I may have this Action against the stranger. *Noy* 111. 21 H. 7. 39. But if one man take away my Goods by wrong (that is) so take them from me, as by his taking he gets a property in them, and then he doth deliver them over to another stranger; or another stranger doth take them away from him by wrong, so that he gets a property in them; in this case it seems I may not have this Action against the second taker. *Broo. Tresp.* 329. 21 H. 7. 39. And yet it is said, That if a stranger buy my Goods of one that hath stoln them from me in a Market or Fair, knowing them to be stoln; in this case I may have this Action against him; as well as against the thief, *D. & St.* 149. If one disseise me of my Land, and afterwards another disseise him, or he make a Feoffment or Lease of it to another, and the second Disseisee, Feoffee or Lessee do Trespass upon the Land; in these cases I may not have this Action against the second Disseisor, Feoffee or Lessee, as I may against the first Disseisor, who must answer me all the Damages done by the rest. *Co.* 111. 51. 6. 7. 9. 13 H. 7. 15. 10 H. 7. 27.

If I have a free Warren or Feeding in another mans ground, and the owner of the ground disturb me, I may have this Action as well against him, as I might have had it against another that did me Trespass. 5 H. 7. 10. *Dyer* 285. So the Lessee for life or years may have this Action as well against the Lessor for a Trespass done by him upon the Land, as against any other man. 5 H. 7. 10. So if a Feoffor having made a Feoffment to me upon Condition, enter before the Condition broken, and after the Condition is broken, and then he enter again; in this case, for his first Entry, I may have this Action against him. 10 H. 7. 22. If a Hue and Cry be levied without cause, and an Officer having some cause of suspicion, arrest me; in this case I may not have this Action against him, but against him that first levied it. 21 H. 7. 27. If a Lord distrain upon his very Tenant wrongfully, and the Beasts return to his Tenant, it seems he cannot have this Action against the Lord for the wrong, but he might have relieved them had they been impounded. *F. N. B.* 96.

This Action will lie for a Maim, Imprisonment, Battery, or Assault done to the person of another: For if another man shall by any violent act, maim me, *viz.* deprive me of the use of any of my principal Members of my Body, as my Hand, Leg, Finger, Eye, one of my Fore-teeth, or the like, whereby my strength is impaired, and I am made the more unfit for publick service; in this case I may either have this Action, or an Appeal of Maim, which I will; and by either of these I shall recover Damages according to my hurt. But if the hurt be small onely, making a deformity in the Body, as when the Ear or Nose is cut off, or the grinding Teeth put out; in these cases the party hurt, hath no remedy but by this Action. *Finches Ley* 204. *Stamf. lib.* 1. cap. 44. See *Exod.* 21. 18, 19. & 22. 5. If another man do unjustly imprison me, or keep my Wife or Ward from me, I may have this Action.

Se. 2. 5.
3. In respect of the thing done, and for what cause this Action will lie or not; but some other, or no Action at all: Wrong to person.
Maim.
Imprisonment.

But

But for the further opening of this point of Trespass for an unjust imprisonment, that we may set forth where an Action of Trespass will lie for a false imprisonment, these things are to be known.

Arrest.

1. If a man shall lay hands upon me, and hold me in his arms, keep me in mine own or another mans house, tie me to a Tree or post, put me in a Prison or Stocks, or any other way restrain me of my liberty against my will; all these are Arrests and false Imprisonments for which this Action lieth. So if a known Officer had but said, I arrest you in the Kings name, and had laid no hands on him, this had been an Arrest. But if one do onely bid me stand or stay, and say that he doth intend or mean to arrest me, but doth not lay hands upon me; or if one carry or detain me with my consent, as a Boat-man in a Boat, Coach-man in a Coach, or the like; this is no Arrest, nor will this Action lie for this. And yet if a Coach-man carry me further then I am willing, for this I may have this Action. *Cap. 66. 69. Broo. F. Imprif. 37. 10. 43. Ed. 3. 16.* But to thrust another in a great throng or a crowd, is not an assault nor actionable. By *Baton Thorp at Gloucester Assises. 1654.*

False Imprisonment.

2. The liberty of a man is much favored in Law, and therefore if any man restrain me thereof without good warrant, and against Law, I may have an Action of false Imprisonment against him, which is in the nature of an Action of Trespass, *F.N.B. Trespass, in toto.*

Where an Imprisonment shall be said to be unlawful, upon which this Action will lie or not, but it is justifiable.

3. Then a man is said to be unlawfully imprisoned, when either there is no good cause for his Imprisonment, or he that doth imprison, hath no good Authority to do it, or having good Authority, he doth not pursue it, or he doth arrest at a forbidden time, or in a forbidden place, or the like. But we shall handle this point apart, and shew at large where an Arrest or Imprisonment shall be said to be unlawful or not, in these following cases.

Sett. 6. In respect of the cause or end, & where, and why one may be imprisoned, or not. For Debt, &c.

If I owe another man money, or have done him a Trespas, and he of his own head without any Writ, imprison me, till I pay him his debt, or till I give him a recompence for the Trespas; or if a man imprison me till I pay him money, enter into a Bond or Statute, or make a Release, or the like; in all these cases this Action is given for my Relief, *Old Book of Entries, 587. F.N.B. 88.* And yet in case where I am duly imprisoned by some legal Warrant, but in a false or feigned Sute, where no money is due, or the money is paid, or the like; in these cases the Imprisonment is lawful, and I may not have this Action for the Imprisonment, *43 Ed. 3. 35.* If a man be wounded and like to die, any man may arrest him that gave the wound, and he may be kept till it be seen that the danger is past. But if he be kept after, an Action will lie for this. *16 H. 7. 28. Broo. F. Imp. 6. Brownl. 1 part. 198.*

For suspicion of Felony.

If one arrest me upon a suspicion of Felony, when in truth no Felony is done; or if there be any Felony done, there is no more cause to suspect me then any other man in the world; in this case, and for this wrong I may have this Action. But on the other side, if a Felony be done, or noised abroad to be done, and there be some cause to suspect me more then another, and he that doth suspect me doth arrest me, he may justify it, and if I sue him for it, he will avoid the Sute: But for the opening hereof, take these things.

1. One man may be justly suspected more then another of a Felony, if either he be a suspicious person, and generally thought to be a thief, and doth live near the place where the Felony was done, or the goods stolen be found in his hands, or there be Hue and Cry after such a kinde of man, or if upon the Hue and Cry he flie, or if he were seen near about the time or place, where and when the Felony was done, or if a Felony be done, and the common report is that *7. S.* did it; this is sufficient to ground an Arrest upon. *Brownl. 1 part 3.* For these and many such like causes, one may be suspected before another.

2. In this case, he that hath cause to suspect, not another, may arrest the party suspected; for if I suspect another man for the Felony done, and tell a third person of it; in this case this third person, albeit he be an Officer, may not arrest him upon my suspicion. And yet if haply upon my relation, he also do suspect him, then he may arrest him upon his own suspicion, for it is a principle of Law, That one man cannot arrest for Felony upon another mans suspicion.

3. He that doth suspect, be he officer or other man, may arrest the party suspect of his own head, and without any Warrant from a Justice of Peace. But the common course is at this day to do it by the Warrant of a Justice of Peace, and this now in respect of the common usage may be lawful and justifiable, *Communis error facit jus.*

4. If the party suspected will not submit and yield himself, but resist, the party that doth arrest may justify the beating of him; and if it cannot be avoided in the apprehending of him, but that he must kill him, he shall not be punished for it. Murder justifiable.

5. The party that doth arrest may justify the breaking of any house to take him, after demand of the opening of the doors. Breaking a House.

6. The party arresting after the arrest made, may bring the prisoner to a Justice of peace, Constable, or to prison, at his choice.

7. If he bring him and deliver him to a Constable, the Constable may justify the detainment of him.

8. If the Constable after he is delivered to him, let him go, yet the arrest of the party was justifiable.

9. If it be an Officer that doth bring the prisoner to the Goal, the Goaler is bound to receive him, but if it be not an Officer it is said the Goaler may chuse whether he will receive him without the *Mittimus* of the Justice of peace: however (in my opinion) as he may lawfully, so he shall do well to receive him in this case.

10. If the Officer let the prisoner go after he is delivered to him, it seems he that did first arrest him, may arrest him again.

11. If the Goaler will not receive the person suspect because he is not brought by the Justice Warrant, the party arresting may carry him back, and take course to secure him.

12. If the prisoner be sick he may keep him in his house a while, till he be fit to be carried, and if he be dangerous or desperate, he may secure him a while in the Stocks, or manacle him, if need be.

13. If the Constable arrest a man for Felony and he flee, and another man without command of the Constable arrest him, it hath been said that this arrest is unlawful, *Sed quere*, for I doubt it, *Broo. F. Impr.* 24. 27. *Trespass.* 9. 207. 335. 13 *Ed.* 4. 9. 7 *H.* 4. 3. 14 *H.* 8. 1. 27 *H.* 8. 23. *Pl.* 40: 13 *H.* 7: 10: 5 *H.* 7: 4: 19 *Ed.* 49: 22 *Ed.* 4. 25.

Watchmen and Constables, and such like Officers may arrest night-walkers that are suspicious, and keep them all night, and if there be cause, as if they be dangerous, the Officers want help, or the like, put them into the Stocks till the morning, and then bring them to a Justice of peace to be examined. But if such Officer shall arrest and use me so without any cause of suspicion at all, I may have remedy by this action, *St.* 5 *Ed.* 3. *Ch.* 14. 4 *H.* 7. 15. *Co.* 9. 68. Night-walkers.

If I binde my self to pay money, and agree that if I pay it not the Debtee himself shall take and imprison me till I pay it, if he do so I may have this Action for it, 28 *Ed.* 3. 3. So if a keeper suffer me (being his prisoner) voluntarily to escape, upon my promise that if I render not my self again by a day, that he shall arrest me, and I do not, and thereupon he do arrest me, I may have this Action against him, *Co.* 3. 44. By agreement.

If I be a Ward to one by Tenure, and he by himself or some other seize me, and keep me, no Action lieth for this, *Plow.* 294. *Broo. Impr.* 13. 21 *H.* 6. 5. *Old B. entries.* 584. Ward.

If one Imprison me for a Fine imposed upon me in a Leet, except it be in case where the Lord can prescribe to imprison for a Fine; in this Case I may have this Action. And yet regularly wheresoever a man is fined in a Court of Record, he may be imprisoned, for imprisonment is incident to a Fine till it be paid, *Broo. Impr.* 97. *Co.* 8. Fine.

Godfreys Case. If a man be mad, and like in his fury to do mischief to himself or others; in this case his Friends may binde or shut him up to prevent it, or if one be like to be drowned or burned, any man may pull him up out of the fire or water with violence To prevent hurt.
Mad-man.

to save him, no action will lie for this, *Plow.* 18. *Br. F. Impr.* 35. *Old B. Entries* 555. So if men be fighting, or about to fight, and like to kill one another, any one may take and keep away one of them from the other, and if need be lock him up in a house for a reasonable time, till the heat be past, to the end that he may not kill nor be killed, & no action will lie for this, for it is justifiable. For the better understanding of this, take these cases. 1. If two men be fighting, any man may stand between them to part them. To keepe peace
and prevent
murder.

P P P P P

2. And

2. And yet if in this case a man shall use them more extremely then he need, or do any thing before there is need; for this he may perhaps be liable to this Action. And therefore if an Officer shall, upon a few hot words, take one of the parties and put him in the Stocks; or if an Officer after an affray is past, and when no hurt is done, shall carry one of the Affrayers to prison, or when there is cause shall keep the Affrayer longer then is needful, he may be liable to this Action, *Bro Impr. 3.*

3. If one be about to do a Robbery, threaten to kill another, abuse an Officer, or be taken in incontinencie, or the like, the Officer may arrest him, and carry him to a Justice to put in Bail, or be ordered according to Law.

4. If the Justice do nothing with him, yet the Arrest is lawful by the Officer, *5 H. 7. 6. Bro. F. Impr. 20. 13 H. 7. 10. Old B. Entries, 554.*

If any men ride armed terribly, or any Insurrection be, all Officers of the Peace, and others in their assistance, may arrest, imprison and disarm them, *Bro. Tresp. 184.*

Escape.

If one arrest me on a Justice of Peace's Warrant, and I get away from him against his will, he may take me again where-ever he can find me, and justifie it. So likewise may a Sheriff his Prisoner in Execution for Debt. And yet if the Sheriff shall suffer him voluntarily to escape, and after arrest him again; this second Arrest is unlawful, and this Action may be had for it. Otherwise it is (as it seems) upon a second Arrest by a Justice of Peace's Warrant, *Bro. Impr. 8. Co. 3. 44.*

Sureties of the Peace.

A Justice of Peace may require any man to give Sureties of the Peace or Good-behaviour; and if he refuse to do it, may cause him to be imprisoned. And if a man arrested by the Warrant of a Justice of Peace to bring a man to give Sureties for the Peace or Good-behaviour, shall refuse to put in Bail, the Officer without any new Warrant may carry him to Gaol. And if the Warrant from the Justice be, to bring him before him, or some other Justice of Peace of the County, the Officer, not the Prisoner, shall have the choice to what Justice of Peace to bring him: It therefore he bring him to one he is not willing to go to, or if he refuse, carry him to Gaol, he may not have this Action against him for this, *Co. 5. 59. Old B. Entries, 598, 599, 560. Bro. Tresp. 177. 5 H. 7. 6.*

Officers.

A man may be imprisoned for divers other causes, and in divers other cases; as for divers offences done against the Common-Law; as an Officer for neglect of his duty, an Officer or any other for disobedience or contempt to a Court, an Officer for making of a false Return, and the like. And therefore if a man be duly imprisoned for any such cause, he may not have this Action for this Imprisonment. But if one be imprisoned for any other cause for which Imprisonment doth not lie, the party grieved may have this Action, *Bro. Impr. 2. 7.* Also a man may be imprisoned for divers causes, and in divers cases, by authority of divers Acts of Parliament; as for Arrearages of Account before Auditors, in cases of Witchcraft, Forgery of Deeds, Forcible Entry, Riot, Rout, unlawful Assembly, for lack of Distress sufficient, or refusing to pay a Rate or a penalty for an offence done, Officers for refusing to execute their Office, or to account, Alehouse-keepers for selling Ale after they are suppressed, Officers or others for not obeying the Orders and Warrants of Justices of Peace in or out of Sessions, Foresters, Regrators, Ingrossers, Rogues, and many others. And therefore in all these cases where the Law doth warrant an Imprisonment, and the party is duly imprisoned according to that Law, he may not have an Action of False Imprisonment against him that doth arrest him, or for this Imprisonment. But for any threatening of a hurtful blow, as to hold up his fist in anger, and saying, *I could find in my heart, &c.* or, *I will sell thee to the ground*, if the man threatened be within his reach: Or for pushing or striking at, though he miss the mark, or thrusting a man, as for menaces and assaults, this Action doth lie. By Baron Thorp, at Gloucester, 1654.

Sec. 7.
In respect of
the authority
by which it
is done.

Then an Imprisonment is said to be unlawful, and gives this Action, when albeit the cause may be good, yet,

1. He that makes the Arrest doth it without any colour of authority at all; as when a Creditor of his own head without authority from any Court shall arrest the Debtor for his Debt. Or,

2. If he have a colour of authority, yet he hath no good authority; as when a Court

Court or Officer, shall give a power, not having it, to arrest a man's body, on a Corporation, without a custom, shall make a Law of Imprisonment, and under this authority a man doth arrest, as a Constable shall arrest a Scold, and put her in the Cucking-stool before she is presented in a Court, and he have a Warrant to do it. Or 3. When a Court or Officer hath a good power, but doth not well make it out; as if the Judges of the Common-pleas by word, without a Writ, command the arrest of a Debtor, or send a Writ without a Seal, and the Sheriff doth execute it; and yet a known Officer in a Corporation may Arrest by his Mace without any precept. Or 4. When the Authority is well made forth, but it is not well pursued and executed; as when a warrant is made to three *Commissaries of Division*, and two of them do it, it seems this is not good, but all or one of them may do it, and this is good, or if the Warrant be to cause one to finde sureties of the Peace, or to arrest him, and the Officer do arrest him before he requite sureties, and he refuse it. So if the Warrant be to arrest him if he doth not give sureties; and he doe give sureties, and yet the Officer doth arrest him afterwards. And yet it doth not help in these cases, if when the arrest is made, it be done without Warrant, or without a good Warrant. If the party arresting do afterwards procure a good Warrant, this will not make the arrest Lawful. *Co. 4. 64. 8. 67. 10. H. 7. 17. 26. Broo. Tresp. 339. 5 Ed. 4. 12. Broo. F. Impr. 17. Dien. 242. 244. 14 H. 8. 16. Ca. 9. 66. 344. Ludlow's Case. B.R. Broun. 1 par. 205. 211. 2 part. 16.*

1. Any other man as well as a Constable may arrest a man out-lawed, or suspect of felony, and no Action will lie for this. *Plow. 49. Dien. 120.*

2. A Watchman or Constable *Ex Officio*, may arrest suspicious persons walking by night, and secure them. But other persons that are not Officers it seems may not do so; if therefore such persons shall do so, the party arrested may have this action. *Co. 2. 68. 4 H. 7. 5. 18. Stat. 5 Ed. 3. 14.*

3. Constables and such like Officers, may *Ex Officio* arrest Persons breaking the Peace, or committing lewdness together. But other men cannot do so, unless it be in case of an affray and danger of murder, to part them, and keep them asunder only till the heat be past. And therefore if I and another be fighting, and one that is not officer take me and put me in the stocks; I may have this action against him. *Fischerly. 336. Fitz. Barre. 102. 12 H. 7. 18. Broo. F. Imp. 28.*

4. If a Constable make a Deputy, and the Deputy arrest me in case where the Constable may arrest me; it seems this is lawfull and not Actionable. *M. 13. Jac. B. R. Phelps Case.*

5. If a Sheriff, Constable, or any such like officer, in the execution of his office (being to arrest me) require others to aid him, and they do so, I may have this action no more against them then against the officer himself, for men are bound in these cases to assist. *Co. 3. 66. 5. H. 7. 15. Broo. Tresp. 335.*

6. A Justice of peace himself may require any man to give sureties of the peace or good behaviour when he hath cause, and if the party refuse, he may himself arrest and imprison him. *Broo. Tresp. 177.*

Any person, Lay or Ecclesiastick, but Bishops and Peers (who are privileged persons) may be arrested; and for these also, if a Sheriff have a *Capias* out of the Common-pleas to arrest such a person, and he do arrest his body, hereby the Sheriff may not be charged in this Action. *Fieri non debet sed factum valet. Co. 8. 67. Broo. F. Impr. 19.* If an officer having Warrant to arrest another man, by mistake arrest me; in this case I may have this action against him; and albeit the officer be led into this error by the misinformation of the plaintiff or any other, yet this will not excuse him. *Trin 38 Eliz. B. R. Cooke's Case. Kelm. 129. M. 5 Jac. Goldsmith's Case.* And if the Sheriff have a Writ against J. S. and he come to me and ask me if my name be J. S. and I say Yes, and then he say, If your name be J. S. I arrest you at the suit of J. W. and he doe arrest me, this arrest is unlawfull, and I may have this Action against him for it. *Trin. 7 Jac. B. R.* And yet if the Sheriff have a Process against one of my name, and there is no distinguishing addition in the process whereby we may know which of us is intended, and the Sheriff arrest me instead of the right man, I may not have this action in this case against the Sheriff, nor have I any

Sett. 8.
In respect of
the party ar-
resting.

Sett. 9:
In respect of
the party ar-
rested.

remedy but by an *Indemnitate nominis*, *Broo. F. Impr.* 19. If a warrant be intended against me, but my name is mistaken, and another name inserted in the warrant, and by this Warrant the Officer doth arrest me; in this case I may have this action for this arrest, *Broo. F. Impr.* 38. *Brownl.* 1. part: 210. 2 part. 48, 49.

An arrest of a Minister going to, or returning from the Church is held to be unlawful, *Brownl.* 2 part. 301.

Se8. 10.
In respect of
the time of the
Arrest.

If a Sheriff or any of his Officers arrest a man upon a Writ after the day of the return thereof is past, this is unlawful, and the party arrested may have this action. And so some say the Law is, if he do arrest before the day of the Test of the Writ, *Co.* 8. 66. *Dier* 242. And yet if a man be arrested on a *Capias* or a *Latitat* the morning of the same day whereon the Writ is returnable; it seems this is a good and justifiable arrest, *Trin.* 3. *fac. per two Judges.*

2. If a Warrant of a Justice be to arrest and bring a man to the next Sessions, and the Officer do thereupon arrest him after the Sessions, this is an unlawful arrest, *Trin.* 9. *Car. B. R.*

3. If one have a Warrant to arrest me from a Justice of Peace or the Sheriff, and before the Warrant is executed the Sheriff or Justice of Peace is discharged of his Office, and the Officer hath notice of it, and yet he do afterwards arrest me upon this Warrant, in this case I may have this Action, *Dier* 41.

By the new
Act of Parlia-
ment, 19 April
1650: all Ar-
rests on that
day, save only
for Felony,
breach of the
Peace, and pro-
fanation of the
day, are made
unlawful, and
the Arresters
to be punished

4. An arrest may be upon any day of the week, and upon any part of the day or night; and yet let the Officer see to it, for if he use to make arrests on the Lords day, or if he arrest a Minister going to, or returning from the Church, or in the Church, especially whiles he is about the service of God; this is an offence that was punishable in the Star Chamber, and is punishable by binding the offender to the good behaviour, *Co.* 9. 66. *Trin.* 3. *fac. per 3 Justices. Stat.* 1. R. 2. *Ch.* 15. 50 *Ed.* 3. 5.

5. If a Warrant be from a Justice of Peace directed to an Officer to cause me to finde sureties of the Peace, and I hearing of it, do voluntarily binde my self before a Justice of Peace, and have a *Superfedeas* from him, and give notice hereof to the Officer, and yet he do afterwards arrest me, I may have this action against him, *Polson de pace.* 20.

Se8. 11.
In respect of
the place.

1. An arrest may be in any place, Church, House or Field, only let the Officer see to it, that he do it not in the Church, especially that he disturb not the service of God; for however the arrest be good, yet the thing done is a misdemeanor punishable, so also let him take heed that he enter not into another mans house to make his arrest, when it is in a suit brought by a private person, and not in case of the Commonwealth, wherein one may justifie the entering into and breaking of a house, if a man cannot otherwise do it. And let him see he do it within his own Precinct, for in these cases he may make himself liable to this action. And yet in case of arrest in another mans house, the Arrest is good, and the Officer not punishable for this by any Action of the party arrested, but the Owner of the house may bring this Action for his entry into the house, *Co.* 9. 66. 14 *fac. B. R. per Ch. Justice.*

2. If the officer arrest a man in a franchise or privileged place, (within his Precinct otherwise) this arrest is good. And yet the Lord of the Franchise may have an Action of the case against the Officer for intruding into his Franchise, *Co.* 9. 66. *Ch.* 7. *ff. B. R.* in 15 *fac.*

Escape.

3. In some cases the Sheriff or other Officer may go out of his County or Precincts as the Sheriff upon the escape of a prisoner, or a speciall Writ to remove a prisoner. But if a prisoner be with his Keeper only in another County where the Sheriff hath not to do, and unless it be in the cases before; this is an escape, and the prisoner may have this action against the Sheriff, *Dier* 66. Also the Justice of Peace may specially command an Officer out of his Precinct, and by such speciall command an officer may Arrest out of his precinct, *Broo. F. Impr.* 26. *Westm. ch.* 1. 34.

Se8. 12.
In respect of
matter subse-
quent to the
Arrest.
False return.
Refuse bail.

If a Sheriff or a Bailiff of a Franchise Arrest me upon a *Capias* ad *Respondendum*, and afterwards he do not return the Writ, or do return him *Non est inventus*; in these cases I may have this Action, *Co.* 5. 90 *Kelw.* 3. 66. 89. *H.* 7. 11.

If the Sheriff or his Bailiffs Arrest me, and I am bailable, and offer them sufficient bail, and they refuse it, for the imprisonment afterwards this action lieth, *Dier* 25 *Pl.* 60. *F. N. B.* 152.

If

If any Officer after I am to be discharged, having put in bail or otherwise, Keep me, or having let me go, Arrest me again for undue Fees; I may have this Action for the detainment afterwards. But for due Fees it seems the Officer may keep the prisoner till he pay them. For Fees.

If one after he hath arrested me, when he should carry me to a Justice, or to a Goal that I may be in a way of Triall or delivery, he keep me at his house, or in another place, unless it be in a case of necessity, and so long as the necessity shall continue; I may have this Action against him, *Kewl. 45. Plow. 38. Bro. F. Impr. 25. Brownl. 2 part. 41. Stat. 5. H. 4. ch. 10.* Keep the prisoner from trial.

If a known sworn common Bailly Arrest me by a Warrant from the Sheriff, and I submit to the Arrest, and desire sight of the Warrant, and he will not shew it, nor declare the contents of it (that is) shew the cause, at whose suit, and for what sum, and in what Court, &c. I may have this Action against him, and if it be another Bailiff, he must shew the Warrant it self, otherwise the party arrested may have this Action against him. But in case where I do not desire the sight of the Warrant, or do not submit to the Arrest but strive to escape, in this case the Bailiff is not bound to shew the Warrant, or declare the contents of it, *Cook. 9. 69. 6. 55. 21 H. 7. 23. 14 H. 7. 9.* Refuse to shew his Authority.

If a Justice of Peace send for a man about a Felony, and then presently send him to Goal without any examination; it seems this Action will lie for him against the Justice of Peace, *M. 8. Jac. B. R.* If the Sheriffs Bailly having Arrested me upon an Execution, I pay the money and get a *Superfedeas* from the Sheriff to discharge me, and the Bailiff pretending he cannot read the *Superfedeas* or the like, refuse to deliver me; I may have this Action against him, *Trin. 37 Eliz. Co. B. Stringers Case.* And by *Just. Whislock at Glouc. Assises. 6. Car. 13 H. 7. 16. 1 H. 7. 28.* So if the Sheriff himself after he hath arrested me, and I get and shew him a Legall discharge, as a *Superfedeas* from above, the Plaintiffs Release, and a power from him to deliver me; he shall notwithstanding keep me prisoner still, in this case I may have this Action against him. *M. 13 Jac. B. R. Wisbers Case. 12 Barr 253.* Not examination of a Felon.

If one do wrongfully beat or hurt me, or cause me to be hurt by setting his dog upon me, or the like; I may have this Action against him, *Finchesley 263.* But for the further opening of this point take these following cases. Sett. 13. Battery and Assault.

1. If one hurt me against his will, or by accident, as at a Training, Tilt, Foot-ball, Fence, or other play, by the glance of an Arrow, cast of a Stone or the like, I may have this Action against him: and yet if the thing done, be done by an unavoidable necessity, wherein he that doth it is no waies faulty, as if he run upon my Sword, or Musket as I am about to discharge it, and thereby hurt himself, or the like; for these things no Action will lie. *Hob. Rep. pl. 176 Bro. Tresp. 178. 294. 6 Ed. 4. 7. 10 Ed. 4. 6.* So if one be forced to strike me, or thrust upon me, I may not sue him that was forced for this, *9 Ed. 4. 37. 21 H. 7. 27.* Accidents.

2. If one make but an Assault upon me first (and what an assault is we have shewed before, and shall do after) I may then beat him and justifie it, but I may not wound him, and it is not material in this case whether I be in any imminent danger or not, *Old B. Entries 644.* Necessity unavoidable.

3. If one go about to enter into my house, or to take away my goods against my will, I may in defence thereof gently put him back, and if that will not do, I may beat him and justifie it. So it seems if a man have taken my goods I may presently retake them, and if he will not deliver them, do as before. But if a man go about to stop or turn my water-course, or enter into my Close against my will, I may not make this resistance. And yet in these cases I may *molliter manus imponere* upon the Trespassor to keep him off, and justifie this, *Curia Pas. 7 Jac. B. R. Old B. entries. 554. 553. 14 H. 7. Baron Henden at Glouc. Assises. 17 Car. Brownl. 1 part. 218.* Of his own wrong.

4. A friend also may justifie the beating of a stranger in the defence of the life and person of his friend, as a Wife for a Husband, a Husband for a Wife, a Father for a Childe, a Childe for a Father, a Servant for a Master or Mistress, but not a Master for a Servant; and in these cases they may disarm him that doth make the assault, till the heat be past, *Bro. Tresp. 37. Old B. entries 553. 554.* In defence of ones House and Goods.

Wound, what.

5. Albeit in these cases the beating of another is justifiable, yet the wounding, that is, the breaking of the flesh and letting out the blood is not justifiable; 16 Ed. 4. 11. 21 H. 8. 39. 27. *Kellw. 92. 9 Ed. 4. 28. Bro. Tresp. 37.*

Rogue.

6. Moderate correction may be given to a Rogue according to the Statute, and no Action will lie for this battery.

Correction of Children, Scholars, &c.

7. A Master may give moderate correction to his Apprentice, Scholar, or Servant, and no Action will lie against the Master for this; but if the correction be excessive, this Action will lie, *Bro. Trespas. 353. 349. Old B. entries. 555.*

Opposers of Authority.

8. If any man arrested upon a Writ, or for felony, shall not submit to the Arrest but resist, and there be no other remedy, they that Arrest may beat or wound him; and if any others shall go about to prevent the Arrest, or after Arrest to release the prisoner, they that make the Arrest may justify the beating of the opposers, 5 H. 7. 5. 4 H. 7. 18. 21 H. 7. 39. 2 Ed. 4. 6. *Fitz. Corone 263.*

9. If two be fighting together, any man that stands by may go between them and do his best to part them, and justify this; but he may not justify the beating or hurting of either of them, unless he do first beat or strike at him, *Per Justices Jones, Lent Assizes at Glouc. 5. Cap.*

10. If a man trouble a Congregation at Divine Service. the Minister or any other for him may as it seems lay hands upon him, and put him out of the Church and justifie it, *Old B. entries 554.*

Self. 14. Assault, what.

If another man do unlawfully set upon me, attempt to beat me, strike at me though he do not hit me, or hold up his weapon to strike at me being within his reach, thrust or push me, cast stones at me, though he do not hit me cast, drink in my face or upon my clothes, beset my house, tear my clothes or the like, this is an assault for which I may have this Action. So if one Ravish me being a Woman, this is a foul assault and an Imprisonment also, for which I may be relieved by this Action. But if one offer to take away my hunting dog from me by force, or strike at me at a great distance, so that he could neither hit me nor put me in fear of being hit or stricken, or if one strike at me, hurl stones at me, or do any such like act as before, merrily or accidentally, and not purposely and seriously, in these cases and for these cases it seems no Action will lie, *Finchessley 29. 40 Ed. 3. 40. Bro. Trespas 336. 236. 9 Ed. 4. 26. 23 Ass. 60: Old B. entries 553.*

Menace and lying in wait.

If one do threaten me to my face or behind my back, to kill or beat me, or lie in wait and watch to do so, inasmuch that I dare not follow my business as at other times, and I have any speciall loss by this, I may have this Action for my remedy. But if he threaten only to sue me or the like, or if I have no speciall loss by the threatening; no Action will lie for this, 18 Ed. 4. 28. 10 Ed. 4. 28. 7 Ed. 4. 24. 3 H. 6. 18. And yet if a man furiously pursue me, that I cannot avoid him, having fled from him as far as I can; I may then threaten to kill him, if he will not depart, and justifie it, *Bro. Trespas 28.*

Violence offered to a man in his Wife, Child, Servant, &c.]

Thus we have done with the Trespasses that are done to a mans own person; now we are to speak to the Trespasses that are done to him in that which is his, that is, his Wife, Child, Servant, Tenant, Ward, House, Land, Goods or Cattel.

If one carry or keep away my Wife from me against my will, I may have this Action; and yet if my Wife be like to be drowned or be sick, or otherwise in imminent danger, and another take her up and bring her home to my house, or any safe place to succour and preserve her, or if one at her request take her up and carry her from a fair, to ease her; no Action will lie for either of these things. So it is said if I abuse my Wife, and a friend take her and carry her to sue out a Divorce, or to have a Warrant of the Peace against the Husband when there is cause, that for this I may not have this Action, *sed Quare* of this, 21 H. 7. 27. 9 Ed. 4. 33. *F. N. B. 91. Old B. entries 553. 20 H. 7. 2.* So if one take or keep away my Ward from me being his Guardian or my Son and Heir, knowing it to be so, I may have this Action. So if one take away my Son or Daughter: So if one threaten or lie in wait for my Servants to kill or maim them, that they dare not follow their business, or maim or hurt my Servant that he doth not, nor can do me the service he did formerly, whereby I have any speciall loss, I may have this Action for remedy against this loss. But if

if the threatening be only to sue my Servants, or the like, or whatever it be, if I have no special loss by it, no Action will lie for it, *Old B. Entr.* 552. 20 H.7.5. 9 H.7.7. *Bro. Tresp.* 388.609. So if one take or keep away my Servant from me, knowing him to be my Servant. And so likewise it is if one threaten my Tenants at will, so that they depart from my Lands, and I have any special loss thereby, I may have relief by this Action. But if my Lessees for life or years be so threatened, no Action will lie by me for this threatening. *Old B. Entr.* 569. 593. 582. 583. So if I be a Gaoler, and one take away my Prisoner from me; or I be a Lord, and one take away my Villain from me; or I be a Soldier and have taken a Prize in War, and another take it from me, I must have this Action.

If any man enter into, burn or break my House, pull down or break down my Walls, or break or carry away my Wainscot, Doors, Furnaces or Windows of my House, enter into my Orchard, Garden, Close or Lands, and tread, ear, plow, root up, cut or spoil the Corn, Grass, Wood, Hedges or Trees thereon growing, or rob me of the Fruit of my Garden or Orchard, set up Pales or a Fold in my Ground, dig or carry away my Land, Coals, Mines or Stones, fill my Ditches: If one dig, root up, break or take away my Poles, Hedges, Gates, Pales, Fences; or if one break, spoil, or take away my Money, Plate, Corn, Grain, Chest, Householdstuff, Wood cut, Weapons, Ship, Boat, Wain, Writings, Bottles, Wooll shorne, or the like Goods, or unlawfully distrain any such thing of mine, or abuse it after it is taken as a Distress, or suffer his Goods to lie in my House, or upon my Ground Damage-fesant: If one kill, beat, hurt, chase or take away my Cattel, Hound, Hawk, Mastiff, Pheasants, Partridges, Poppinjays, Thrushes, or the like, being tamed and using my House, pull or shear my Sheep, strike my Horse in travel, and by that means it throw me down, take away Goods waived, or an Estray or Felons goods belonging to me, or unlawfully arrest or distrain my Cattel, or abuse them being distrained, or suffer his Cattel to be upon my Ground Damage-fesant: If one kill, hurt, or take away my Deer, or any such like Beast, my Cocks, Hens, or my Partridges, or any such like Fowl, while it is tame and using about my House, my young Pidgeons or Hawks out of their nests or boxes: If one hunt in my free Warren, destroy my Fish, or disturb my Fishing, hinder me in my Fold of my Cattel, put any thing in the water I use for my self or my Cattel to infect it: If one do stop Ditches, and thereby or otherwise cause the water to overflow or run over my Ground, take Wine out of my Bottles and put water in the room, dig Trenches overthwart the way to hinder my going to my Ground, or let out the water out of my Mill-pond that I cannot grinde, break or cut my Sluces or the head of my Pond, and let out my Fish; or break the head of another Pool, and let so much water into my Pond, that it doth overflow, and the Fish do go out: If any man take away my Tythes, being Parson: In all these cases before, and such like cases, I may have this Action for my remedy, *Brownl.* 1 par. 30.

It is said also, that for taking excessive Toll of me by a Millard, I may have this Action; and that if one disturb me in a Market or Fair where it is due, I may have this remedy. *Bro. Tresp.* 41. and *F. N. B. Tresp. in toto. Old N. B. Tresp. in toto. Co.* 9. 112. But for this see more afterwards. If a Devisee of a Term or Goods, enter into the Lands or take the Goods before the assent of the Executor, he may have this Action against him, *Bro. Tresp.* 25.

If I have a Fishing or a Warren in another mans Ground, and the Owner of the Ground or another take, hunt, kill or destroy my Fish or my Game, I may have this Action for my relief, 12 H.8.3. *Kelw.* 30. If I have Fish in a Trunk or Pond, and a stranger take them away, I may have this Action against him. If I have Hounds, Spaniels, Mastiffs, Greyhounds, or such like useful Dogs, and any man take them from me, or hurt them with me, I may have this Action against him, *Hob. Rep.* pl. 363. 12 H.8.3. 18 H.8.2. And yet if one have a Dog that doth use to kill my Conies in my Warren, or a Hawk that doth use to kill my Pidgeons about my Pidgeon-house, and I kill him; no Action will lie against me for this. *Sir Persival Willoughbies Case. Bro. Tresp.* 387. *Madhursts Case, M.* 2 Jac.

If I have a Deer, Hare or Cony, or any such like beast; a Pidgeon, Swan, Hawk, Pheasant, Partridge, Parrot, Black-bird, Thrush, Popinjay, or the like Bird that is tame and

Wrong done to a man in his House or Lands, or Goods or Cattel.

Sett. 15. In respect of the case, and where this Action will lie for such a thing done, or not. Matters of pleasure.

Wild Beasts and Birds

and doth use my house, and any man do take them from me, and hurt them with me, I may have this action. But if any man take any such creature whiles it is wilde, no Action will lie for this, nor if once they were tame and after become wilde again. If one take away my Hawk in flight, or my Deer out of my Warren whiles I am in hunting of him, I may have this action, 12 H.8.3. 3 H.6.5. 18 H.8.2. *Broo. Trespass.* 407. 215. *Hob. Rep. pl. 363.*

If one come into my Warren or priviledged place, though it be not my Ground, and there hunt, kill or take away my game of Fish, Beasts or Fowl, or kill my Cones, in my own ground that is no Warren; I may have this action against him. And if a man spring a Fesant in his own Warren, and it flie into another mans Ground which is no Warren; he may enter the ground and take the Hawk and Fesant; but if they flie into another mans Warren, there his entry is a trespass. But if one kill my wilde hares or conies out of my free Warren and out of my Ground, I can have no action for this 12 H.8.3. *Kelw. 30. F. N. B. 87. 38 Ed. 3. 10 Broo. Trespass. 1111:*

Damag fefant.

If a mans goods or Cattel be in my house or ground Damage Fesant, albeit it be against the Owners will and without his knowledge, yet I may have this Action for the trespass, or Distraine them Damage fefant at my choise, *Kelw. 3. 13 H. 7. 10. Old B. entries. 570, 571.* As if a lessee of my house suffer his Goods a longer time then is reasonable, after his lease ended, I may Distrain them, some say I may also bring this Action against him: but it is best to make an entry first, 13 H. 7. 9. And if the owner of the Cattel enter and take them away before he have tendred amends to me for the Trespass, this is a second Trespass for which I may have this Action also, 21 H. 7. 27. If a stranger put in his beasts into the Common where I have common, I may not have this action against him, but I may Distrain them Damage Fesant, *Co. 9. 112. 15 H. 7. 13.*

Chasing of
Cattel.

If a man himself or with dogs chase or hunt my Cattel in mine or another mans Ground, I may have this action; and yet the owner of the ground wherein my Cattel are doing Trespass, may gently by himself or his Dogs chase them out, and justifie it. But if he do them hurt thereby, this Action will lie, *Hill. 16 Jac. B. R. Per. 3 Justices in Burges Case. M. 5 Jac. B. R. Glover's Case. Co. 4. in Terringtons Case. Broo. Trespass. 421. Co. 8. 67.* And if ones Pigs be in my ground, I may chase them out with a Dog, if I do not hurt them, *Hill. 16 Jac. B. R.*

If a mans Cattel be in anothers ground doing trespass, the owner of the ground is not bound to put them into the pound, but may put them out, and if they be thereby lost he shall not answer them, *M. 5, Jac. Sr Chr. Hndsons Case.*

Goods con-
founded that
cannot be
known.
Tenant at
will.
Waste,

If a man take my Corn and put to his, so that it cannot be distinguished which is his and which is mine, and then I carry away all, it seems this Action will not lie against me for this, 22 Car. at Glouc: Assises, per Serjant Wilder:

If my tenant at will of my Land do commit any voluntary waste, as burn the houses or the like, I may have this action against him. But otherwise it is of a negligent or permissive waste, *Co. 5. 31: Dier 171. Lit. Set. 71 Broo. Trespass. 362.* And if such a Tenant cut under-wood, not timber, at seasonable times, or having a Mine, dig and sell there, no Action will lie for either of these things against him, *Broo. Trespass. 327.* But for cutting Trees this Action, not waste lyeth. Also this action will lye against my servant for taking away or spoiling my goods in his hands and possession. *Goldsb. 72. Pl. 18. 66. Pl. 10.*

Goods deli-
vered upon
trust, or come
without tak-
ing into a
mans hands.

Regularly where a man hath my goods by my delivery upon a trust, as when I deliver to another my goods to keep, or I deliver Goods to a Carrier to carry, or the like; if he convey or keep them from me, or spoil, or sell them, or negligently suffer them to be spoiled, I cannot have this action for my remedy, but some other action, *Co. 5. 14. 2 H. 7. 11. 16 H. 7. 3.* And yet if my shepherd willfully destroy my sheep, or my Butler willfully spoil my plate, or I deliver my Cattel to one to plow or compass his land, and he kill them; in these cases I may have this Action against him, *Co. 5. 14. 31. 2 H. 7. 11: Broo. Trespass. 343. 327. 395. 72. Litt. Set. 72.* So if another do it by the Licence of such a person. And by these cases it seems this Action should lie against the Carrier in the first case, *Sed quare.* If I be a Taverner, Mercer or Draper, and my servant using to sell my goods give away my Goods, it is said I may not

said, I may not have this Action, nor any other against the taker, but must take my remedy against my servant. *Broo. Tresp.* 205. *See quere.* If my Wife convey away my Goods, and I die, my Executor may not have this Action, but must have some other remedy. *M. 8 Jac. 6. B.* If one give me leave to put my Corn in his Barn, and I agree that he shall keep the Key, and he sell the Corn; it is said, I cannot have this Action against him, but some other. By Serjeant *Wilde*, 22 *Car.* at *Glocester Assises.* If my Goods happen to be in an Executors hands amongst the Testators Goods, unawares of the Executor, no Action of Trespass will lie against him for this. But after notice given to the Executor, and a Demand of the Goods, and Refusal, some other Action will lie. 21 *H. 7.* 17. *Broo. Tresp.* 311.

We have shewed before, that this Action will lie for the owner of a House, against him that shall take away or spoil any of the Incidents of his house, as Furnaces, Doors, Waincoats, Pale, Glass, or the like: And for this it is to be known, That all things that are annexed and fastned to a House by Nails, Scrues or Pins, or by Morter or Stones, as Glass, Wainscot, Tables, Shelves, Vaults, Furnaces, Doors, Locks and Keys, and the like, are so inseparably incident to the House, that be they put on by whomsoever, they cannot be taken away by the Lessee for life or years, before or after the end of his Term, but he must subject himself to this Action; but he that hath any Estate in Fee-simple or Fee-tail of such a house, may pluck it down if he will, and so may a Lessee that holds it for life or years, without Impeachment of Waste, 21 *H. 7.* 26. *Co.* 463. 21 *H. 7.* 13. See more in *Property*, cap. 17.

If a Man do voluntarily take away my Goods or Cattle, and keep them till I pay him money, either without colour or with colour, as under pretence that it is his Herriot, Waiff, or Estray, when it is not so, this Action lieth; and if he will not restore them till I pay Money or Bond, I shall have a Recompence for it all in Damages in this Action, *Broo. Tresp.* 354. *M. 8 Car. B. R. Cannons case.* So if a man shall any way take away or spoil my Goods. If a man drive my Cattel into another mans ground, I may go into the ground and fetch out my Cattel, and yet by this I am a Trespassor to the owner of the ground, and for this he may bring this Action against me, and I must take my Counter-remedy against him that drave them in, *Dodridge* in his Treatise. 21 *H. 7.* 27. *D. et St.* 34. *Co.* 2 pars. 54. But if the owner of the ground drive my Cattel, or carry my Goods without Authority into his ground, I may (especially in a fresh pursuit) go into his ground and fetch them out, and for this he can have no Action against me, and yet in this case I may not go into his dwelling-house to take my Goods again, nor had the Goods been delivered by me, could I have entered into his Close to take them again. 21 *H. 6.* 39. 2 *Ed.* 4. 35. *Trin.* 18 *Jac. B. R. Old B. of Entries*, 561. If ones Cattel in drift break a way into my ground, where the Inclosure is good, or into my house, the door being open, the Driver may fetch them out, but I may have this Action for the Entry, being a Trespass, *Broo. Tresp.* 321. If I be driving Cattel to Pound, and they escape into another Parish, or another mans ground against my will, and I do presently fetch them out, no Action will lie against me for this, *Broo. Tresp.* 325.

Wheresoever I may justifie the taking of my Cattel, I may justifie the taking of their yong ones, if they have any. *Broo. Tresp.* 323. If one take away my Goods from me, I may then presently take them from him, and justifie it, *Kelw.* 62. *Broo. Tresp.* 185. And if I deliver to one Goods to deliver to me on Request, and he deliver them to another, it is said, I may take them away from him, 21 *H. 7.* 13. *Broo. Tresp.* 118. 186.

If my dead Goods be in danger of spoiling, as my Corn in the Harvest, and my Neighbor out of his good will doth take it up, or bring it to his own, or my Barn; or if he trench my Meadow where need is and doth mend it, or if a Strangers Cattel be in my Corn, and he drive them out: In all these cases, and for these things, done without my leave, I may have this Action. And yet if my own Cattel be in my Corn, and another man drive them out, no Action will lie for this. If a house be on fire, I may take any mans Goods out of the house, or fire, to preserve them, and no Action will lie for this. And if my Horse be fallen in a Pit, and in danger, any man may justifie the pulling of him out of the Pit, *Kelw.* 88. 2 *H. 6.* 37. 21 *H. 7.* 27. 12 *H. 8.* 2, 15. 8 *Ed.* 4. 35. 13 *H. 8.* 16.

Incidents of House.

See. 16. About taking away Cattel or Goods, and where a man may take his Cattel or Goods from another man, or not.

Note.

Acts of kindness.

For Publick
good:

See 19.
About Entry
into, or break-
ing of another
Mans House or
Ground, and
where it is
lawful, or not.
View or to
fetch Goods.

Flight to save
life.

To fetch out
lops of Trees:

To Repair.

Upon a Li-
cence.

To take Tithes

To remove a
Nuisance,

To Distrain.

To prevent a
common mis-
chief, and for
Publick good.

If a Ship be in danger of drowning, the Marriners may cast out the Goods to save men and justifie it: So when a House is on fire, the Neighbors may take out the Goods to preserve them, *Daffins case*. 6 Jac. 21 H.7.27. If one assault me with a weapon, I may (it seems) take away his weapon and deliver it to a Constable to keep the peace, and justifie it, *N. B. of Entries* 651.

It is a rule that no man may enter into my House or Ground without my authority or licence, or authority of Law. And if he doth, he is a Trespassor to me, and I may have this Action against him, 12 H.8.2. But in many cases a man may enter into my House or Close, and be blameless. For the opening hereof, therefore take these cases.

1. If another man have a Horse, Timber, or other Goods in my House or Ground, and he enter into it, to see or take it away without my leave, I may have this Action against him; and albeit he had a Lease of the Land a little before, yet if it be now ended, this will not help him, 21 H.7.13. 19 H.7.9. 14 H.8.1. 9 Ed.4.35. And albeit I did command my servant to deliver the thing to him, yet this will not excuse the Entry, 18 Ed.4.25. If I be an Executor, I shall have a reasonable time to fetch away my Goods out of the House wherein I may enter and take them. And yet if I be a Lessee of a house for the life of 7. S. or 7. S. Lessee for life make me a Lease for years, and 7. S. die; in these cases, if I have Goods in the house, and take them away in convenient time, no Action will lie against me; otherwise it is if I suffer them to stay too long; and the Judges shall set down what time is reasonable, not the Jury, 22 Ed.4.27. By Justice *Haughton*, 2 H.6.15, 16. *Brownl.* 1 part. 224.

2. If a man take away my Cattel or Goods, and put them into his ground, I may follow them and take them again; otherwise it is if they were taken away by a stranger, or I deliver them to him, or they be in his dwelling-house, see before. And yet it is said, if a man have my Goods in his house, and his door be open, that I may go in and fetch them out. *Howes case*, *M. 9 Jac. B.R. Broo. Tresp.* 118. 186. 21 H.7.13.

3. If a man be assaulted and like to be killed, and he flee through my ground to save his life, I cannot sue him for this, 37 H.6. 37.

4. If a man lop a Tree, and some of the Lops unavoidably fall into my ground, and he go into my ground, and fetch them out, I cannot have an Action for this, either for the fall or entry; but the necessity must be unavoidable, else an Action will lie for both, *Broo. Tresp.* 310. *Hill.* 8 Jac. By Justice *Dodridge*. And yet if there be two Tenants in Common of a Tree that doth grow between two men, and one of them doth cut and seise it all; in this case the other cannot go into the others house or ground to seise it.

5. If one be bound to repair a Bridg which cannot be done without his coming upon my ground do it; in this case he may do so at a seasonable time without danger of this Action, *Broo. Tresp.* 260. So if one grant me to dig a trench in his ground to lead water to my house, if it be stopped, I may go into his ground to amend it, 13 H.8.15. 9 Ed.4.25.

6. If I do license 7. S. to deliver Wood to 7. D. in such a Close, and 7. D. come into the Close to take it, it seems this is justifiable, *Broo. Tresp.* 241.

7. The Parson may come into my ground, being a Parishioner, and shall have a reasonable time to order and fetch his Tithes, *Bro. Tresp.* 345. 325. 49.

8. If I have a Mill, and the water that drives it, runs through another mans ground, and something is done there to obstruct my water; in this case I may go into his ground to see, and if any be, to remove it, and if it be a house, I may abate it, and justifie it, 9 Ed.4.35.

9. If my Tenant when I am coming to distrain, drive his Cattel into another mans ground, or into some other ground of his own, held of another man; in these cases I may enter into the ground and take them.

10. In case of a common danger, as if water that runs by a Town be stopped, that it may endanger the drowning of the Town, I may go into any mans ground to give it a passage, and if a House be on fire, any man may pull down part of it to save the rest; or pull down it, or perhaps other houses to prevent the burning of many others. So in case of Enemies, Soldiers may justifie the making of Bulwarks. So Fishers may justifie the going into any mans ground to amend or dry their Nets. So men may go

into

into any mans ground to hunt or kill Foxes, Otters, Grayes, and the like Vermin, and all this without the License of the owner, *Dyer* 36. 12 H.8. 2. *Broo. Trespass* 40. 21 H.7. 27. 13 H.8. 16. 8 Ed.4. 35, 18. But a man may not do so to kill Hares: Also to keep the peace and prevent mischief, any man may enter into anothers ground, or (as it seems) his house either. So also to apprehend Felons, any man may enter into another mans ground or house, and break the house also if need be: Also a man may turn his Plough upon his Neighbors Land in the Field, if it cannot be avoided in Plowing, *Broo. Trespass* 354. 327. So to make a perambulation, the Minister and Parishioners may after their usual manner go into mens grounds. *N. B. Entries* 652. *Old B. Entries* 558. See more after where this Action will lie against an Officer.

11. If a Mans Horse or Beast be like to be drowned, I may go into any mans ground to save him, and if he be like to be killed, I may go into into his house to preserve him, 12 H.8.2. 13 H.8.5. And yet if I go into another mans ground to save his horse from stealing, or his Tithes from being spoiled by weather or Pigs, he may have this Action against me, 21 H.7.27. 9 Ed.4.35. *To save Men or Cattel in danger.*

12. If one be unlawfully imprisoned in my house, and he break the house, and get out, I cannot have this Action against him, 9 Ed.4.35. 21 H.7.37.

13. If one have sheep stohn, he may go into any mans ground where he doth suspect the sheep are, to see the sheep whether they be his or not. By Justice *Berkley*, *M. 8 Car.* *To look for stohn Goods.*

14. If the Sheriff have a Replevin against my Goods, the Plaintiff may come with him into my Close to shew him my Goods, 3 H.6. 37.

15. If I have Cloth in a Tailors or Sheremans shop, and the door be open, I may go in to see it, *Hewes case. M. 9 Jac. B. R.* *To see a Man Goods.*

16. If I make a Lease of my dwelling-house, rendring Rent, or one is bound to pay me money on an Obligation in my dwelling-house; in this case he may come into my house to do it, when I am there to tender. But if it be to be done in another mans house. *Contra. Plow. 71. 18 Ed.4.25. 9 Ed.4.25.* *To pay Money.*

17. If I or the Commonwealth have a way through anothers ground, or title of Common there, or cause to distrain there; in these cases I may come into the ground to use or do it, and no Action will lie against me for this in any of the cases before, *M. 7 Jac. B. R. Old B. of Entries* 559, 560. And yet if I be besides the way, or take more common then my due, this Action will lie for this exceeding. *To take his Way, Common, &c.*

18. If a man have business with me to shew me a deed for preventing a difference, or the like, and I being in my house or ground, he come in to speak of the matter; it is said this is not actionable, *Broo. Trespass* 23. *Sed Quere.* For if he do it without licence or invitation, it seems to me actionable.

19. In many other cases the Law gives power to enter into House or Land, as Travellers or others, may go into a common Inn or Hostry, a man may Distrain for his Rent, or Damage-felant, a man that hath right to an Estray, may seise him, a man that hath a Reversion of Land may go into it to view it, a man that hath power to sell Land, hath power to view it and value it; a Commoner may go on the Common to see his Cattel: The Kings Purveyor might have taken up Cattel for the King, and no Action will lie against these men for any of these things.

But in all these, and such like cases, where a man may justifie his Entry into another mans house or ground, for some special purpose, he must see he do not abuse his power there. And therefore in all the cases before of power given to enter into Lands, if he shall break the Hedges, leave open the Gates, or otherwise abuse his power, he shall be punished as a Trespasser from the beginning. And in the last cases, if a Traveller or other, shall stay in the Inn over-long, break or take away any of the Household-goods, break the Windows of the Inn, or the like, or the party distraining in the next case shall work, kill, or otherwise abuse the Distress, or in the next case he shall hurt, sell, or kill the Estray, or in the next case, if he in Reversion shall break the house to come in, or being come in at the doors, stay all night, cut down Trees, or dig the ground, or the Purveyor sell the Cattel or Goods taken up; in all these, and the like cases before, the Law doth reckon all that is done unlawful, and the party grieved may have this Action for his relief.

Debt.

And yet if one enter into an Inn, and do not pay for his victuals he collect for, or being distrained, and he offer the Rent, for which he was distrained, and the Distrainer will not deliver the Distress; in these cases, and for these causes the offender is not reputed a Trespasser *ab initio*, but in that thing onely.

Action of the Case.

And in the first case the In-keeper shall have an Action of Debt, or on the Case, for his money; in the latter, an Action of Trespass, or Trespass on the Case for his Relief. Co. 8. 146. 5. 76. D. & St. 113. Dyer 36. 134. 5 H. 7. 11. 16 H. 7. 14; 21 H. 7. 22. 9 H. 6. 29. 11 H. 4. 73.

Action of the Case.

In like manner it is of an authority given by one man to another, if he to whom it is given, exceed and abuse it, as I give one leave to enter into my house or close, and he break the House, or cut down Trees, or I give one power to take one, and he take two of my Horses, or I give one power to ride my Horse to Dover, and he ride him further; in these, and such like case, he is a Trespasser onely in the excess. And if there be violence, or colour of violence in the Act, it is punishable by this Action. But if the injury be rather in matter of Fraud, it is punishable by an Action of the Case, *Broo. Tresp. 327. 295. 71.* And in all these and such like cases before set forth, the Action may be avoided by setting forth the matter in a special Plea.

By inevitable necessity or accident.

If one do me a Trespass against his will; as if his Cattel come unawares into my ground, yet I may have this Action against him; and yet if my Dog of his own accord without any provocation of mine, kill or chase a mans Cattel, I shall not be charged with this, unless it be sheep, and the Dog have been used to chase and kill them, and I have had notice of it. *Dyer 29.*

By Cattle in Corn.

If all the Neighbors in a Village take their Corn out of their Field, and one perverse fellow leave his Corn there of purpose, and the Neighbors put their Cattel in the Field, and the Cattel eat his Corn, he may not have this Action for this. *Broo. Tresp. 352.*

By the fall of Lops.

If a man lop a Tree, and some of the lops by chance, and against his will, that doth lop, fall into my ground, or on my hedg, and he fetch it out again presently; yet in this case, and for this I may have this Action for one and other: But if there be an inevitable necessity, or it fall out by the Act of God onely, or by a strange wind, or the like, no Action will lie for this, *Broo. Tresp. 310. 10 Ed. 4. 2. 10 Ed. 4. 6, 37.*

To catch a bir in passing on the way.

If one have a way through my ground where no inclosure is, and he drive his Cattel there, or through the Corn field, where the way is, and they catch a bir as they go against the drivers will, being as careful as he can, no Action will lie for this: But if the driver bait, or keep the Cattle there, I may have this Action against him, or the owner of the Cattle, *Broo. Tresp. 321. 351.*

To part Cattle.

If my Cattle be with another bodies so together that I cannot part them, and I drive them to a convenient place to shift and part them: No Action will lie against me for this, *Broo. Tresp. 354. 327.*

To Plough Land.

If a man in Earing be necessitated to turn his Plough upon my Land according to the fashion of the Countrey, and the Sallow hap thereby to turn up some of my Land, or the Cattle hap to catch a bit of my Grass or Corn on my Land, no Action will lie for this. *Broo. Tresp. 354. 327.*

Upon an Estate made by an Infant, Feme-covert, &c.

If an Infant make a Feoffment, and make a Letter of Attorney to give Livery of Seisin, and the Attorney do enter; he is a Trespasser, and for this the Infant may have this Action. But if the Infant give Livery of Seisin with his own hands, he cannot then have this Action against the Feoffee. So if he sell Goods, and the Vendee take them without his Delivery, by this he is a Trespasser: But if the Infant deliver the Goods with his own hand to the Vendee, *contra. Broo. Tresp. 16. 338. Perk. Sess. 16, 17.*

If an Infant, Feme-covert, or Man *per duress* grant a Rent charge out of his Land, and the Grantee by colour thereof distrain upon the Land, the Cattle of the Infant, Husband that hath in right of his Wife, or him that granted by *duress*; in all these cases this Action lieth against him that distraineth, 21 H. 7. 39. *Broo. Tresp. 151.*

To skour a Ditch.

If a man have an ancient Ditch in my ground, and he come at seasonable times to skour it, and doth skour it, keeping the old breadth, I cannot bring an Action against him for this. By Baron *Henden* at *Glocester* Assises, 17 Car.

Trespass, punishable in Hay.

If a man give me leave to set a Rick of Hay in his ground, till I can conveniently sell it, and after two years time he makes a Lease of the ground to another, and he turns

turns in his Cattle, and doth eat up my Hay; in this case I can have no Action against him, for by making the Lease, it seems the License is determined, *Hill. 17 Jac. B.R. Sir William Webe case*:

The Parson shall have a reasonable time to prepare and fetch his Tiche on my Land: But if he leave it on my Land any long time after my Corn is gone, and my Cattle spoil it, he hath no Remedy, 12 Ed. 4. 6. In Tiche.

If a new Gate be set up in the High-way, where none was before, and I being a Traveller break it to peeces; this is justifiable, and no Action will lie against me for this, Adjudged. *Cur. B.R. James and Haywoods case*. So for any other Nufance. In Gates. Nufance.

A man that will maintain this Action for any wrong done to, or in his Lands or Goods, must have a good Ownership and Property, or at the least a good and lawful Possession in the thing wherein the Trespass is supposed to be done: And for this, take these things. *Set. 18. The Ownership and Possession of the thing wherein the Trespass is done.*

1. A man may gain a Property into Goods, two ways. First, Either by Act of the Party, as by Gift, Sale, Legacy, and the like: Secondly, Or by Act of Law, as by Waiving, Straying, Shipwrack, Forfeiture, Executorship, Administration, Trespass, and Recovery of damage, Sealing and open Sale, by Tenure, Custom, as Herriot, and the like. *Justice Dunderidge, 2 part. f. 72, &c.*

2. A Lessee for years after his Lease is ended, may have this Action for a Trespass done upon the Land before the Lease was ended. *Plow. 431. Broo. 456.*

3. Any man that hath but a bare possession of, and no Title to Land, may have this Action against him that hath no right. *Plow. 431. 546. Broo. 456. Co. 5. 85.*

4. No man can have this Action for a Trespass done upon his Land, until he be possessed of the same by Entry: And therefore if Land descend to an Heir, or a Lease to begin at *Michaelmas*, or one hath a title of Entry for a Condition broken, or the like, and a Trespass is done upon the Land before the Entry of the Heir in the first, the Lessee in the second, or him that hath title to enter in the third case; in these cases the party grieved, may not have this Action. *H. 7. 22. Plow. 142. 12 Ed. 4. 37.*

5. If Lessee *par. ante* vis or Lessee for years keep himself in possession of the Land after the Term and Estate ended, the party that is to have the Land, cannot maintain this Action till he have made his actual Entry, and then onely for the Trespass done after, and not before his Entry. *Plow. 133. 136. Broo. Tres. 363. Co. 1. 57. H. 7. 22.*

6. If an Office finde Land in a Subjects hands to Elsehear, he that is in possession of the Land, cannot afterwards bring this Action for Trespass done in the Land. *Plow. 489. 19 Ed. 4. 2.*

7. If one give or sell me Goods, and before I get the possession of them, another man doth take them away or hurt them; in this case I may have this Action for my Remedy. *Broo. Tres. 303.*

8. If I borrow a Horse to ride a journey, and the owner or a stranger take away the Horse from me before I have done my journey, it seems I may have this Action; and albeit I abuse him, or ride him out of the way, yet he cannot take him from me till I have done my journey. *Lives case.*

9. A man may have this Action for a Trespass done in Goods, wherein he hath onely a possession and no property: And therefore it is no good Plea to this Action, that the goods be the goods of a stranger, and not of the Plaintiff. *4 Ed. 4. 75. 3 H. 6. 32.*

If a man cut or carry away my Trees, I may have this Action against him: And for this, take these things. *By cutting off, or taking away Trees.*

1. If a Tenant in Tail sell his Trees growing upon the Land, and die before they be cut, in this case the Vendee may not cut and take them away, but he will be liable to this Action, by the Heir, or by him in Reversion. But otherwise it is of Trees sold by Tenant in Fee-simple. *Perk. Set. 58, 59.*

2. If I grant to another Estovers in my Wood, by the view and delivery of the Bailly, and he take them without leave of the Bailly: Or if he have power to take in my Wood to any use without asking, and he take more then he doth put to that use, I may have this Action. *Broo. Tres. 327.* And yet if he cut it before he do use it, to the end it may be more reasonable and fit for use, no Action will lie for this, *10 Ed. 4. 3. Brownl. 1 part. 44.*

3. If

3. If I be a Lessee for life or years of Land, and a stranger cut down Timber, or do any other waste, I may bring this Action against him, and shall recover treble damages, because I must be charged so much in the Action of Waste against me.

4. If one sell me all his Trees in such a Close, and after he cut them down himself, and then I fetch them away, no Action will lie for this, *Dyer* 305. So if after this sale he selleth his Close to another, and I do then cut and carry away the Trees, I may justifie it. *Broo. Tresp.* 400.

5. If I sell a Wood, except forty Oaks, to be taken away by me in two years, and I do not cut them within the time, and then he do cut all, and do not leave me forty Oaks; in this case I am without Remedy. *Broo. Tresp.* 30. 399.

Waste.

6. If my Lessee for life or years do a Waste in the Lands leased, I may not have this Action, but must have Remedy by an Action of Waste. And yet if I make a Lease for life or years of a Close, excepting the Trees, and the Lessee or a stranger do Trespass in the Trees, Acorn or Fruit thereof, which in this case I am also to have; for this, this Action and not an Action of Waste lieth, *Co.* 5. *Sir Thomas Palmers* case. See more in *Property*, cap 17.

By cutting,
taking away
of Corn or
Grais.
Executor.

If a man cut or carry away my Emblements, viz. my Corn or Grafs, I may have this Action against him. But for the further knowledge hereof, take these things.

Husband and
Wife.

1. If a Tenant in Fee-simple, Fee-tail, for life, or at will, sow his Land, and die before he reap it, his Executor shall reap it: So where-ever an Estate dependeth on a life, If a Lease be made for life, the Remainder in Fee, and the Lessee for life make a Lease for years, the Lessee for years sow the Land, and after the Lessee for life die; in this case the Lessees Executor, not he in Remainder, shall have the Corn, *Co.* 5. 85. So if Tenant in Dower sow her Land and die, her Executor shall reap it. *20 H. 3. 1. Perk.* 512. But if she sow her Land, and then take a Husband, and he die before it be cut; in this case she, not her Husbonds Executor, shall have it. *Broo. Emblements* 16.

Co. 5. 116. *Co.* upon *Littl.* 55. And if the Lessor of a Tenant at will, determine the will himself after the Corn is sowed, the Tenant at will, not the Lessor, shall have the Corn, *Co.* upon *Littl.* 55. But if the Tenant at will, himself determine the will, *contra.* And if such a Tenant after he is discharged shall enter again, and then sow the Land; in this case the Lord, and not the Tenant, shall have it. *Co.* 5. 116. *Dyer* 173. And if any Tenant do onely ear and dung the Land, and it be not sowed before his death, he loseth the Corn. *Littl.* 68. *Co.* 5. 116. *Perk.* 512. 37 *H. 6. 25.* And albeit the Corn be cut, yet he that hath right to it shall have it.

2. If a Tenant for years in Certain, who knoweth the end of his Term, sow the Land, and his Term end before the Corn be ripe and cut; he that hath right to the Land, not the Tenant, shall have the Corn. *Littl.* 68. *Co.* upon it.

3. If a man under colour of a Lease, or other Conveyance, supposing him to be good, when he is not, doth sow the Land; not the owner nor his Executor, if he die, but he that hath right to the Land, if he shall enter, must have the Corn. *Law* case. 9 *Jan.* 1111. *1111.*

4. If two be Tenants in Common, and one die, and his Wife hold in Common, and sow the Land, and die; in this case, neither the other Tenant in Common, nor the Heir, but the Executor of the Woman, shall have the Corn, *Perk.* 513.

5. If a Parson die before the Corn is reaped, when the Glebe Land is sowed, and another Parson made; in this case, not the Successor, but the Executors or Administrators of the first Parson dead, shall have the Corn: But the Tithes accreving, during the Vacation, must go all to the Successor. 21 *H. 8. 30.* 34 *H. 6. 33.*

Property.
Executor.

6. If a Disseisor, or a Disseisor of a Disseisor, or a Feoffee, Donee or Lessee of the first or second Disseisor, sow the Land, and cut and carry away the Corn, or cut and carry away the Grafs or Trees; or gather and carry away the Fruits, Apples, Nuts, &c. or give or sell, either the one or the other; in these cases after the Regress of the Disseisor, the Property of it all is in him, and he may take it where ever he finde it; and if he die his Executor shall have it: And so it seems is the Law for Flax or Hemp, or any other Annual profit; and if it be gone he shall recover damages in Trespass. *Co. Inst.* 1. part 55. 11. 512. *Dyer* 31. *Perk.* 519. *Co.* 5. 85.

Husband and
Wife.

7. If one be seised of Land in the right of his Wife, in fee or for life, and he sow the Land,

Land, or he make a Lease for years, and the Lessee sow the Land, and after before the end of the Term the Husband or Wife die, his Executors, or the Lessee, or his Executors, shall have the Emblements, 7 H. 4. 17. So if a Joint estate be made to the Husband and Wife, and the Husband sow the Land and die, his Executor shall have it, Co. 1. part 55: Dyer 316. If Land be leased to a Husband and Wife at will and after they be divorced *Causa pracontractus*, and the Land be sowed before the Divorce; in this case the Husband, not the Lord, shall have the Corn, Co. 5. 116. If the Wife of a Copie-holder that holdeth *Durante viduitate*, according to the custom sow the Land, or make a Lease, and the Lessee sow the Land, and before it be cut she take a Husband; in this case the Lord or his Executors, not the Husband shall have the Corn, Co. 5. 116.

Executors.

8. If one seised of Land in Fee have issue a daughter, and die, his Wife being privily with childe of a son, and the daughter sowe it, and after the son is born, the daughter in this case shall reap it, though the son enter before the Corn be ripe, Co. 1. 55.

9. If a Tenant by Statute sow the Land, and after some extraordinary increase happeneth that he is satisfied; in this case the Tenant shall notwithstanding reap it, Co. 1. part 55.

10. If the estate of the Tenant, though incertain, be upon a defeasible Title by a right paramount, or if the estate of the Tenant determine by his Act, he that hath right or entrench, not the Tenant, shall have the Corn. And therefore if one enter upon Land on a Condition in Deed, or a Condition in Law, as if Lessee for life or years of Land, alien it in Fee, or do waste; or if a Feoffment or Lease be made on Condition, and the Condition be broken: or the Lord of a Copy-holder enter for a Forfeiture on his Tenant. So where one commits Felony and forfeit, and an entry is made for the Common-wealth; in all these cases the Feoffor, Lessor, Lord, or Keepers of the Liberties shall have all the Emblements that are growing, and not cut upon the Land at the time of his Entry upon, or recovery of the Land, But if it be cut and so severed from the Land before the entry, *contra*. So where ever one doth recover Land in an Action, he shall have the Corn upon it, Co. 5. 115. 4. 31. *Park, seil: 315. Co. upon Lis: 55. 5 H. 7: 16. See more in Property, ch. 17.* And in all or most of these Cases where any man doth cut or take away the Emblements that doth belong to me; I may have this remedie by this Action of Trespass. *Brownl. 1. part 221.*

This Action wil lie against a Sheriff his Bailiffs or under-Officers, or any other such like Officers. But for the further opening of this point, take these cases following.

Against an Officer.

1. If a Sheriff have a Writ against the Lands or Goods of another man, and he mistake and execute it upon my Lands or Goods; as if he take my Horse under my servant in a sute against him; or repleive my Goods for another mans, I may have this Action against him. And it will not excuse the Officer in this case to say, that the Plaintiff in the suite, or any other man did affirm, that the Lands or Goods were the Lands or Goods of the Defendant, *Dyer 295. Kelw. 129 119. D. & St. 149: 150. Brownl. 1 part 210. 226.*

Seil. 19.
For mistaking the Goods.

2. If another mans Lands or Goods be leased or pledged to me, and the Sheriff take them as his Lands or Goods, I may have this Action against the Sheriff, *Brownl. Trespass 264.*

3. If the Sheriff or any of his Officers having Proces against my Land or Goods, exceed his Authority, as upon a common Proces, *Capias ad respondendum, Lasisat*, or the like Proces, or a *Capias ad Satisfaciendum, Fieri facias*, or the like Execution against me; if in the Executing of these Writs he brake open my House, Doors or Chests, which is more then he can justifie, for he may not (as it seems) in this case do more then come in when the Door is open, and cannot pull the latch or open it; in these cases I may have this Action against him, *Co. 5. 93. 8 Ed. 4. 4: 18. Ed. 4.*

For breaking my House.

41. *Hob. Rep. pl. 62. Brownlow. 1 part 117.*

4. If upon such a Writ, Proces or VVarrant against my Lands or Goods, in Executing whereof or otherwise, where an Officer may break my house, as upon an *Habere facias Seisnam*, or *Possessionem*, or *Capias ut legatum*, or to apprehend Felons or Adulterers, or to search for stolen Goods, or upon a *Capias ad Satisfaciendum*, to take another man in my house; in these and such like cases, if he break open my

Where one may break a House.

my house or Doors before he hath first demanded the opening of the Doors, I may have this Action against him, 1 H. 7. 6. 13 Ed. 4. 9. Co. 3. 90. 68. *Bro. Trespass* 248. *Brownl. 1 part. 59. 221.*

5. If in all these and such like cases the Officer do but his duty, no action will lie against him; & therefore if the Officers of the County Court within their Jurisdiction, attach meys Goods by Warrant of the Court, and take them with them, or leave them with the owners, or others in their places do according to their duties, they may justify it, 9 H. 7. 6.

If a Sheriff execute a writ the returne day it is a good Execution. *Goldsb. 142. pl. 56. See Distress.* If a writ come to him to doe Execution of the goods of *I S* and he make Execution of the goods of *I N*, he is a Trespassor, and albeit the Plaintiff himself did direct him to these goods; this will not helpe him unless there be practice between him and *I N*. and so in case of Replevin upon the goods of a wrong man. Also the party grieved may have this action against him that did misguide him, *Brownl. 1 part. 211.* So if a Bayliff execute Procees made to him by the Steward of a Court where the Court had not Jurisdiction. *Brownl. 1 part. 210.*

6. If one inform a Constable that *A* hath robbed *B*, and he doth thereupon enter into the house of *A* to search for the Goods stolen, and in truth no Robbery is done; in this case the Lord-Keeper held, That this Action will lie against the Constable; but the two chief Justices held the contrary, *Hill. 3 Jac. in the Star Chamber. See Authoritie. Licence.*

7. If a man have taken my Goods, and impounded them in his own Close, and a Replevin come, and the owner of the Ground resist it, if then the Officer break the Close to do it, this is not Actionable, 21 H. 7. 27. 4 Ed. 4. 35.

8. If an Officer do any such Act as belongs to his Office without the precinct of his command, as a Constable without his Parish, regularly he is by this a Trespassor, and this is actionable; and yet if an Officer attach my Goods within his Jurisdiction, and I rescue them, and carry them without his precinct; in this case it seems upon a fresh pursuit, I may go after them, and take them again, *Bro. Trespass. 23.*

If one distrain my Cattel or Goods without any cause or colour, or for a Debt on a Bond, or Fine, or a Amercement in an Court-Lett that is not legally set, or any such like cause that is not good or Just. Or if a man having distrained my Goods, will not tell me requiring it, and offering to give satisfaction, for what cause he distrained, or if having cause to distrain, he do distrain beasts not distrainable, as beasts of the Plough, or sheep of the Fold. Or if having distrained beasts distrainable, he after abuse them, as if being a Horse or Ox he work it, or being unruly he fetter it; or tie it to the Pound, so as it be thereby hurt, or if he put the distress in an unknown place that I cannot tell how to relieve it. Or if he take them out of one County and put them in a pound in another County; or if he distrain them in the high-way, or a place not distrainable; in all these cases I may have this Action, Co. 8. 147. D. & St. 112. F. N. B. 47, 48. And yet it is said, if a Lord distrain upon his very Tenant without any just cause, that he may not have this Action for this wrong. And it is said, if the Lord distrain for Rent, and the Tenant offer the Rent, that no Action but Detinue lieth. *Bro. Trespass 29. H. 7. 11. Bro. 344. 220.* If my servant take a distress for me, and the owner of the Cattel desire me to deliver them, and if he pay not the money by a day, that he shall have them again; in this case it is said, if he pay not the monie, that my man may take them again, *Bro. Trespass 29.* If I be about to distrain for a Rent, and the Tenant seeing me coming to distrain, drive his Cattel into another mans ground, not held of me, and I distrain them there, no Action will lie against me for this, *Old Entries. 570.* If a Distress be taken from me after I have distrained, I cannot for this have this Action, But I may have a Rescous, *M. 7 Jac. Co. B. Brownl. 1 part. 12. 221. 224.* There are divers Trespasses which by certain Statutes are to be further punished, then by single Damage. As

1. For breaking cutting or destroying the Head or Damme of any Poole, Mote, Stews, or Pits wherein are Fish, and for fishing in any such Place against the owners will, a man is to be imprisoned 3 months, and then put to sureties for his good behaviour 7 yeares, or else to continue in prison till he so doe; and he is to pay to the partie grieved treble damages.

2 For

About a Distress.

5. Several Trespasses for which the Trespassor is to be further punished then to give single damage to the partie wronged. Destroying Fish-ponds taking away Fish.

2. For breaking into, and hunting in any Park, or inclosed ground to hunt and kill the Deer there, or Coney there, or to take away any Hawk, or any Hawk Egges out of any mans Woods, a man is to be punished in the same manner and measure. 5 *Eliz.* 21.

Robbing Parks of Deer and Coney.

3. If it be for killing Deer, he is to be bound with two good Sureties, or in stead of treble damages, the party grieved may recover of him ten pound for his satisfaction. And when he is satisfied for the wrong, he may, if he will, release him of the Good-behavior. 7 *Jac.* 13. 3 *Jac.* 13.

Taking Hawks and Hawks Eggs.

4. For wilful cutting of the head, or dam of any Pool, Mote, or Stew, or the head, or pipe of any Conduit, or burning of any Cart or Wain load of Coals, or other Goods, or burning of any heaps of Wood prepared for Coals, Billet, or Talwood. And for cutting out the Tongue of any tame Beasts; and for cutting of a mans Ear (except it be by an affray, &c.) And for barking of a mans Fruit-trees. For any of these offences, the offender must pay to the party wronged treble damages for his amends, and pay ten pound penalty to the Lord Protector. 37 *H.* 8. 6.

5. For cutting and taking away Corn growing, robbing an Orchard or Garden, digging up or taking away any Fruit-trees, breaking any Hedges, Pales, or other Fences, cutting or spoiling any Woods, or Under-woods standing and growing, or the like, the offender is (and such as receive the things, are) to give such amends to the party wronged, as any Justice of Peace shall set down: And if he do not perform the Order of the Justice of Peace; or the Justice think him unable to make amends by money, he is to be whipped. 43 *Eliz.* 7.

There are divers things to be pleaded in avoidance of this Action: There is the general Plea, which is Not guilty, and there are divers special Pleas; and the special Pleas are some of them of one nature, and some of another, for some of them found in a way of justification, when the matter doth contain a good Reason to maintain the lawfulness of that he did, for which he is now questioned: Some of them found in a way of excuse onely, and will free a man from any punishment for the thing so done at that time: And some of them found in acquittal of a man altogether, and contain so much, that he is not guilty at all: And some of them found in discharge of him of the Action whereto he was once chargeable and liable. And the Defendant must be very careful, for if he have matter of justification or excuse to plead, he must be sure to plead it specially; for in those cases if he plead Not guilty; it will be found against him, *Co.* 5. 85. upon *Littl.* 282. 283. *Brownl.* 1 part. 224.

Self. 20.
6. What shall be said to be a good Plea in Bar, and avoidance of this Action, or not.

Special Pleas by way of Justification, are such as set forth some special thing, by which he doth justify the thing he doth with another mans Lands or Goods; as that he did it by authority. And this may be given either by the Law, or by the party: Wherein to make it good, there must be two things. First, A good Authority: Secondly, It must be well pursued.

Self. 21.
Matter of Justification.

In Trespass for Entry into Land, it is a good Plea to make a good Title to the Land or Common in it, and so for Goods. *N. B. E. in toto.* *O. B. E.* 566, 567, 565, 590, 580.

It is a good Plea to a Trespass for an Assault and Battery, to say that the Plaintiff began, &c. *N. B. of Entries* 644. And to this Action for Imprisonment, Assault or Battery, That he did it by necessity, in an Arrest to enforce obedience, or the like, *Old Book of Entries*, 599. 598. 560. It is a good Plea in Trespass for taking a Horse, to say, he borrowed it for a time, or a purpose which is not yet out or done. *Broo. Trespass* 337. In Trespass for cutting Trees, it is a good Plea, That the Plaintiff hired him to do it, *Broo. Trespass* 383. In Trespass for taking of Goods, it is a good Plea to say, That the Plaintiff left them in the Defendants house, and after there was an Agreement between them, that he should keep them till the Plaintiff had paid him ten pound, which he hath not paid him, 21 *H.* 7. 13. But it is no good Plea to say, That the Goods were the Goods of a stranger, and not the Goods of the Plaintiff, 4 *Ed.* 4. 75. 3 *H.* 6. 32. In Trespass for Entry into a House, it is a good Plea to say, He entered to apprehend a Felon, and took his Goods that were there, *Old Book of Entries* 580. In Trespass for taking of Goods, it is a good Plea to say, He did it by Warrant, as Bailiff of a Court-Leet for a Forfeiture, &c. *N. B. of Entries*, 665.

For Assault.

Rrrrr

or

or be distrained for rent services, *Old B. of entries* 604. 605. 603 That he distrained for Subsidie, Fifteens or the like, *Old B. of entries* 601. So that he took them by vertue of any Procees out of a Court enabled with power to make out such Procees, *Old B. of entries*, 598. 599. 600. That he took the goods for Harior, Waif, Estray, Wreck, or the like. *Old B. of entries*, in voce 584. Or that he distrained them for pownage, or the like; or for levying of expences for Knights of the Parliament, or the like, *Old B. of entries* 599. See *Authoris.*

His Freehold.

In Trespass for entry into Land, it is a good plea to say, That it was his Freehold or the Freehold of another from whom he had Authority to do what he did. *Br. ch.* 47. 23. *New B. of entries*, 645. 587. So if it be for putting in of Cattel; it is a good Plea to shew he hath right of Common there, and under colour thereof he put in his Cattel, *Bro. Tresp.* 30.

If one have Com upon anothers Land, and he take it, and the Owner of the Land sue him; he must justifie, and may not plead Not guilty, *Co.* 5. 87.

In Trespass for taking Cattel; it is a good bar to set forth a good sale to the Defendant, and that he thereby took them *Bro. Tresp.* 328. For cutting Trees, it is a good plea to say that the Plaintiff gave them to the Defendant, *Bro. Tresp.* 42.

There are divers other Pleas that enure by way of bar, as a Judgement had and Damages recovered against the defendant for the same Trespass, in another Action of the same or another nature, *Fitz. Corona.* 110. And if an Action be brought against a man for a Trespass by assault and battery done by him, it is a good plea to say it was done by him and another, and the plaintiff hath recovered Damages of the other. But if the beasts of A and B come together into my Ground; in this case I may recover severally, and this plea will not hold. *Hill.* 18 Jac. B. R. *Hunnys* Case.

Arbitrement.
Accord.

Arbitrement may be also pleaded in bar of this Action.

Also Accord with satisfaction may be pleaded in bar of this Action. For the clearing whereof take these things.

1. The thing given and received must be valuable and satisfactory, a charge to the giver, and a benefit to the receiver. And therefore if one plead, that wheras there were divers Trespasses committed by each of them, one upon another, and by mediation of friends they agreed one should go quit against the other, this is no plea, neither will it bar in the Suit. So in an entry on the Statute of *Rich.* That the Plaintiff shall reenter and have his Land in peace, and that he shall deliver in the Writings that he hath that do concern the Land, *Dyer* 356. 16 Ed. 4. 8. 9 Ed. 4. 19. *Fitz. Accord.* 3. 4. So if it be in Trespass for Goods taken, and the Defendant plead an Accord made that he should have his goods again, 9 Ed. 4. 19. 30 H. 6. 4. So if it be that the Defendant should do his endeavor to make the Plaintiff and another (who was at odds with him) agreed, or (as it seems) to shew that he did make an Accord between him and the stranger, unless he shew withall that he is at some charge to do it. And yet if the Defendant give the Plaintiff a pottle of Wine in satisfaction of the Trespass, and he agree to it, this is a good accord and a bar in the Action, *Fitz. Accord.* 1. 19, H. 6. 29. *Fitz. bar* 26.

2. It must be perfectly and completely finished and Executed, and satisfaction made according to the agreement before any Action brought: and therefore if the Defendant plead an Accord that he must make Windows, and pay 10 l. at a day to come, and he set forth that he hath made the Windows, but he hath not set forth he hath paid the 10 l. this is no bar, 17 Ed. 4. 2. 6 H. 7. 10. In Trespass the Defendant pleaded an Accord to pay 6 d. to the Plaintiff, and to give him counsel when he shall require it; this is no good Plea, 17 Ed. 4. 2. *Old N. B.* f. 122. Tender of money without payment is no good plea in bar of this Action.

3. It must be in the life-time of him that did the wrong; and therefore if the Accord be between the parties, and be executed by the Heir or Executor of the Trespassor, this is no bar where this Action may lie against the Executor, *Dyer* 356.

4. The Party to whom the wrong is done must accept the amends according to the agreement, for it seems notwithstanding the Accord, he may refuse it; and tender of amends without an acceptance thereof, is no plea to this Action, but being accepted

accepted, is. For as wrongs and injuries cause discord and variance, and beget Suits; so by an Accord between the parties this may be recompenced, and this recompence begetteth Peace, *Co. 9. 79. 5 Ed. 4. 7. Dyer 356.*

5. If divers do a Trespafs, and one make a good Accord, this will discharge and be a bar to all the rest, *Co. 9. 79.*

6. If a stranger, as one of the Parents or Friends of the Trespaffor, give the amends in recompence; it seems this is as good as if the party himself did give it. In Detinue for a Chest and Charters therein, by the delivery of the Plaintiff, the Defendant plead an Accord, that he should keep the Chest untill the Plaintiff come to *Bristol*; and there it shall be opened, and if any Deeds be there that do concern a House of which the Plaintiff had enfeoffed the Defendant, that he shall keep it still, and saith that he never came to *Bristol*; and it was awarded a good concord. But *quere Fitz. Bar 166. Accord. 2. 7 Ed. 4. 23.*

7. If one be Amerced for a private Nuisance or Trespafs done to the Lord in his Leet, and he receive the Amercement, though it be Extortion, and he could not have recovered it; yet it seems if he after bring an Action for this Nuisance, this acceptance of the Amercement may be pleaded in bar. *Fitz. Bar. 187. 221. Broo. Tresp. 195. 61. 66.*

8. In a writ of false imprisonment, the Defendant saith it was agreed between the Plaintiff and him that he should bring the Defendant to such a place which is the same imprisonment, and it seems this was no good Plea. *Fitz. Bar. 14. Brownlow's 1 part. 133. 2 part 130. 131. 132.*

That the Plaintiff hath a Replevin depending in another Court for the same Trespafs, is a good Plea, *Broo. Tresp. 357.* But it is not a good Plea that he hath been indicted for the same thing, and paid a Fine to the King. And yet that he hath been Indicted, Arraigned and Acquitted, is said to be a good Plea, *sed quere.* So, that he hath been (being a Tenant) Amerced for the Trespafs at the Lords Court already, and paid the Amercement, is said to be a good Plea, *Co. 4. 43. 9. H. 6: 50. Broo. Tresp. 405. 17 Ed. 4. 8.* But I doubt this case.

If it be for Cattel Damage-feasant in his Ground, it is a good Plea to say the Plaintiff did drive the Cattel into his ground, *Broo. Tresp. 148. Kelw. 30.*

A License may be pleaded in avoidance of this Action, as if it be for an entry into House or Lands, taking of Goods or the like, he may plead a License so to do from the Owner, as that he invited me into his house, gave me leave to go through his Close, &c. *Broo. Tresp. 533. Co. upon Lis. 368.* But then there must be these things in the case

Matter of excuse and discharge.
Sect. 22.
License.

1. A good License, for if a Tenant at will shall License me to cut down Trees upon the Land, or a Shepherd that hath Sheep to keep shall License me to kill them; this will not excuse me in a suit for this, *Broo. Tresp. 295.*

2. This License must be pursued. 11 *H. 7. 21. Old B. entries. 596. 597. 505. Broo. Tresp. 194. 19 H. 6. 65.*

To an Action for a Battery, it is a good plea to say that he did it of his own wrong, that is, that the Plaintiff did begin the Affray first, &c. 34 *H. 6. 16. 41. Aff. pl. 21. Books of Entries in toto.*

If the Action be for suffering a mans Goods to lie in his house Damage feasant, it is a good excuse for the Defendant to say that he was Tenant to a Lessee for life, that lived far from him, that he could not hear of his death in a long time after he was dead, and therefore the Goods were not removed so quickly. In Trespafs for a hurt, It is a good Plea to say that the Plaintiff and Defendant agreed to run at Tilt, Barriers, or to play at Backsword, Foot-ball or the like, and by that means the hurt came, *Fitz. Bar. 244.* In Trespafs for Damage by Cattel, it is a good Plea to say that the mounds of the close adjacent were the Plaintiffs, and for lack of repair thereof they came into the Plaintiffs Ground, *Old N. B. 561. 562. 563.*

But if the beasts were turned in, the Plaintiff may shew it by his reply, *Old N. B. 503. 563.* It is a good plea to shew a pardon by Act of Parliament, *Old B. Entries 396.* In an Action for Toll, it is a good plea to say, time out of Mind such men have

been discharged and ought to be discharged of Toll in Fairs or for passages, &c. *Old B. Entries* 605.

In trespass for beating a servant, it is a good Plea that he was not his servant at that time, *Old B. Entries* 605. For entering into a Close, that the Defendant being Lessee for life, made a Feoffment in Fee, and so a Forfeiture or an Escheat. *Old B. Entries* 577. 581. That the Goods were pledged to him, or him that delivered them to him for money not yet paid, *Old B. Entries* 598. For Fishing it is a good Plea to say he hath a fishing there, and under colour thereof he doth fish, *Old B. Entries* 596.

The Defendant in this Action hath many Pleas to plead in avoidance of this Action by way of excuse. As to an Action of Trespass for the Defendants Cattel breaking into the Plaintiffs Close, it is a good Plea to say that they came in through the mounds of the Plaintiff, for want of Sufficient repair, For further knowledge of which point, these things are to be known,

1. This is not a good Plea for any but for him that hath some interest into the adjoining Ground, as having Title of Common there, or being Lessee for years, or at will of it, having his Cattel there at Tack, or having leave to put in his Cattel there; and therefore this will not bar the Action of the case of a stranger where his Cattel had nothing to do in the next Ground towards which the Inclosure was so bad.

2. Neither is this any good Plea for him that hath some interest in the Ground adjoining, where he did put in his Cattel first of all into the Plaintiffs Ground, and not into his own, for the Cattel must goe in of themselves.

3. It is no Plea that there is no good Inclosure, unless he say that the Owner of the Ground time out of mind did use to inclose it.

4. It is sufficient proof to maintain this Plea, that the mounds were bad at the time, though it cannot be proved that the Cattel went in through those bad mounds, for that shall be presumed unless the contrary appear, *Dyer* 365. *Bro. Tresp.* 192. 255. 148. 145. 136. 345. In Trespass for breaking pales, that they were set up in his Chase, and kept his Deer from feeding, &c. *Old B. Entries* 594. If a man that ought to make the Hedge between him and me, go over it and break it down, so as my Cattel get in his Ground, I may plead this in avoidance of his Action. *Juss. Dodridge. Trin.* 18. *Jac. B. R.* If the Action be for taking my Cattel, I may justify that the Ground was a Free-hold, and the Cattel were in my Ground Damage-feasant, and therefore that I Distrained them, *Old N. B.* 570. 569. 571. In an Action for cutting Timber that I was seised of the place and Timber, and sold the Timber to the Defendant, and he took it. *Old B. Entries* 606. For taking Goods it is a good Plea to say that the Defendant being possessed thereof, delivered them to a stranger from whom the Plaintiff took them, and the Defendant took them from the Plaintiff, *Old B. Entries* 573: or to say that he did lawfully Distrain them for Rent or the like, *Old N. B. Entries* 608.

That I am Parson of A and a Parishoner set out his Tithes, and the Plaintiff took them away, and I took them from him, this is justifiable, *Old B. Entries* 374. To say that the Plaintiff gave him the Goods, *Old B. Entries* 376. or to say he took them as Waif, Estray, or as Wreck for the Lord, &c. *Old B. Entries* 612. 611. 577. Sale in Market overt to the Defendant by the Plaintiff or a stranger *Old B. Entries* 606. 605. A Release of the Party Trespased to the Trespasor, is a discharge in Law, and may be pleaded in bar of this Action.

Release.

Self. 23.
Matter of discharge.
Release of one.

If divers do a Trespass together, and the party to whom it is done release it by generall or speciall words to one of them, this is a discharge of all the Trespasors, and every one of them may plead it in bar if he can get and shew it, for they are but one Trespasor, and each of them is answerable for the whole fact, but a release is a good satisfaction in Law as a satisfaction in Deed: *Hob. Rep.* pl. 96. But see more of this in Release chap. 19. in my Book of Common Assurance. *Old B. of Entries* 602. *Authoritie.* Licence. Tender of amends, that is, offer of a recompence for a Trespass done, is a good plea in this Action. But therein these things are to be done.

Amends.

1 That if one distrain my Beasts Damage-feasant, and I offer him a competent recompence before the Beasts be taken, or before they be Impounded, this is a good bar, and so may be pleaded in the Action of Trespass: but such a tender after the Impounding of the Beasts is not so. *Co* 5. 76. 2 And

2. And yet in all Actions *Quare Claufum fregit*, if the Defendant do tender fufficient amends before the Action brought, and in his Plea to the Action difclaim to make any Title or claim to the land, and the Trespafs be by negligence or involuntary, by this (being proved) the Plaintiff fhall be barr'd, *Stat. 21. Jac. chap. 16.* And it was the opinion of two Juftices, *Popham & Williams, Trin. 3. Jac. B.R.* that the common Law was fo before this Statute.

The Defendant in this Action may plead Not guilty in all thefe following cafes.

1. VVhen the thing fupposed to be done for matter of Fact, is not true.
2. VVhen the matter as it is, is not a Trespafs; but fome other offence, nor is this Action of Trespafs given for it, but fome other Action.

Self. 24.
Where one
may plead
Non guilty or
not, but he
muft plead
Specially.

3. VVhen the Lands or Goods is mine for which the Action is brought, not the Plaintiff. But in all other cafes the Defendant may not pleade Not guilty, but muft pleade Specially, and fhew the fpecial matter by way of excufe or juftification, as the cafe is. And therefore he muft pleade and juftifie Specially in all thefe following cafes; as where an Imprifonment or entry is given by authority of Law, or by authority from any party, as for an Imprifonment by the Statute of Trespaffors in Parks, putting a man off his ground, arrefting a man as Conftable to keep the peace, thrufting a man out of a Church that doth trouble the Congregation in Service: That he parted an affray, and kept the quarreller apart, during the heat. *Old B. Entries. 555. N. B. of Entries; 643.* For an Affault or Battery *de fon affault de mefne*, in defence of himfelf or his. For a Trespafs by entry into Land, that it is his own Free-hold, or anothers Freehold, and he did it by VVarrant from him, *N. B. Entries in toto. Old B. Entries in toto.* That they entred in their perambulation. *N. B. Entries 637. 558.* That the Cattell came into his Clofe by the default of the Plaintiffs clofing, *Co. upon Lit. 282.* That it is a common High-way, *Old B. Entries 559.* That he entred to amend his gutter leading to his houfe, as of ancient time they had been ufed to doe. *Old B. Entries 561.*

Imprifon-
ment,

For Entry into a houfe that it was a common Inne, &c. *Old B. of Entries 549.* So if the Defendant juftifie by reason of a Rent-charge, he muft plead it efpecially, and cannot juftifie it upon a Not-guilty, *Old B. Entries 549.* So if one put in his Cattell by agreement with the Plaintiff *Idem.* And yet it feems if he be to juftifie by reason of a Title to the Land, he may plead not guilty, and give the fpecial matter in Evidence, as in *Detinue, Non Detinet*, when the goods are the Defendants, *12 H. 6. 33. Co. upon Lit 283:* For Entry into a houfe and taking money away; That the Plaintiff owed him the money, and he went into his houfe to receive it, being invited by the Plaintiff, *Old B. of Entries 561.* And if the Action be for taking goods, and the Defendant juftifie the taking, as a Harriot, VVaif, Eftay or VVreck, *N. B. Entries, 666.* Or that the Plaintiff took away the Defendants Cattell, and he entred into the Clofe where they were, and took them again, *Old B. Entries. 562. 561. 612. 611.* That he took the Cattell damage feafant in his ground, *Old N. B. 571.* Or for an Amercement in a Leet, or the like, *Old B. Entries, 450:* That the goods were the goods of *IS* delivered to the Plaintiff to keep, and *IS* commanded the Defendant to take them, *Old B. Entries, 557. 556.* Or excufe it that the Plaintiff delivered them to him, *Old B. of Entries. 556.* That the Plaintiff was in Debt to the Defendant, and gave him the goods in fatisfaction of his Debt, *Old B. Entries, 556, 557.* That he took them by a VVrit. *Old B. Entries 671.*

Entry into,
Land or a
Houfe.

The Action is for a Battery, and he juftifies, as Schoolmafter giving moderate correction, *Old N. B. 555.*

Battery.

In Trespafs for taking away goods, That a ftranger took them away, and gave them to *IS* and the right owner commanded the Defendant to take them as he did, *Old B. Entries 562.* In an Action of Trespafs for taking away a box of VVritings it is no good juftification to fay, there was but one writing in it, which was the Defendants, for a man cannot juftifie the breaking or taking away of anothers box to fetch or take out his own goods, *Fitz. Trespas 73.*

And in thefe cafes where the Defendant hath caufe of Excufe or Juftification, and fhould plead fpecially, he pleade the generall plea of Not guilty, it will upon the evidence (the cafe appearing fo) pafs againft him: for he may not give the
Special

speciall matter in Evidence. But this must be understood with two cautions,

1. That whensoever a man cannot have advantage of the speciall matter by way of pleading, there he shall take advantage of it in the Evidence. For example, the rule of Law is, that a man cannot justify in the killing or death of a man, and therefore in that case he shall be received to give the special matter in evidence, as that it was *de defendendo*, or in defence of his house in the night against thieves and robbers, or the like.

2. That in any Action upon the Case, Trespass, Battery, or of false imprisonment against any justice of peace, Major or Bayliff of City or Town corporate, Headborough, Portreve, Constable, Tythingman, Collector of subsidie or fifteen in any of the Courts at *Westminster*, or elsewhere, concerning any thing by any of them done by reason of any of their Offices aforesaid, and all other in their aid or assistance or by their commandment, &c. they may plead the generall issue, and give the speciall matter for their Excuse or justification in Evidence.

In an Action of Trespass or other suit against any person, for taking of any Distress or other Act doing, by force of the Commission of Sewers, the defendant in any such Action shall and may make Avowry, Conuſance, or Justification generally, that it was done by Authority of the Commission of Sewers for Lot or Tax assessed by that Commission, &c. And the Plaintiff shall reply he did it of his own wrong without such cause, and both these Acts were made for avoiding of prolixity and captiousness of pleading, tending to the great charge and danger of Officers and Ministers of Justice, &c. *Co. upon Lis.* 282. 183.

If any Action be brought against any person for doing any thing by vertue of an Ordinance of Parliament by the persons enabled to do it, or others by their command or in their aid, it must be laid where the fact was done, not elsewhere, and the Defendant may plead not guilty, and give in evidence the Ordinance of Parliament: and if it appear not to be done in the same Country where it is laid, the Jury shall finde for the Defendant; and if the verdict pass with the Defendant, or the Plaintiff be nonsuit, or suffer a discontinuance, the Judges shall give to the Defendant double costs, *Ord. 2. Dec. 1646.* If any Officer or their assistants be sued for any thing done by Authority of the Ordinance of 9 February 1647. he must be sued in the Country where it was done, he may plead the generall issue, and he shall recover double costs, *See the Ordinance.* The like remedy is given in divers other cases by divers other Ordinances of Parliament.

And now by the late Act made, 23 *Octob.* 1650. The Defendant may plead the generall issue of Not guilty, or some such like generall Plea, and give the speciall matter in evidence.

CHAP. CLXI.

Of Trial.



His word *Trial* seems to be taken two ways in our Law. 1. For the manner and order of Proceeding in the hearing and determining of matters in difference. 2. For the manner of finding out and discovery of a thing doubtful and in question; or to find out by due examination the truth of the point in issue between the parties, whereupon Judgment may be given, *Co. sup. Lit. 125.*

And as the Question between the parties is always twofold, so is the Trial thereof. 1. Trial, what. For it is either *quæstio Juris*, as upon general Customs of England, which is of it. Common-Law, or the sense of a Statute; and that is always tried by the Judges; either upon a Demurrer, special Verdict, or Exception: For, *Cuiuslibet in arte sua perito est credendum, & quod quisque novis in hoc se exerceat.* Or it is *quæstio Facti*: Or it is matter of Record, and then it is tried by the Record it self. And for this, as there are diverslity of matters and things to be tried, so there are divers manner of Trials, and the Trial is always to be according to the nature of the thing to be tried.

There are divers ways and means of Trial of matters of Fact, when they are pleaded and come in issue. *Sec. 1:*

1. By Peers: For the Trial of a Peer of the Realm, in Treason, is by Peers upon their Honor, without oath. *By Peers.*

2. By Judges: For, the Customs and Usages of Courts by the Judges of the same Court, if they be there pleaded; and the Nonage of an Infant and Maihime by Inspection, and the reasonableness of a Fine of an Offender, or upon Surrender of a Copihold-estate, the reasonableness of a Custom, and such like things, shall be tried by the Judges. *By the Judges: Inspection, what*

3. By Witnesses: And then it is usually done by two Witnesses. In Dower, and Appeal of the death of the Husband, if his death be in question, it shall be tried by proof of Witnesses before the Judges. So the proof of a Summons, or the Challenge of a Juror must be tried by proof of Witnesses; and divers other things must be tried by the examination of parties and Witnesses. And of this nature is the Trial by Wager of Law: which see in *Law.* *By Witnesses: Wager of Law: Examination.*

Also some Trials have been by Parliament; and sometimes by Battel, now out of use. Many things also are tried by Certificate; as the doing of Service by him that holdeth by Escuage in Scotland, was to be tried by the Kings Marshal of his Army, Bastardy, Excommunication, Entry into Religion, Marriage, and the like, were tried by the Certificate of the Ordinary: But these must now be tried the ordinary way, and so must Wills and Administrations. The Priviledges and Liberties of Courts of Record, Cities and Burroughs, must be tried by their Charters and Records. But the most common and frequent way of Trial of all matters of Fact, is by a Jury of twelve men; and sometimes greater, called a Grand Assise; or lesser, called a Petit Assise. For all these things, see at large, *Co. upon Lit. 125. 6. Plow. 230. Co. 9. 30. 31. 35. 40. & 11. 10. 44. Plow. 82. D. & S. 20. Crompt. Jur. 65, 66, &c. Stat. 28 Ed. 3. 13: Bro. ch 397. Co. 10. 104. Dyer 28. 304. F. N. B. 47. Stamf. lib. 3. ch. 7. Kelw 70. Finches ley, 403. Stat. 33 H. 8. ch. 20. 13. 28 H. 8. 13. 27 H. 8. 4. 35 H. 8. 2. Co. 7. 14. 11 Ed. 4. 3. 21 Ed. 4. 46. Co. 8. 62. Brownl. Rep. 1 par. 36.*

The Trial of all Criminal matters is by the Country; and the party accused hath this benefit to be tried by his neighbors, and cannot be denied it unless it be his own fault, as where he is mute, and will not put himself upon the Country; for then without further Trial, Judgment *de pain fort & dure* is passed by the Judges upon him. *Mute:*
Sec. Allion. Stamf. pl. Cor. 150.

For

Se^d. 2.

3 In what
place a Trial
by Jury shall
be.

For the places of Trial of matters, these things are to be known.

1. This is a general Rule ; That the Trial must be always in that County and place where the Jury may have the best knowledge of the matter. And therefore if the thing lie in the notice of two Counties, the Jury shall be made equally out of both Counties. But out of more then two Counties it cannot be made.

2. Questions of Title of Land (except it be in some special cases, and by special order of the Judges) are to be tried in the County where the Land doth lie. For the Law is, That all real and mixt Actions, as Waste, *Ejectione Firme*, and the like, must be brought in the County where the Land lieth. But for Debts, *Detinue*, Account, Actions of the Case, Trespass for Battery, and the like, they use to lay it in any County, and accordingly it may be tried.

3. The Judges of the Court wherein the Action is depending ; may order the Trial of all Actions to be where they please.

4. All Criminal matters are to be tried where the offence is done. See for this more, 49 *Aff.* p. 11. 21 *H.* 6. 3. 7 *R.* 2. 10. 26 *H.* 8. 12. 27 *H.* 8. 4. 28 *H.* 8. 15. 33 *H.* 8. 12. 33. 2 & 3 *Ed.* 6. 14. 14. 18 *Eliz.* 11. 7 *Jac.* 1. 21 *Jac.* 12. *Co.* upon *Lit.* 124. 7. 1. 9. 19. 9 *Ed.* 3 *f.* 1. c. 4.

5. If done beyond Sea, it may now be tried in *England*. See *Aff.* Sept. 20. 1649.

Issue, what.

This word hath divers' uses. It signifyeth sometimes the Children begotten between a man and his wife : Sometimes profits by Fines, Amerciaments, &c. Sometimes profit of Land ; and sometimes the Point of matter depending in Suir, whereupon the parties join and put their Cause to the Trial of the Judge or Jury, to make an end of the Suit. And this is sometimes upon a Point in Law, and then it is called a Demurrer ; and sometimes it is upon a matter in Fact, when a thing alleadged by one is denied by the other. And then also it is either general, as *Nor guilty*, or the like : Or special, when it is joined upon some special matter ; sometimes about matter of Record, sometimes about matter of Writing, and sometimes about matter of Fact, as about a Person, Time, Place, or the like. Sometimes also it is in the Affirmative ; sometimes in the Negative. And for all this, see *Finches* l^y, 397. *Co.* 11. 107. 13 *Ed.* 1. 39.

Enquest or In-
quest, what.
Jurors, what.

An Inquest is the Enquiry that is made by a Jury of men sworne to that purpose. And some do divide it into an Inquest of Jury, and Inquest of Office. The Jurors are the men that are sworne in this Jury, which sometimes are twelve, and sometimes twenty four ; who are sworne to deliver and find the Truth upon such Evidence as shall be given in to them touching the matter in question.

Se^d. 3.

4. The pro-
ceedings in
Civil causes.

And by such men are matters of Fact (for the most part) tried with us in *England*, in causes both Criminal and Civil. For in causes Civil, after each party hath said what they can one against another in pleading, if there arise any Doubt about any matter of Fact, it is to be referred to the discretion of twelve indifferent men to be impannelled by the Sheriff for the purpose ; and as they bring in their Verdict, so Judgment passeth. And this the Judge is to declare as the Law is, upon the matter of Fact : For the Judge saith, the Jury finds the Fact thus, then the Law is thus, and so we judge. For the Rule is, *Ad questionem Facti respondent Juratores, & ad questionem Legis respondent Judices.*

5. The pro-
ceedings in
Criminal
causes.

And for Criminal causes, the course in that is, That at the great and general Assises, and at the general Sessions of the Peace, where are many Causes, there is (amongst the rest) one Jury called the Grand Jury, that commonly is of twenty four of the most substantial men out of every Hundred within the County returned by the Sheriff, and they are to consider of all Bills of Indictment preferred to the Court : which they do either approve by writing these words upon them, [*A true Bill ;*] or disapprove, by writing upon them, [*We are ignorant.*] And such as they do approve, if they be proceeded upon, are then further to be referred to another Jury. They may also upon their own Presentment without Indictment charge any man with any crime ; and this will be of the force of an Indictment, and the same Proceeding in this as upon an Indictment : For the party accused may traverse the offence, and bring it to be tried by a Petit Jury. Other lesser matters there in these Courts are proceeded upon without a Jury. And there some things are challenged for

for insufficiencie, that must be tried by the Court: Some things are removed by *Certiorari* into a higher Court, and then there it must be tried. And that thing to which there is a Traverse put in, must be tried and ended by a Petit Jury: which (for the most part) in all Civil and Criminal causes; are but twelve. And these ought to be Free-men, not Vilains or Aliens; and lawful men, not outlawed men, and also men of worth and honesty.

What Jurors ought to be.

But if the Suit be between an Alien and Denizen, in this case the Jury must be the one half of Aliens, and the other half of Denizens, which is called Trial *medietate lingue*. The Disseisin of an Office in any Court, or raising a Record in any Court, by the Filizers and Attornies of the Court.

Medietate lingue, what.

And the Answer of such a Jury in any Criminal or Civil matter referred to them, is called their Verdict. See for all these things, *Finches ley* 399. *Westm.* 2: 38. *Stat.* 28 Ed 3: 9. 11. 26 Ed 3: 13. 11 H. 4: 9. 34 Ed 3: 8. 27 Ed. 1: 2. Co. 6: 47: 7. 14. upon *Lit.* 155. 271. with many others.

Verdict, what.

And these Jurors in Civil matters are to see that they be not corrupted. For if they be, they may be severely punished by a Writ called a *Decies tantum*, which is a Writ lying against a Juror in any Inquest, when he taketh money or other reward of the one party or the other, to say or give his Verdict upon his side. And this any man that will, may sue against the Juror in the *Lord Protector's* and his own name; and if it be found, he is to lose ten times so much as he took, to be divided between the *Lord Protector* and Informer. And so it lieth against an Embraceror, one that doth procure another to be so perjured. See for this, *Crompton Jur.* 308. 38 Ed 3: 13. 39 Ed 3: 8. *F.N.B.* 171. Co. 7: 14. And if the Jury give a false Verdict, and Judgment be given upon it, the party grieved may have a Writ of Attaint against them. But for this see my Second Part of the *Marrow of the Law*, f. 169, &c.

Decies tantum, what.

Attaint, what:

Vine is a neighbour-place near at hand, out of which the Jury must come for the Trial of the thing in question committed or done neer thereabouts. For every Trial must be out of that Town, Parish, Hamlet, or place known out of the Town, &c. within the Record within which the matter of Fact issuable is alleadged, which is most certain and neereft thereunto, the Inhabitants whereof may have the more certain knowledge of the Fact. As if the Fact be alleadged to be done in a certain street called *Kings-street* in the City of *Westminster* in the County of *Middlesex*; in this case the Vine cannot come out of the street, for it is neither Town, Parish, nor Hamlet nor place, out of the neighbourhood whereof a Jury may come by Law, nor shall it come out of *Westminster*, but out of the Parish of *S. Margaret*, because that is most certain. See for this, Co. upon *Lit.* 125. 158. *Hob. Rep.* f. 8, 9. *Stat.* 25 H. 8: chap. 16.

Self: 4. Vine, or Veneu what.

This word *Issues* is sometimes taken for the Forfeiture for not appearing upon a Distress infinite, which is the value of the Land from the Test of the Writ to the day of the Return: But it is also taken for the Forfeitures of those Jurors, that being duly summoned to appear, do make a default, which is more or less, as please the Judges of the Court. And these Issues being returned upon a Tenant in Fee-simple, in tail, or for life of another or himself, or in the right of his way; the Land he then hath will be chargeable for it, and any mans Cattel upon this Land may be distrained for it. See for this, Co. upon *Lit.* 104. 22 H. 6: 4. 35 H. 8: 6. 2 Ed 6: 22. 8 H. 6: 9. 27 Eliz. 6: 7. 1 Jac. 26. 4 H. 8: 7.

Issues, what.

Exemption of Juries, is a privilege that some men have to be exempted from the service in Juries. And this some have by dignity, as Barons, and such as are above them in degree; who are not to serve in ordinary Juries, but for Trial of a Peer, or the like. Others by a Writ, when they are very old, then they may have a Writ of Exemption or of Ease to be quit of all such publick service, as *De non ponedis in Assis*, and the like. Or it may be by the Kings Grant: Or it may be by Custom, as Tenants in ancient Domes. But which way soever this notwithstanding, in case of a Grand Assise, Perambulation, Attaint, and some other special cases, such men as common persons in the three last cases may be forced to serve. See for this, 12 Ed. 4: 18. Co. 6: 53. *Crompton Jur.* 20. *Brownl. Rep.* 1 par. f. 30. *Marlb. ch.* 4: 5 H. 8: 46.

Exemption of Juries, what.

Writ of Ease. De non ponedis in Assis & Juratis, what.

Sec. 5.
Tales, what.

A *Tales* is a supply of men impanelled upon a Jury or an Inquest, when they do not appear, or when upon their appearance they are challenged for the Plaintiff or Defendant. Which supply, as it seems, was heretofore used to be made by Writs of *Decem tales*, *Octo tales*, &c. one of them after another as there was need, until the full Jury did appear. But now by a new Statute, the Judge upon motion made to him may (in case but one of the principal Pannel do appear) presently cause a supply to be made of so many men as are wanting, of them that are there present standing about the Court. And hereupon the very Act of Supply is called, A *Tales de circumstantibus*. 35 H.8.6. 14 Eliz.9. 4 & 5 P.& M.7.9. Ca.10.99. 20 Ed.4.11. *Stamf.* 155. 37 H.6.12. 14 H.7.2.

Triers, what.

Triers be such as be chosen to examine whether a Challenge made to the whole Pannel, or any one of the Pannel or Jury, be just, or not. For the course is, sometimes to try a man by his Oath, and sometimes by others of the Jury: If any of the Jury, after some of them be sworn, be challenged; those that are sworn, are to say whether he that is challenged be indifferent, or not. But if the first or second man be challenged, then the Court doth use to appoint some of them (who it pleaseth) that shall be afterward sworn, to try the indifferencie of the person challenged. 27 H.8. 28. 49 Ed.3.1. 3 H.6.36. 21 H.7.29. 28 H.8.26. *Fines ley* 112.

Hundredors,
what.

Hundredors are men dwelling within the Hundred where the Land lieth, fit to be returned of a Jury upon any controversie, *Crompt. Jur.* 217.

Pannel or Ar-
ray, what.
Array the
Pannel.

The Pannel or Array, is nothing else but a Schedule or Roll containing the names of the Jurors that are returned in the Jury by the Sheriff to pass upon the Trial of the matter. And so array the Pannel, is nothing else but to set forth one by one the men that are impanelled. For this, see *Plow.* 177. *St.* 18 H.6.14. 42 Ed.3.11. *Co.* upon *Lit.* 158.

Sec. 6.
Venire facias,
what.

Venire facias is a Writ Judicial going out of a Record, and lieth where two parties plead and come to issue upon the saying of the Country: For then the party, Plaintiff or Defendant, shall have this Writ directed to the Sheriff to cause to come twenty four lawful men of the County to say the truth upon the Issue taken. And if they come not at the day of the Writ returned, then shall go forth against them a *Habeas corpora*, and then a *Disfringas* and other Writs, to bring them in to try the matter. The which two last Writs are usually made with this clause, *Nisi prius Iudicarii venerint*, &c. and is returnable after the time of the Judges coming in their Circuit, and then it is usually dispatched by their Commission of *Nisi prius*. *Old N. B.* f. 157.

Nisi prius,
what.

Nisi prius, is a Writ Judicial lying where the Inquest is pannelled and returned before the Justices, upon request of either party to the Sheriff, to cause the Jury to come before the Justices in the same County for the case of the Country. 14 Ed.3.15. *F.N.B.* 120.

Challenge,
what.
The kinds
of it.
Array.
Polls.

Challenge is an exception to things or persons. To things, as Declarations, Pleadings, &c. For which see *Pleadings*. To persons, when in an Assise or Jury the Plaintiff or Defendant doth except against all, or some, or one of them. And this last Challenge is sometimes to the whole Array or Pannel, and sometimes it is the Polls only, (i.) to some, or one, or more of the Jurors. And this Challenge also is sometimes peremptory, (i.) without cause, which the Law doth give in some special case as an advantage: As a Prisoner arraigned for Felony (in favour of life) may challenge twenty of the Jury that are to try him for his life, which he may do without shewing any cause; and then these twenty must be put out, and others put in their room. Or else it is upon Cause. And amongst Causes some are principal, and some inferior. A principal Challenge is, where it is apparent the Pannel or Person challenged is partial, being made in favour to one side, or in malice to the other, and so not indifferent. As if a Sheriff or Juror be a Brother, Son, Son-in-law, or Tenant of the one party, or be of kin in the ninth degree, though he cannot be Heir to the Land in question. And if a Juror be of kin nearer or further off, and of the whole or half blood, so the pedigree can be conveyed in a certainty, it is a good Challenge. And so it is if the Juror were put in at the parties naming to the Sheriff, or the Sheriff or Juror be within the parties Fee, or his Servant, or within his Distress; whether

whether a mediate, as holding of *q. s.* who holdeth of the party, or immediate Tenant, or not his Tenant, but he is to come to his Hundred, or the party hath a Rent-charge going out of his Land, or the party is to be Heir to him of other Land: All these are good Causes of Challenge, and are (as it seems) principal Challenges. So in personal Suits, That the party hath been Arbitrator of his side, and in that matter; That he hath an Action of Battery depending against the party; That there is an Action of Debt depending by the party against him; That he hath taken money to give his Verdict for the one party; That he hath given his Verdict beforehand, or that he hath given his Verdict formerly in the same matter: These are said to be principal Challenges. So it is said of those things that do only induce it; as that he is the parties Servant, Attorney, or Counsellor, Steward of his Manor, of the same Society, or hath given his Verdict before in a like matter. In all these and the like cases the other party may challenge him for this: And this being found by his own confession, upon his oath or otherwise, or by the Triers to be true, he will be laid aside. The inferior causes are such, as though they be found to be true, are more questionable. But in all Challenges, these Rules must be kept.

1. All Challenges must be taken before the Jurors be sworn.
2. If one challenge a Juror, and it be found against the Challenger, he may not now challenge the Juror for a second cause.
3. If one challenge the Array, and it be found against him, he may not afterwards challenge any of the Polls without shewing cause presently, and this shall be tried presently.
4. No Challenge shall be admitted against the Triers appointed by the Court. See for all this, *Co. upon Lis. 6. 156, 157, 158. Plow. 124, 125. Co. 1. 6. Finches ley 400. 7 H. 4. 10. 18 Aff. pl. 12. 21 Ed. 4. 61, 67. Stat. 27 H. 8. 26. 25 H. 8. 3. 22 H. 8. 14. 33 Ed. 1. Crompt. Jur. 681. 97. 25 Ed. 3. 3.*

Rules concerning it.

Treat doth signifie as much as taken out or withdrawn; and is applied to a Juror, as a Juror is challenged for any cause, and for that cause he is *Treat*, that is, withdrawn, removed or discharged. *Old N. B. 159.*

Treat, what.

This is (as it seems) where the Bailiff of a Tenant in an Affise pleadeth, &c. and loseth by the Affise, and the Tenant himself hath a Release or some other Discharge to plead, then he may by this means have the Parties and first Jurors to appear again; and if it be found, he that recovered before shall lose the Land and yield double damages: *Terms of the Law.*

Sec. 7. Certificate of Affise, what.

This word *Evidence* sometimes signifieth authentical writings of Contracts. And sometimes any Proof, be it by testimony of Witnesses, Writings, Records, or otherwise offered to a Jury for proof of a matter in question and at issue, *Co. 9: 9.* And Proofs for to determine matter of fact, and to be offered to a Judge and Jury, are of two sorts. First, living, as by Witnesses; and to a Jury one Witness is sufficient: And dead, as matters of Record, as Letters-Patents, Fines, Recoveries, Inrollments, and the like; Writings sealed and delivered, as Feoffments, Leases, Releases, &c. and without Seal, as Courts-Rolls, Accounts, and the like. *Co. upon Lis. 283. 115. 6.* For when a cause or suit in a mans proceeding comes hitherto, as that the contrary part denieth any deed or thing as not done, or not to be so as is alleadged on the other side, and then he joineth in the affirmative and offereth to prove the same, each of them are to give the best Evidence that they can to make his own saying good and true. And if the case be between the King and a Prisoner, he is first to say what he can himself; and then all that can say any thing against him, are to be heard upon oath; and then others may be heard for him, but not upon oath: And according to this Evidence on both sides, or without any Evidence at all, the Jury are to give their Verdict according to their oaths. *Co. 9: 9. Dyer 21. Crompt. Jurisd. 218.*

Evidence or Proof, what.

Witnesses.

For answer hereunto, these things must be known.

1. Such persons as are infamous, as are persons attainted of Felony, or of a false Verdict, or of a Conspiracie, or of Perjury, or in a *Pramunire*, or of Forgery upon the Statute of *5. Eliz. chap. 14.* and not upon the Statute of *1 H. 5. 3.*

What Witnesses are good Witnesses to give in Evidence, or not.

SSSSSS 3

and

and such as have had Judgment to lose their ears, or stand on the Pillory or Tumbrel, or have been stigmatized or branded; and Infidels, men not of sound memory, or not of discretion, or such as are interested in the cause, and may have benefit by the thing in question, are not competent Witnesses, but may be excepted against; and a Wife cannot be a Witness for or against her Husband. But all other persons, albeit they be Kinsmen never so near, Tenants, Servants, Masters, Counsellors and Attornies, are allowed for competent Witnesses, *Co. upon Lit. f. 6. Plow. 8. 12.* And these being required must come in to give Evidence, or they forfeit Ten pounds to the party damnified, and must give him costs and damages, *St. 5 Eliz. c. 9.*

What shall be
said to be good
Evidence, and
what things
may be given
in Evidence
and proved,
and how, and
by whom.

For Answer to this, take these things.

1. Some things ought to be pleaded, and may not be given in Evidence. And for this, see *Co. upon Lit. 282, 283.*

2. Records may prove themselves and other things, but may not be proved by Witnesses. But any thing done in the County-Court, Court-Baron, or Hundred-Court, may be proved by Witnesses.

3. A Fine or Common-Recovery may be given in Evidence without being under the Great Seal, or Seal of the Court, and without vouching the Roll of the Recovery. And yet the Jury (as it seems) may choose whether they will find it upon this Evidence, or not. *Plow. 410.*

4. In a *Plene Administravit*, an Account given to, and allowed by the Ordinary, was not allowed for a good Evidence, nor is it to be received. *The Court, Pasche 7 Jac. Co. B.* So a Pedigree by a Herald of Arms is not to be admitted for proof of an Heir; but it must be proved by Deeds, Records, or Witnesses. *The Court, Pasche 8 Jac.*

5. Depositions taken in the Ecclesiastical Court, cannot be given in Evidence, though the parties be dead. *March Rep. f. 120.*

6. A Church-book is not to be given in Evidence. *Brownl. 1 par. 207.*

Shop book.

7. None that keep a Shop-book, his Executors or Administrators, may give it in Evidence for Wares or Work, for above a year before the Action brought, unless they have a Bond or Bill for the Debt, or brought an Action thereupon within a year after the Wares delivered, or Work done. But this is to be observed amongst others, and not between Merchant and Merchant, Tradesman and Tradesman, or Merchant or Tradesman, *St. 7 Jac. 12.*

8. By the new Statute, 23 *Octob. 1650.* one may give in Evidence upon a general Issue, any matter special that he might have pleaded in the Action.

9. Justices of Peace, Constables, Bailiffs, Churchwardens, Surveyors of Highways, and such like Officers, may plead the general Issue, and give the special matter in Evidence, *St. 7 Jac. 5. 21 Jac. 12. Ord. 31 March, 1654.*

Self. 8.

What shall be
said a good
Evidence or
proof to main-
tain a point in
issue, or not.

For Answer to this, take these Cases.

If in a *Plene Administravit* the Defendant give in Evidence, that part of the goods were pledged, and he redeemed them with his own money, and paid as much of his own money towards the Testators debts; this was held good. *Co. super Lit. 283.*

Dyer 2.

If the Issue be a Recognizance or not, and a Recognizance with a Defeasance is given in Evidence; this is a good proof. *Plow. 14.*

If the point in Issue be, That he was never Executor, and the other prove an Administration committed to him; this is a good Evidence. *Dyer 305.*

If in a Detinue the Defendant plead he doth not detain, and he prove a Gift of the thing from the Plaintiff, this is a good Evidence. But otherwise it was, if he had shewed that they were pledged for money, and the money not paid; for this must have been specially pleaded. But now this will be good also upon the new Act for general pleading. *Co. super Lit. 283.*

If in Waste the Defendant shew the thing done was by a Tempest, or by Lightning; this is a good Evidence. And so now to say, That he did repair it before the Action brought: But this heretofore must have been specially pleaded, *Co. sup. Lit. 282.*

If

If in debt upon a Bond, the Defendant plead, *Non est factum*, it is not his Deed; and the Defendant prove the Seal was broken off and put on again, or prove a Rasure of the Deed; either of these is a good Evidence, and will bar the Plaintiff. *Co. 5. 119. 11. 27.*

If the point be upon a transitory Trespass done at a day or place certain, and the proof is that it was done at another day before, or at another place; this is good enough. But otherwise it is, if the proof be that it was done at a time after the time laid in the Action, *Co. super Lis. 283.*

If the Issue be an Agreement, a special Agreement proved will maintain it. So of a Feoffment, a Feoffment on Condition will maintain it. *Plow. 8.*

If the Issue be in a Suit against an Executor or Administrator, Assets in London; proof of Assets in any place in the world is good to maintain it, *Co. 6. 47.* And if it be in case of an Heir on a Suit grounded on a Specialty against him, the Issue is Assets by descent; it will make it good to prove Assets in any place in England. And if Assets in one County be the point, it is good enough to prove Assets in any County, *Dyer 271. Crompt. Jur. 12.*

If the Defendant plead payment to a Bond or Bill, and it appears the Debt is very old, and it hath not been demanded, nor any Use paid for it for many years, nor is there any badg of the continuance of it; in this case it is, upon the common presumption that it is paid, held a good Evidence, and the Juries do use to find for the Defendants. (*Experience.*)

In Trover and Conversion of Goods, and Not guilty pleaded, it is good Evidence for the Plaintiff as to the point of Conversion of the Goods, that the Plaintiff demanded them, and the other denied or refused to deliver them. *Plow. 14.*

A Licence to alien Land, or a Pardon for an Alienation of Land, was held by a common presumption, a good proof that the Land was held in Capite. *M. 7 Car. B. R. Sir Jo. Constables Case.* But if a Lease for life be the point, and it is proved, and no Livery of Seisin given upon it; this is no good Evidence, *Co. sup. Lis. 283.* So if the point be a Gift in Tail made by J. S. and the proof is of a Deed made by J. D. this is not a good Evidence. So if the point be a Lease parol, and a Lease in writing is given in Evidence; these are not good. *Bra. Gen. Issue, 81. Plow. 14.*

If in Debt on a Bond, and not his Deed pleaded, he shew that the Bond was joint, this is not good, *Co. sup. Lis. 283.* And yet perhaps now by the new Act, this special matter may be given in Evidence; for he may give in Evidence any thing that he may plead especially; and this pleaded specially would have barred. So in an Assise, and no wrong pleaded, and a Release after the Disseisin is given in Evidence. So where the Issue in Trespass is *Not guilty*, and the Defendant give in Evidence a Licence, *Kelw. 55. 59.* Or give in Evidence *son assault demesne*, that the Defendant began. But if he plead *de son assault demesne*, he may not give in Evidence, *Not guilty. Idem.*

To prove the sealing and delivery of a Deed, and not know the party that did it, is not a good Evidence; and yet if they know him when they see him again, it is well enough. *Kelw. 59.*

If Executors in a *Plene Administravit* had given a Judgment in Evidence; this was not good, but must have been pleaded specially; but it seems is good now. *Kelw. 59.*

If the Action of Waste be laid in cutting and selling Trees, and the Evidence in mooting or rooting up of Trees; it seems not good. *M. 7 Jac. Co B.*

If a Feoffment be the Issue, and a Deed is shewed with this Indorserment, That J. S. Attorney of the Feoffor did give Livery according to the Deed, and no Letter of Attorney proved or inserted in the Deed, but the Feoffor recites in his Will that he had conveyed his Land; this (it seems) is not good. *Gibbins Case, P. 7 Jac. B. R.*

In an Action of the Case upon a Promise, and *Non assumpsit* pleaded, Payment could not have been given in Evidence, as now it seems it may. (*Three Judges.*) So in Debt for Rent, That the Lessor had entred into part of the Land, *Goldsb. f. 81.*

One brings an Action of Trespass in a Close abutting on a certain Mill, &c. If he prove not the Buttals, he is gone. *The Court, Goldsb. 125.*

If there be two Batteries made between the Plaintiff and Defendant at divers times;
the

the Plaintiff to maintain the Issue, must prove the Battery made the same day he hath laid in his Declaration, and may not be admitted to give another day in Evidence, *Brownl. 1 par. 233.*

See. 9.
Verdict, what.

Verdict is the Answer of the Jury made upon any cause Civil or Criminal, committed by the Court to their consideration or Trial: which is general, as Not guilty, or Guilty; or special, when they find Special, and for the doubtfulness of it refer it to the Judges for their advice. *Co. 9. 12. 119. 6. 46.*

What shall be
said to be a
good Verdict,
or not.

If a Verdict find the matter or substance of the Issue, it is good enough, though it vary in circumstance. See *Co. upon Lit. & Dyer 55. March. 9.*

Notwithstanding a Jury, after they be agreed, do eat or drink at their own charge, or at his charge for whom they do find; this is not Finable, and the Verdict is good. But if it were before they were agreed, at the charge of him for whom they find; this would make the Verdict void. But if it were at their own charge, or his against whom they find, it is Fineable, but the Verdict is good, *Co. upon Lit. 127.* And yet if they eat and drink at their own charge before they be agreed, it is said the Verdict is naught, *Dyer 3. 20 H. 7. 3. Hughes 1 Rep. 353.*

If the Action be against a Lessee for cutting of Trees on a Covenant, and he say he cut twenty Trees, and the Jury find ten, it is a good Verdict: For if the matter of the Issue be found, it is well enough. As if one be indicted, that he of malice premeditated killed J. S. and the Jury find him guilty of manslaughter; this is a good Verdict. So if a Plaintiff alleadg the avoidance of a Church by privation, and the Jury find it to be by death, it is good, *Co. upon Lit. 282.*

The Jury must not find any thing contrary to what is agreed in pleading between the parties, either expressly or implicitly; and if they do, the Judges may reject it. As in Waste supposed in *A.* if the Defendant plead that *A.* is a Hamlet in *B.* and not a Town of it self; in this he confesseth the Waste: The Jury that are to try this Issue, whether it be in *B.* &c. shall not be admitted to find no Waste done, for that were against the Record, *9 H. 6. 56. Co. upon Lit. 22.*

If upon a Trespass local, as Grass cut down in the County of *S.* where the Trespass was in the County of *D.* and the Defendant plead Not guilty (as he may) and the Jury find him guilty in the County of *S.* this Verdict is void, and no Judgment shall be given upon it, *9 H. 6. 63.*

If they find a matter in certainty or ambiguously, it is void: As in a *Plene Administravit*, if they find the Executor have Goods in his hands, and find not to what value: So if they find part of the Issue, and find nothing for the residue, it is void. But if they give a Verdict of the whole Issue and more, it is good enough. *Utile per inutile non vitiatur, Co. on Lit. 227.*

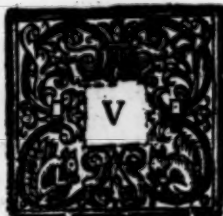
If the Plaintiff after Evidence given, and the Jury departed from the Bar, deliver any Letter, Evidence, or Escrow to the Jury, not before given in Evidence at the Bar: if it pass with him, this will avoid the Verdict; but if it pass against him, *contra, &c.* So if they carry away any Writing unsealed, this will not avoid it, though this be a Misfeasance, *Co. upon Lit. f. 227, 281. See more, Brownl. Rep. 1 par. 49. 2 par. 150. 190. 9 H. 6. 57. 20 H. 7. 3. Dyer 3.*

Witnesses.

As to Witnesses, these things are to be known. First, Those that are served by Process out of any Court of Record to come in as Witnesses, and are tendred reasonable charges, must appear if they have no let, under pain of Ten pounds, and to give recompence to the party grieved according to his damage, *5 Eliz. 9.* Wherein this is to be known, 1. It sufficeth to leave a Note of the Process at the house of the Witness. 2. If the charges tendred be not enough, if the Witnesses accept it, he is bound to appear: But otherwise not, if he do not leave sufficient to bear his charges. 3. He that sues upon this Statute, must aver that he is dammified, *March Rep. 43.* 4. A Lawyer that was of Counsel, may be examined upon oath as a Witness to the matter of the Agreement, not to the validity of an Assurance, nor to his Counsel that he gave, *Mar. R. 83.* Secondly, If a Witness commit wilful Perjury, he loseth Twenty pounds, shall be imprisoned six moneths without Bail, stand in the Pillory, and be disabled to be a Witness, *5 Eliz. 9.* Thirdly, The penalty of him that shall procure such Perjury, *Idem.* Fourthly, How Witnesses to prove a Deed were called in before *5 Eliz. see St. 12 Ed. 2. 2.*

CHAP.

CHAP. CLXII.

Of Upholsters, View, Victuallers, Universities,
and Vilains.

View is, where an Action is brought for Land, and the Defendant doth not well know what Land it is that the Demandant asketh; then the Tenant shall pray the View, (that is) that he may see the Land which he claimeth.

Then the Court will send Veyors to view the place in question, for the better decision of the Right. And if the Defendant deny, this is called a Counterplea of the View.

View, what.

Veyors, what.

Counterplea of the View.

For matters relating to the Universities, see Stat. 2 & 3 Universities.

P. & M. 14. 13. Elix. 21.

How Upholsters must prepare, make and sell Featherbeds, Bolsters, Pillows, Quilts, Matresses, and Cushions, see Stat. 11. H. 7. 18. 5 & 6 Ed. 6. 23.

For Victuallers, Victuals, and Hostlers, these things are to be known:

1. Victuallers must sell their victuals at the prices the Justices of Peace shall set down in their Sessions. Stat. 13 R. 2. 8. 25 H. 8. h.

2. If they do not assise, they must sell at reasonable rates, respecting the times.

3. They may not make Agreement to sell their Victuals at a certain price, Stat. 2 & 3 Ed. 8. 15.

4. No Victualler, whilst he is a Victualler, may exercise any Judicial office in that place.

5. The Inholder may keep his Guests horse, till he be paid for the meat of him and his horse. And if he stay so long till it come to the worth of the horse, he may sell the horse and pay himself, by a Custom in London, *Brownl. 2 par. 154.* But out of London it seems he cannot sell the horse, nor do more then keep him as a Pledg; nor can he work him, *Brownl. 2 par. 154.*

No Inholder or Hostler may take any thing for Litter for horses; nor may they take of any man more then what is reasonable, having respect to the Markers, for any kind of provision for man or beast. Nor if he live where a Baker is, may he make his Horse-bread himself; and if he do, he must make it of the due assise and weight. See for all this, 8. 13 R. 2. 8. 13 Ed. 3. 6. 21 Jac. 22. 5 Elix. 5. 27 Elix. 11. 28 H. 8. 14. 37 H. 8. 13. 34 H. 8. 7. 4 H. 4. 25. 12 Ed. 4. 8. 25 H. 8. 11. 32 H. 8. 11.

7. The Inholder is to look to the goods of his Guest, whilst they are in his house. And for this these things are to be known. 1. He is not to be charged with the goods of any one that doth not loddg in the Inne: And therefore if a Neighbor come to dinner there, he shall not answer for his goods; so if any Neighbor come in to tipple there. 2. He shall not answer for any goods, but what are lost by his default. 3. He shall not be charged for the goods of any but such as loddg in the Inne: And therefore if a Haberdasher come to an Inne and there sell divers Hats, and then go to a Fair and leave divers Hats there, and they be lost; the Inn-keeper shall not be charged. And yet one loddged there and left a Trunk a while, and went away and did not lie there; the Trunk was stolen, and the Inn-keeper charged with it. 4. If the Owner desire his horse may go to grass, and is be lost, the Inn-keeper shall not answer it; but if the Inn-keeper put him to grass of his own head, it is otherwise. 5. Albeit the Inn-keeper deliver the key of his chamber to his Guest, yet he shall be charged if the goods be lost, *Brownl. 1 par. 144, 145.* 6. An Inn-keeper must receive a Traveller, or else the Traveller may sue him. 7. The Inn-keeper is not bound to receive his horse or goods, unless he receive the Master also. See *Assise upon the Case*.

Stat. 1.

Victuallers,
Inholders,
and Hostlers.

Villains, Villenage, what.
 Neife, what.
 Liberate probanda.
 Natio habendo.
 Manumission, what.

As for Villains, which were Bondmen, and Villenage, which was a servile Tenure long since gone: Therefore of them, and of a Neife, which was a Bondwoman; *Liberate probanda*, to prove freedom and discharge from bondage; *Natio habendo*, to fetch a Villain again, being run away; Infranchisement or Manumission, the freeing of a Slave out of Bondage; we shall say nothing, because they are things gone long since.

CHAP. CLXIII.

Of Uses.

1. Use, what.



Cestuy que use.
 Trust or Confidence, what.

Use is, the profit or benefit of Lands or Tenements: Or as others define it, The equity and honesty to hold the Land, in *conscientia boni viri*: Or as others define it more fully, It is a trust or confidence reposed in some other, which is not issuing out of the Land, but as a thing collateral annexed in privity to the Estate of the Land, and to the person touching the Land; so that he for whom he is trusted shall take the profit of the Land, and the Terre-tenant shall dispose of it according to his direction. As for an example: If a Feoffment be made to J. S. and his heirs, to the use, profit or behoof of W. S. and his heirs; in this case heretofore J. S. had the estate and property of the Land, but W. S. had and was to have the profit in honesty and equity. So if one agree with W. S. for a piece of Land for Twenty pounds, and pay him the money, but hath no assurance of the Land, yet the equity and honesty to have this Land is in him that hath contracted and paid his money for it. And this Trust was called the Use of the Land. And hence came the course in Conveyances, to set down in the *Habendum* to whole use; as, *Habendum* to A. and his heirs, to the use of A. and his heirs. And he for whom this Trust is, and that ought to have the profit of the Land by Conveyance as aforesaid, is called *Cestuy que use*. There is a Use also of Goods and Chattels, which is properly called a Trust or Confidence; for one may have such things to the use of another. Co. 1. 121, 122. See the Addition to Just. Dodds Treatise. Co. super Lit. 271, 272.

2. The kinds.

A Use is either express, (i.) when the use or intent is openly declared and expressed between the parties upon the making of the Estate of Land whereunto the use is annexed: As when a Feoffment is made of Land to J. S. and his heirs, to the use of W. S. and the heirs of, or heirs males of the body of the said W. S. or to the end or intent that W. S. and his heirs, or W. S. and the heirs of his body shall take the profits of it, and the like; or when I covenant to stand seised of the Land to the use of my wife for life, and after of my eldest son and the heirs of his body, or the like. Or it is implied, (ii.) when the Use is not declared upon the agreement between the parties; but is left to the construction, and made by the operation of Law: As when a man seised of Land makes a Feoffment in Fee, or doth levy a Fine, or suffer a Common-Recovery of it to another without any consideration, and it is not agreed nor declared to what use or intent it shall be; this by construction of Law shall be to the use of the Feoffor, Conusor, or Recoverer: But if there be any consideration of money or other thing paid or given, or any Rent or Tenure reserved, then by construction of Law it shall be to the use of the Feoffee, Consee, or Recoveror; for otherwise the Law presumeth that the intent of him that did part with the Land was so, viz. That the other should have the property of the Land to his use, and that he himself should take the profits of it. So when one doth bargain and sell his Land for money to another, and no Use is expressed; in this case the Law doth say, it shall be to the use of the Bargainee and his heirs. Doct. & St. 95. Perksell. 533. Co. 2. 58. 9. 11. Dyer 18, 146.

A

A Use also is either in *esse*, and that in Possession, Reversion, or Remainder; as when a Feoffment is made to *J. S.* to the use of *J. W.* and his heirs, or to the use of *J. W.* and after to the use of *J. D.* and the heirs males of his body, and after to the use of *S. T.* and his heirs for ever. Or it is in *posse*, or in contingencie; as when by possibility it may happen to be in Possession, Reversion, or Remainder: As where a Use is limited to me for life, and after to him that shall be my first son in Tail; this is only the possibility of a Use, for it may or may not be. *Co. 1. 121.*

3. The nature, incidents, and original of it.

A Use at the Common-Law, before the Statute hereafter spoken of was made, was, and where that Statute doth not take place, is nothing but a meer confidence and trust collateral to, and distinct from the Land annexed in Privy of Estate, and to the person touching the Land, to this purpose, That *Cestuy que use* should take the profit of the Land, and the Feoffee or Terre-tenant that was trusted should make Estates, and otherwise dispose of the Land as the *Cestuy que use* in his life, or at his death by his last Will and Testament should direct and appoint; and if he made no disposition, then that it should go to his heir. So that the Feoffee had the Freehold or sole property of the thing in him; and *Cestuy que use* had neither *jus in re*, nor *jus ad rem*, (For if he against the Will of the Feoffee had entred into the Land, he had been a Trespassor:) but a bare confidence or trust, for which the *Cestuy que use* had no remedy but in Chancery upon breach of the trust, and there to have the Feoffee imprisoned until he perform the trust according to the Order of the Court. And these Uses to some purposes were reputed in Law as Chattels, and therefore were devisable by Will; and to some purposes as Hereditaments, and a kind of Inheritance, of which there was *possessio fratris &c.* And to some purposes neither Chattels nor Hereditaments; for they were not esteemed Assets in the Heir or Executor, neither were they reputed as Commons, Rents, Conditions, and such like Inheritances which are discontinued or taken away by the Alienation of the Terre-tenant, Escheat, Disfeisin, &c. But a Use is not so. *Co. in Chudleighs Case, in toto; and Shelleys Case. Kelw. 160. Dyer 12. Bro. Feoffm. at uses in toto. Consc. 29.*

And to every of these Uses there were two inseparable Incidents; Confidence in the Person, and Privy in the Estate, expressed by the parties, or implied by the Law: And when either of these failed, the Use was either gone for ever, or suspended for a time at the least. And therefore if the Feoffee to use, upon good consideration, had enfeoffed another of the Land that had not notice of the Use, the Use had been gone for ever; because howsoever here was a Privy of Estate, yet here was no Confidence in the person. But if the Feoffment had been without Consideration to such a one; in this case the Use had remained still, because the Law did imply a Notice. *Trin. 17 Jac. Cancellaria.*

So also it seems the Law was, when it was made in consideration of marriage only. And if a Disseisor, Abator or Intruder had come to the possession of the Land whereof the use was, albeit he had notice of the use, yet the use was suspended during their possession, and they should not have been seised to use as the Feoffee was; for they come not to the Land in the *per*, but in the *pos*. And if a Lord by Escheat, Lord of a Villain, or one that had entred for Mortmain, or that had recovered in a *Cessavit*, &c. had come to such Land, and had notice of the use, the use had been gone for ever; for these came to the Land in the *pos* and above the use. And Tenant in Dower and by the Courtesie should not be seised to uses in being; for all these wanted Privy of Estate. And if there had been Tenant for life, the Remainder in Fee to the use of another, and the Tenant for life had made a Feoffment in Fee to one that had notice of the uses; this second Feoffee should not have stood seised to the first uses.

So if the Husband had made a Feoffment in Fee of the Land of his Wife, upon Consideration, and without any Use expressed, the Wife should not have had a *Subpana*, because the Feoffee was not in Privy of Estate of the Wife. And if *Cestuy que use* for life or in tail, the Remainder in tail, with divers Remainders over in use, had made a Feoffment to one that had notice; he should not have been seised to the first uses, *causa qua supra*. But otherwise it is of Commons, Advowsons, and such like appendants or appurtenants: For if Tenant in tail, or Husband in right of

T E T T E T

his

his Wife make a Feoffment of a Manor, or of part of it with an Advowson appendant; the Advowson at least, after Presentment, shall pass as appendant to the Manor, or to part of the Manor, and not to the Estate of the Land which is discontinued by the Feoffment. So if a Disseisor, Abator, Intruder, or the Lord by Escheat, or the like, shall have these things as annexed to the Land, or the possession of the Land. So that there is a difference between a Use, a Warranty, and such like things that are annexed to the Estate of the Land in privy; and Commons, Advowsons, and other Hereditaments that are annexed to the possession of the Land.

The original of it, and why so much lands were put in use.

And these Uses began first when the custom of Property began and was brought in, that one man knew his own from another mans, and then was to enjoy his own, and not to be deprived of it without consent or order of Law. For then he that had Land, had two things in him; a possession of the Land, and power to take the profits of it. And those being to be distinguished, he might give the Freehold or Possession to another, and take the profits to himself; *D. & S. 96. Co. l. 123, 124. Stat. 27 H. 8. ch. 10. in the Preamble.*

The mischief of Uses.

And they were the rather allowed by the Law for a time as reasonable, because they gave a man power to dispose of his Land by Will, which otherwise he could not have done but in some special cases by Custom of the place. But in time this use was turned into an abuse; and the greatest part of all the Lands in the Kingdom, especially in the time of the Broil between the Houses of *York* and *Lancaster*, were put in Use, partly of fraud, and partly of fear. Which produced not a few inconveniences: For thereby many were deceived of their just and reasonable rights, as namely, A man that had cause to sue for his Land, knew not against whom to bring his Action, or who was Owner of it; the Wife was defrauded of her Thirds, the Husband of being Tenant by the Courtesie, the Lord of his Wardship, Relief, Harriot and Escheat, the Creditor of his Extent for Debt, the poor Tenant of his Lease, and other Purchasers of their purchase. For these rights and duties were given by the Law from him that was owner of the Land, and none other, which at this time was the Feoffee of trust; and so the Feoffor, the old owner of the Land, should take the profits, and leave the power to dispose of the Land at his discretion to the Feoffee: And yet the Feoffee was not such a Tenant of the Land, as his Wife might have Dower, or the Land be extended for his Debt, or that he might forfeit it by Felony or Treason, or that his Heir should be in Ward for it, or any duty of Tenure fall to the Lord by his death, or that he could make any Estates of it. Also Lands were many times conveyed by last Wills, by words only, and sometimes by Tokens only in time of great extremity of weakness: And many perjuries for Trial of secret Uses, were daily committed.

Uses and Feoffment united.

All which having been espied, have been laboured to be cured and holpen by divers particular Acts of Parliament in all succeeding ages. *Stat. 1 R. 2. ch. 9. 4 H. 4. 7. 11 H. 6. 3. 1 R. 3. 1. 4 H. 7. 17. 1 H. 7. 1. 19 H. 7. 15. 27 H. 8. 10.* But the makers of these Laws finding the continuances of these Uses so mischievous, that they did over-reach the policie of all Laws: For a general remedy, and a perfect cure of all the said mischiefs and abuses, have at last provided; That where any are, or shall be seised of any Lands to the use or trust of any other, by reason of any Bargain, Sale, Feoffment, Fine, Recovery, Contract, Agreement, or otherwise, by any means whatsoever, *Cestuy que use* or trust, that hath any such use in Fee-simple for term of life or years, or otherwise, or any use in Reversion or Remainder, &c. shall have the possession of the Land in such quality, manner and condition as he had the use or trust: And where any one is seised of Lands to the use or intent that another shall have a yearly Rent out of the same Lands, *Cestuy que use* of the Rent shall be deemed in possession thereof of like estate as he had the use. By which Statute the use and possession of Land is now at this day coupled, conjoined and married with an indissoluble knot, so as they cannot now stand apart and divided, but he that hath the one must have the other, and the one doth ensue the other as the shadow doth the body: And therefore now upon Fines, Recoveries and Feoffments, the Estate doth settle as the use and intent of the parties is declared by word or writing before the act done.

As for example, If a Writing be made between two or more, that one of them shall levy a Fine, make a Feoffment, or suffer a Recovery to the other, to the use and intent that one of them, or another man shall have it for life, and after another in Tail, and after a third in Fee-simple; in this case the Law setteth the Estate according to the use and intent declared: So that now what Estate a man hath in the use, the same he hath in the possession.

But herein for the more full understanding of this Statute, and the Law at this day, it must be observed, that this Statute doth not extend to all manner of uses, neither are all uses executed and united to the possession hereby. For to every execution of a use within this Statute, four things are requisite.

To what uses the Statute of 27 H. 8. doth extend, and to what not.

1. That there be a person seised,
2. That there be a *Cestuy que use in esse*.
3. That there be a use in *esse* in Possession, Reversion, or Remainder.
4. That the Estate out of which the uses do arise, be vested in *Cestuy que use*. So that when these four, viz. Seisin in the Feoffees, *Cestuy que use in rerum natura*, Use in *esse*, and that the Estate of the Feoffees doth vest in *Cestuy que use*, then there is an execution of the use within this Statute. But if any of these fail, there is no execution of the use within this Statute. Co. 1. 126. 136. Plow. 351. And therefore it is agreed, that this Statute doth not execute any use but only uses in *esse*: So that the right of a present, and a future or contingent use are excluded until they come in *esse*, and then the Statute doth execute them. Also if no alteration be of the Estate of the Land before; and if *Cestuy que use* in tail with divers uses in remainder had made a Feoffment, and died before the Statute, no execution should have been of this right of a use until Entry by the Feoffees. Co. 1. 126. Dyer 58. 88. 330. So if *Cestuy que use* in possession had made a Feoffment before the Statute, no right of the use in possession or remainder shall be executed by the Statute, until the regrest by the Feoffees. So if a Feoffment had been made before the Statute to the use of the Feoffee for life, and after to the uses of others in remainder, and the Feoffee had made a Feoffment in fee to another; this use shall not be recontinued, or the repossession of the Land executed unto it by this Statute.

So that the right of uses in *esse*, and uses in contingencie, until they happen to be in *esse*, remain at the Common-Law as they were before the Statute. And therefore if the Estate of the Feoffees be in such cases divested by Disseisin; or the King, or a Corporation, or an Alien, or a person attaint, &c. be enfeoffed of the Land before the use come in *esse*; or if the Land be aliened *bona fide* upon consideration to one that hath notice of the use; this use can never be executed until these Possessions be removed by lawful Entry or Action of the Feoffees. And if their Entry and Action be barred, the use is gone for ever, and the party grieved thereby hath no remedy but in Chancery. And therefore if *Cestuy que use* in tail, the Remainder in tail restrained with a clause of perpetuity be disseised, no use in contingencie can be executed by this Statute.

And if before the Statute a Feoffment had been made in Fee to the use of *J. S.* for life, and after to the use of the right heirs of *J. N.* and the Feoffees had been disseised, and then the Statute had been made, and after *J. N.* die, and after his death *J. S.* die; this use shall never be executed in the right heir of *J. N.* Co. 1. 138.

And so also if a Disseisin be after the Statute, and before the death of *J. N.* no possession shall be executed in the right heir of *J. N.* Also uses that need no execution by the Statute, as when a man doth convey Land to *J. S.* and his heirs, to the use of *J. S.* and his heirs; this doth not need help of this Statute: Also uses that are against the Rules of the Common-Law, shall not be executed by this Statute. And therefore if a Feoffment be made to the use of *A.* for life, and after to the use of every person that shall be his heir one after another for term of his life. So if one make a Feoffment to the use of another in tail, with divers Remainders over, with a Previso that neither of them shall discontinue or alien, &c. These uses shall not be executed, because these Limitations are wholly void. And in these cases (it seems) there is no remedy to be had in Chancery against the Feoffees.

So that out of all this appeareth, that some Uses are executed presently, as Uses in esse; and some are executed by matter *ex post facto*, if they be according to Law, and come in esse in due time. But if they be Uses invented and limited in a new manner, and not according to the antient Common-Law, they are altogether void, and extinguished and abolished by this Statute. And where Lands are conveyed to others in trust after this or the like manner, *viz.* That the Feoffees shall take the profits, and deliver them to the Feoffor and his Heirs, &c. or that the Feoffees shall convey it to the Heir of the Feoffor at his age of twenty one years: And where Lands are conveyed to certain uses expressed and declared, and there be other secret uses and intents agreed upon between the parties; these uses or trusts are not within this Statute, neither will the Statute execute them, but they remain as they were before the Statute, determinable in *Chancery*.

Also Leases for years of Lands in use that have their being before, and are granted over in use, are not executed by this Statute. And therefore if a Lessee for years of Land grant or assign over his Estate to *A.* and *B.* and their Assigns, to the use of the Grantor and his wife for the term of their lives; this use or trust is out of the Statute, and not executed thereby: And therefore in this case all the Estate is in *A.* and *B.* and the Grantor hath nothing but a use, for which he hath his remedy in *Chancery*. *Dyer* 369.356. *Crompton* 747.69.

So if one be seised of Land in Fee, and he bargain and sell it, or make a Lease of it to another in trust, and for the benefit of a third person; this is but a *Chancery*-trust &c. in this third person, as was held clearly, *M. 8 Car. B. R.* And yet if a Feoffment be made to the use of *J. S.* and his Assigns for the term of twenty years, this term of years shall be executed by the Statute: And so in all such like cases and questions of Trusts and Uses that are not within the Statute of Uses, the Law is now as it was before the same Statute was made, and all those matters are determinable in *Chancery*. For as the questions of Uses and Trusts that are within the Statute, are to be decided and ruled by the Judges of the Common-Law; so are all other questions of Uses and Trusts that are out of the Statute, to be ruled and decided by the Judges of the *Chancery*.

4. What shall be said a good use of Land, or not; and when and where such a use shall be raised, altered or created, or not. First in respect of the manner of raising it, and the several ways whereby Uses may be raised.

To make a good Use, or to make a Use to rise, especially such a Use as may be within the Statute, respect must be had to divers things, *Co. super Lit.* 271: *P. l. w.* 301.

First, to the ways or means of creating and raising of Uses: wherein it is to be observed, that albeit the quality of the Uses be changed in most cases by the Statute of Uses, yet Uses, and Uses within this Statute are, and may be raised as they might before the Statute, either by transmutation of the Estate, as by Fine, Feoffment, Common-Recovery, &c. or out of the Estate of the Owner of the Land, as by Bargain and Sale, by Deed indented or inrolled, or by Covenant to stand seised to Uses upon good consideration.

And therefore a Fine, Feoffment, or Recovery may be had of Land, to the use and intent that either of the parties thereunto, or others, shall have it for any time or estate; and by this means what Uses, and consequently what Estates a man will, may be raised and created. And in these cases the Conusor, Feoffor, or Recoverer may appoint the Use of the same Fine, Feoffment, or Recovery to whom he will, without any respect of marriage, money, kindred, or the like; for in this case his will guideth the equity of the estate, *Brumf.* 2 par. 76. 201. *Dyer* 186.

Or if a man make a Lease to *A.* for life, to the use of *B.* for life; this is a good use and estate in *B.* during the life of *A.* *Co.* 6.68.

Or if a man by Bargain and Sale for good consideration sell his Land to another, hereby the Use will rise according to the Estate bargained and sold, unto the Bargainee. But in this case if it be an Estate of Freehold, as of Fee-simple, Fee-tail, or for life, that is sold; the Bargain and Sale must be made by Deed indented and inrolled within six moneths after in some of the Courts at *Westminster*, or in the Sessions Rolls of the Shire where the Land lieth, (except it be in Cities and Corporate-Towns where they use to inroll Deeds) otherwise no Use will rise by it. But if it be an Estate or term for years only that is sold, there the Use will rise well enough without

without any such matter, *Dyer* 155. *Co* 2. 36. 7. 40. 8. 93. 4. 70. See *Bargain and Sale*. *Co* 2. 34. 8. 94. Or if a man seised of Land in Fee, covenant to stand seised of it to the use of his wife, children, brethren, or other kinsfolk for life, in Fee-simple, Fee-tail: Or if one seised of Land in Fee-simple, covenant to stand seised of it to the use of a woman he is to marry, or to the use of a woman his son or other kinsman is to marry, or the like: hereby the Uses, and consequently the Estates will rise accordingly. And in these cases there is no need it should be by Deed indented, &c. or that the Deed be inrolled; for Uses may be raised by Deed poll, as well as by Deed indented.

Uses may be raised by Covenant for Jointures: But power to make Leases cannot pass in this manner. But this must be done by Fine, Feoffment, or Transmutation of Possession, if there be a Covenant that the Owner will stand seised to these uses. And this also is the opinion and practice of the Chancery, *Car. Rep.* 22. 30. But if a man by Deed convey Land to his second son, thus: I do give and grant this Land to J. S. my second son, and his heirs after my death, and no Livery made; the son shall take nothing by this Covenant, nor will any Use arise, *Mar. 50. pl. 78.*

Also Uses may be created (as some hold) by word or Parol-agreement, as well as by Deed or writing: For it is said it hath been adjudged, That if a man say to his son and a wife that his son is to marry, that in consideration of the same marriage they shall have the Land to them two in tail, that hereby a good Estate-tail will arise after the marriage: And that where one doth by word without Deed grant to his son and his wife in tail Land in consideration of their marriage, that it was agreed by all the Judges, that the Use did rise upon this agreement. *Crompt. Jur.* 61. 60. *Plow.* 301. 308. and the better opinion of the Judges in *Corbins Case*, 38 *Eliz.* Howsoever it is safe in these cases to do it by Deed and in writing: For, *Dyer* 296. *Plow.* 22. seem to oppugn this.

And if a man make a Feoffment, levy a Fine, or suffer a Recovery to the use of his last Will, or to the intent to perform his last Will, or to the use of such person and persons, and of such estate and estates as he shall limit by his last Will, and then afterwards by his last Will declare the Uses, these are good Uses, and this is a good way of raising of Uses. *Lit. sect.* 462, 463. *Co.* 6. 17.

So if a man devise his Land by Will to J. S. and his heirs, to the use of J. D. and his heirs; it seems that the Use will rise to J. D. and his heirs by this means. And if a man by verbal agreement, in consideration of money or the like, sell his Land to another, or agree and promise that the Bargainee shall have it for any time, howsoever that hereby no Use nor Estate will arise (if it be a Freehold that is sold) within the Statute, because it is not by Deed indented, &c. yet it seems a good Use will arise at the Common Law, and that the Bargainee shall have relief in Equity for his Purchase. See *Stat.* 27 H. 8. of *Uses*. *Fitz. Devise* 22. *Dyer* 229. *Conscience.*

The second thing whereunto respect must be had, is to the persons trusted, or to him to whom the Conveyance is made: For to every good Use there must be a person seised to use, and he must be a person capable of such a Seisin. And for this it must be known, that any sole person that may make an Estate to himself, may make an Estate to other uses. Also a man may be seised of his own Land to other uses, as in the case of a Covenant to stand seised to uses. But the King, or any Body Corporate, Alien born, or person attaint, cannot be seised to other uses no more by an original Feoffment to use, then when they come by the Land in use at the second hand: In which case (as hath been shewed) neither such Persons, nor Disseisors, Abators, or Intrudors, or Lords of Villains, or by Escheats, shall be seised to other uses: But in all these cases the uses are void, and the parties shall hold the Land to their own uses, or to the uses of the Feoffors &c. and not to the use of *Cestuy que use*. And a Bargainee of Land for valuable consideration, cannot be seised of the Land to any other use but his own. *Co.* 1. 122. 127. 135. *Plow.* 238. *Dyer* 8. 283. *Resolved in Doctor Atkins Case*, 44 *Q. Co. B.* *Dyer* 155. *Lit. Bro. sect.* 60.

Secondly in respect of the persons trusted, and what persons may not be seised to the use of another, but to their own use.

Thirdly in respect of the persons for whom the trust is, or the *Cestui que use*.

The third thing to be respected is the *Cestui que use*: For to every good use, as there must be a person seised to use, so there must be a person to whose use he is seised, and he must be capable also. And for this it must be observed, that any man that is capable of an Estate directly and immediately to himself, is capable of the same Estate by way of use. But if the use be limited to a Corporation, there must be a Licence had, otherwise it will be an alienation in Mortmain. (*See before.*) And if future uses upon Contingencies be limited to such persons as are not in being, these uses, howsoever they are good at the Common-Law, yet they are not good within the Statute, neither doth the Statute execute them at all until they come in possession. And if a Feoffment be made to *J. S.* and his heirs to the use of the Parishioners of *Dale*; this use is void, for they are incapable by this name; and it shall be to the use of the Feoffor. *Co. 1. 136. Bro. Mortmain, 37. Brownl. 1 par. 193. St. 12 H. 7. 27. 49 Ed. 3. 4.*

Fourthly in respect of the estate and possession of him that doth create the use.

The fourth thing to be regarded, is the Estate of him that doth raise the use, in the Land whereof the use is raised. For howsoever the Tenant in Fee-simple of Land may create what uses he will in Fee, for life, or years upon it, and such uses are good, and the Tenant in tail or for life may perhaps grant their Land for their own lives to the use of a third person: Yet if a Tenant in tail for good consideration covenant to stand seised to the use of himself for life, and after of his eldest son in tail, no use will rise by this Covenant. So if Tenant in tail of an Advowson in gross, grant it by Deed to one and his heirs, to the use of himself for life, and after to the use of another in Fee; this Grant is void by the death of the Tenant in tail. And if such a Tenant in tail bargain and sell his Land by Deed indented and inrolled, hereby the Bargainee hath an Estate descendible to his heirs, but determinable upon the death of the Tenant in tail. And if one covenant by Indenture to stand seised to the use of *B.* of White-acre, which he hath not then, but he doth afterwards purchase it; by this no use will rise. And if one that hath but a term of years grant it to *J. S.* to the use of himself for life, &c. this is no good use within the Statute, but a Chancery-trust only. *Hil. 38 Eliz. Co. B. Curia. Ca. 2. 52. Pasch. 13 Jac. Co. B. Seignior Savers vs. Smith. Co. 10. 96. Telvertons Case, 37 Q. B. R.*

Fifthly in respect of the estate and possession of him that doth take by the Conveyance.

The fifth thing to be respected, is the Estate of him that doth take by the Conveyance out of which the uses are derived: For howsoever where a man doth grant in Fee-simple to another and his Heirs, he may limit what uses he will upon this estate; and if a man make an Estate for life to another, he may limit an use thereupon; yet if a man make a Gift in tail to another, he can limit no use thereupon, *Dyer 369. Co. 2. 78. Co. super Lit. 19.*

And therefore if one grant his Land to *J. S.* and the heirs of his body, to the use of *J. S.* and his heirs in Fee; this limitation of use is void, and *J. S.* hath hereby an Estate in tail. And if a Feoffment be made to *J. S.* to have and to hold unto him and the heirs of his body, to the use of him, his heirs and assigns for ever, this use is void. *Trin. 14 Jac. B. R. Adjudged, Cooper and Franklins Case.*

And where one doth bargain and sell Land for money, (in which case the Law doth make an express use) no other use can be appointed. And therefore if *A.* for money bargain and sell Land to *B.* and his heirs, to the use of *A.* for life, and after of *B.* in tail, and after of *A.* in fee; all these uses are void, for a use cannot rise out of a use. *Dyer 169. Cromp. Jur. 53. Lis. Bro. seff. 284.*

So if *A.* make a Lease to *B.* for years rendring Rent, to have and to hold to the use of the Lessor; this use is void, as being against reason also. And if a Feoffee to use before the Statute of Uses, had bargained and sold the Land to one who had notice of the former use, no use had been made hereby; for there might not be two uses in being of the same Land at one time. *Dyer 155: Co. 1. 136, 137.*

And if *A.* enfeoff *B.* to the use of *C.* and his heirs, with Proviso, that if *D.* pay to *C.* an hundred pounds, that *C.* and his heirs shall stand seised to the use of *D.* and his heirs, this last use is void; for the use must arise out of the Estate of the Feoffee, and not out of the Estate of the *Cestui que use*. See *Brownlows Reports, 1 par. 40.*

The sixth thing whereunto respect must be had, is the Cause or Consideration. For howsoever in cases where Uses pass by way of transmutation of possession, as by Fine, Feoffment or Recovery, there the Consideration is not at all material, for he that doth make the Estate, may appoint the Use to whom he will, without any respect to marriage, kindred, money, or other thing: For in this case his own will and consideration guideth the use and equity of the Estate. Yet in Bargains and Sales, and Covenants to stand seised to Uses, it is otherwise: for there Consideration is so necessary, that nothing will pass, neither will any Use rise without a Consideration; i.e. some matter that may be a cause or occasion meritorious which amounteth to a mutual recompence in Deed or in Law, which must be expressed or implied in the Deed whereby the Use is created, or else supplied by averment and proof: For howsoever in this case an Averment shall not be allowed and taken against a Deed, that there was no Consideration given, when there is an express Consideration upon the Deed; yet when the Deed expresseth no Consideration, or saith [for divers good Considerations] or the like, there an Averment of a good Consideration given shall be received, for this is an Averment that may stand with the Deed; and without Consideration Inrollment will not help. And therefore if one bargain and sell his Land to another by Deed indented and inrolled, without any Consideration; it seems no Use will rise by this to the Bargainee. *Dyer 169. Cromp. Jur. 62. Dyer 146. Cal. 176. 11. 25. Dyer 312.*

Sixthly in respect of the cause or consideration of it, and what shall be a sufficient consideration to raise or alter a use, or not;

Averment

So if one [for divers good Causes and Considerations, or for divers great and valuable Considerations] bargain and sell his Land to another, or covenant to stand seised of his Land to the use of another that is not of his kindred, no use will rise by this, unless it be proved that money or something else was given for it. *41 Q. adjudg.* But if a man by Deed in consideration of money, as [in consideration of the sum of an hundred pounds to him paid, or in consideration of a competent sum of money to him paid, or otherwise promised to be paid, or in consideration of other Land, or of giving of Counsel, or the like] bargain and sell, or by such like words grant his Land to another in Fee-simple, Fee-tail, for life or years; in these cases the Use will arise to the Bargainee well enough. *Plow. 301. Bro. Fait. Inroll. 92. D. & S. 99: Cromp. Jur. 60. 61. Dyer 90. Cromp. Jur. 61.*

And therefore if I covenant with with *B.* that when he doth enfeoff me of White-acre, I will stand seised of Black-acre to the use of him and his heirs, and he doth enfeoff me accordingly; in this case the use of Black-acre will rise to *B.* and he and his heirs shall have it according to the agreement.

So if I agree with my Lessee for years, that if he pay me a hundred pounds within his term, that I will stand seised of the Land to the use of him and his heirs, and he do pay me the hundred pounds accordingly; in this case the Use will rise, and he and his heirs shall have it according to the agreement. *Bro. Exposition of words, 44.* So if I covenant that my son shall marry the daughter of *A.* and *A.* promise to give me a hundred pounds for the marriage-portion, and I covenant that if the same marriage do not take effect, I and my heirs will stand seised of the Land to the use of *A.* and his heirs, until the hundred pounds be paid; in this case a good Use will rise of the Land accordingly, if the marriage do not take effect.

But in all these and such like cases, the Covenant must be by Deed indented, and it must be inrolled; otherwise no Uses will arise. And when the Deed is inrolled, it shall take effect as from the beginning by Relation, to avoid all intervenient Estates and Charges whatsoever. And in like manner it is, if one for no cause, or for no consideration, as [because he is of his antient acquaintance, or because there hath been entire love or great familiarity between them, or because he hath been his Chamber-fellow, School-fellow, or Fellow-servant, or because he hath done him good service, or because he was his Master and taught him, or to the end that he may pay his Debts and Legacies, and discharge his Funerals, or for divers good causes and considerations:] If one for any of these, or any such like cause and consideration covenant with another that he will stand seised of his Land to the use of that other and his heirs, or that he and his heirs shall have the Land, &c. By this Covenant, whether it be inrolled or not, no Use at all will rise. *Plow. 302: 2 H. 7. 20.*

Relation

Covenant.

So if one covenant to stand seised to the use of *J. S.* (who is his Bastard-son) and his heirs, no Use will arise hereby. And yet perhaps upon such a Covenant as this, whereupon no Use nor Estate doth arise, an Action of Covenant may lie. *Dyer* 374. *Co.* 7. 11. 10. 143. 1. 83. *Plow.* 301. *Lit. Bro. sel.* 284. *Co.* 1. 154.

But if one [in consideration of nature, kindred, blood, or marriage with ones self, or any of his blood, payment of debts, or for the like cause] or without any such express Consideration at all, covenant to stand seised to the use of himself, his wife, children, brothers, sisters, or cousins, or their wives; these are good Considerations, and the Uses and Estates thereupon thus raised and made are good. And therefore if one covenant by his Deed, without expression of any Consideration, to stand seised of his Land to the use of himself for life, and after of his Wife for life, and after of his Child in tail or for life, and after of his Brother in tail or for life, or in fee, or in any such like manner; these Uses will rise, and the Estates will be well made hereby accordingly.

So if I agree with another, That if he marry my daughter, that from the time of the marriage they shall have my Land to them and their heirs; in this case, and by this agreement, if he do marry my daughter, they will have my Land according to the agreement. So if I being about to marry with a woman, covenant with *J. S.* to stand seised of my Land to the use of my self for life, and after to the use of the woman I am to marry for her life, and after to the use of the heirs of my body begotten on her; these are good Uses and Estates that are made by this Covenant. *Plow.* 301. *Bro. Feoffment, al. uses,* 54.

But here by the way this difference must be observed, where a man doth covenant in consideration of a Marriage to be had, to stand seised to Use, and the Marriage doth not take effect, there no Use shall arise. *Curia, Trin. 10 Car. B. R. Hoskins Case.* So also if the parties disagree at their age of consent: And so was it held in the Lord *Herberts Case.* But where one doth covenant to make a Feoffment, or levy a Fine to such Uses, and the Feoffment is made, or Fine levied accordingly; there notwithstanding the Marriage doth not take effect, yet the Use shall arise: for there he is in by the Fine or Feoffment, in which case there needs no Consideration. And therefore if *A.* covenant with *B.* that in consideration *C.* is his Kinsman, and in consideration of a Marriage to be had between *C.* and *E.* he will make a Feoffment and other Assurances to the use of himself for life, the Remainder to *C.* and *E.* and the heirs of their two bodies, and after Assurances are made accordingly by Fine or Feoffment, but they do not intermarry, but marry others; in this case notwithstanding *E.* shall have a Moity of the Land.

So if I covenant (in consideration of the love I bear to my Wife) to stand seised to the use of her and her heirs of my body begotten, and after to the use of my Brother; hereby the Use will rise to my Brother also, albeit he be not within the express Consideration. *Co.* 7. 40. 11. 24. *Dyer* 374.

So if one covenant with his two Sons for the love he doth bear to them, to stand seised of his Land to the use of himself for life, and after of his Wife for life, and after of his two Sons in tail one after another; in this case the Consideration is sufficient to raise the Use to the Husband and Wife also.

So if one (in consideration of the love he doth bear to his Brother) doth covenant to stand seised to the use of his Brother, and the Wife of his Brother for life, or in tail; in this case the Consideration is sufficient to raise the Uses to them both. So if I covenant (in consideration of the marriage of my son with the daughter of another) to stand seised to the use of my self for life, and after of my son and his wife in tail; these are good Uses, and will rise accordingly.

If I covenant with *J. S.* to stand seised to the use of him, his Executors, &c. (he being none of my kindred) for twenty years, and after to the use of my Son in tail; in this case the Use will not rise to *J. S.* but it will rise to my Son well enough. For albeit the Consideration of money given by one, may be a Consideration to all the Estates; yet the Consideration of blood, &c. is singular, and will raise the Use of that only to which it goeth. *Plow.* 307. *Dyer* 174.

But

But if I Covenant with *B* in consideration of the marriage of my son with the daughter of *B* to stand seised to the use of *R* (a stranger) for life, and after to the use of my son and his wife in Taile; in this case the use shall rise to *R*, albeit he be a stranger, and that for the supportance of the remainder, which cannot be without a particular estate: and in all these, and such like cases, no inrolement of the Deed is necessary. If I (in consideration of 100*l.* given to me by my son,) Covenant with him to stand seised of Land to the use of him and his heirs; in this case, no use will rise without inrolement by the implied consideration, because there is an express consideration, *Et expressum facit cessare tacitum*. Cook 11. 24, 25. 7. 40. Inrolement.

And yet if I Covenant, that in consideration that *I S* is my son, and hath paid me 100*l.* that I will stand seised of Land to the use of him and his heirs; in this case, the use will arise without inrolement. *Manrels case Trin. 3 Jac. B. R. Broo. Feoffmental use, 15 Plow.*

And if I Covenant in consideration of 100*l.* and of a marriage, to stand seised to the use of my self for life, and after of my son in Taile; hereby the use is raised, and the possession charged without inrolement. *Manrels case. 4.*

So also where a Feoffment is made, fine levied, or recovery suffered, and no use declared thereupon; and the same is without any consideration of fine or Rent; by this the use is not changed, for it doth result to the Feoffor, Conusor, and Recoveree, and he hath the estate as he had it before; but if in these, and such like cases, there be but a penny or a penny worth of consideration given, or any Rent reserved upon the Feoffment; the use will rise well enough to the Feoffee, &c. Cook 1. 24. *Doct. & St. 97. 99, 101.*

And if any Tenure be created, as where a Gift in Taile, Lease for life or years is made; in these cases, albeit there be no consideration given, yet the use will rise well enough to the Donee or Lessee, and especially, if any Rent be reserved, for that is a kind of consideration: But if a Lessee for years grant over his term to another without any consideration at all, it seems by this no use at all will rise to the Grantee, and therefore that the Grantee shall hold all it to the use of the Grantor; *sed Quere.*

The Seventh thing whereunto respect is to be had, is the manner and form of words used in the making and raising of uses, wherein there is much regard to the mind and intention of parties. Seventhly, in respect of the manner and frame of the words used in the raising of uses, and what manner of uses may be made, or not.

For if one Covenant in consideration of 20*l.* paid him by *I S*, to stand seised of Land to the use of *I S* and his heirs: or if one covenant that *I S* and his heirs shall have his Land; if this Deed be inrolled, this is a good bargain and sale to raise the use, and will do it as well as when it is made by the words [*bargaine and sell.*] Cook 8. 95.

So if one for good consideration by words of Demise and Grant, make a Lease of his Land for a term of years; hereby the use will rise to the Lessee as well as if the Lease were made by the words, *bargaine and sell, Et sic de similibus*. Cook 2. in *Sir Rowland Heywoods case.*

And yet if one by words of *bargaine and sell*, convey his Land to his son, no use will arise by this, except there be money paid, and the Deed be inrolled. *Wards versu. Lambert. Co. B. Pasche 37. Eliz.* Inrolement.

And if one, in consideration of Money grant his Land to his son, or any other by the word [*enfeoffe*]; no use will rise by this, unless Livery of Seisin be made thereupon, because the intent of the parties in these cases doth appear to be to pass it in another manner: And if in the last case Livery of Seisin be made, then the use shall be guided by Law, that is, if nothing be given, it shall be to the use of the Feoffor, and not amount to a limitation of use to the son. *Resolved in Stiles case. 37. Eliz.*

If one Covenant with his son, that his Land shall remain, or that his Land shall descend to him; this is a good Covenant to raise the use according to the limitation: 21. Hen. 7. 18. Plow. 308. 301. *Broo. Feoffmental use, 16.*

Uuuuuu

And

And yet if one covenant with his Son upon his marriage, that his Land shall remain, revert, or descend to his son in Fee, or in Fee-Tail, by this no use will be raised, because it is so incertain; but perhaps this may amount to a covenant, whereupon the son may have an Action of Covenant.

Covenant.

If I Covenant for me and my heirs, that I and my heirs, and all others that are seised, shall be thereof seised to the use of &c. this is a good covenant to raise the use, albeit it be in words of the future tense.

If I Covenant with my eldest son and strangers, to convey my Land to the same strangers to the use of my self for life, and after of my son in Tail &c. and I grant by the Deed, that the said persons seised of the said Land, shall be from thence seised to the said uses, and none other use, and no other conveyance is made; it seems this is sufficient to raise the use: And yet if I be seised of Land in Fee, and covenant with *IS*, that *AB* and *CD* and their heirs, shall stand and be seised of this Land to the use of &c. it seems this is not a good Covenant to raise the uses:

Dyer 374.

If a Feoffment, or other Conveyance be made to the use of the Feoffor and the heirs of his body, on the body of *M* the wife of *ST*, and for default of such issue, to the use of him and the heirs of his body of *S* the now wife of *WK*, and for default of such issue, then to the use and performance of his last Will for 10 yeares immediately after his death, and after the term ended, to the use of the Feoffees and their heirs during the life of *W* (eldest son of the Feoffor,) and after his death, to the use of the first issue male of the body of the Feoffor lawfully begotten, and the heirs of the body of such first issue male, and for default of such first issue male, to the second issue male &c. [in the same manner;] these are good limitations of uses. So if a use be limited to *IS* for life without impeachment of waste & after to the use of *B* & *C*, their executors & administrators for the term of twenty yeares, & after, to the use of *C* & the heirs males of his body &c. these are good uses. So if a use be limited after this manner, viz. to the use of a mans last Will and Testament, or to the use of such person and persons, and of such estate and estates as he shall limit and appoint by his last Will and Testament; or to the use of such person and persons, or to such uses and purposes as he shall by any writing under his hand and seal declare and appoint; these are good limitations. If I Covenant with another in consideration of blood &c. that I will stand seised of my Land to the use of such of my sons, or such of my cousins, as the Covenant shall name, in this case, after a nomination made, the use will rise well enough. *Cook* 1. 120. *Cook* 1. 90. *Cook* 6. 18. *Litt. selt.* 462. 463. *Cook* 1. 176.

Incertainy.

But if I (for and in consideration of 10*l.* or the like good consideration) Covenant to stand seised of Land to the use of such persons as the covenantee shall name; in this case, albeit the covenantee do nominate some of my cousins, or blood, yet no use will rise by this for the incertainy of it. If a Feoffment or other conveyance be to the use of *IS* and his heirs, provided that if the Feoffor pay 10*l.* at such a day, that then it shall be to the use of the Feoffor and his heirs; this is a good limitation, and the use will rise accordingly. A use may be limited to a woman *durante viduitate sua*, and this is good. *Cook* 4. 3.

If a man be seised of two Manors, and covenant to stand seised of the same to the uses following, viz. of the one to the use of the covenantor for his life, and after to the use of his wife for life, and after to the use of his eldest son in Tail &c. And for the other Manor, to the use of his second son in Tail &c. these are good limitations, and the uses will rise accordingly. *Cook* 11. 23.

If a man seised of Land in Fee agree with another, that a Fine shall be levied of it, and that the same shall be to the uses following, viz. that *IS* (the Conusor) shall have one yearly Rent of 50*l.* during his life to be issuing out of the same Land, and as touching the Land charged with the Rent &c. to the use of *ID* (the Conusee) until default of payment of the said yearly Rent, and then to the use of *IS* and his heirs for ever; this is a good limitation, and the use will rise accordingly, *Et sic de similibus*. *Cook* 2. 69, 70.

If a Feoffment be made by *IS* to the uses in certain Indentures Tripartite of the same date, and therein is declared that it shall be to the use of *A* for life without impeachment

ment of Waste, and after to the use of such Farmors, or Tenants to whom he shall demise any part of the premises for life, or lives, or for any term of years, as in any such demise shall be limited and appointed; and after to the use of the performance of the last Will of the said *L*, and to the use of such person or persons severally to whom the said *L* by his last Will and Testament shall appoint any estate; and after to the use of &c. these are good uses, and the estates shall rise accordingly. *Brownl. 2. part 51.*

A use may be limited upon condition, and the condition may be annexed to one of the uses, and not unto another. *Cook 4 14.*

If Lands be conveyed to *IS* and the heirs of his body, to the use of *IS* and his heirs, or to the use of a stranger and his heirs: this use will not rise in this manner. And yet if lands be conveyed to *IS*, and his heirs, to the use of him and the heirs Males of his body, and after to the use of a stranger and his heirs, it seems this is a good limitation. *Cook super. Littl. 19.*

If one grant Lands by Deed to husband and wife, To have and to hold to the use of the husband and wife, and of the heirs of their two bodies; this is a good estate Taile by this limitation, albeit he do not say *Habendum* to them and their heirs &c. but *Habendum* to their uses; but otherwise it were if the use were limited to a stranger in this manner. *Hill. 6 Car. B. R. Adjudge.*

If Lands be conveyed by *IS* to *ID*, to the use of *IS*, or to the use of his wife for life, or to the use of any other for life, the remainder to another in Taile, or for life, the remainder to a third, his Executors &c. for six months, and after the six months ended, to the use of a fourth and his heirs; these are good limitations, and the estates will rise accordingly. *Dyer 314.*

If a use be limited to the Conusee of a Fine, or a Recoverer in a Recoverie until he make a Lease for Fourty years, and after to the use of the Recoverses or Conusors and their Heirs; this is a good limitation, and the use will rise accordingly. *Dyer 290.*

Contingent uses, or uses in *posse* may be created as well as uses in *esse*; and therefore if Lands be conveyed to the use of a man, and the wife he shall afterwards marry, or to the use of his first, second, or third wife, or to the use of *IS* for life, and after to the use of the right heirs of *ID*, and *ID* is then living; or to the use of *IS* for life, and after to the use of him that shall be his first heir male, and the heirs of the body of such heir male &c. all these, and such like, are good uses; but they are uses at the Common-Law still, and are not executed by the Statute until they come in *esse*. *Cook 1 in Chudleighs case, 135.*

The last thing whereunto respect is to be had, is the Nature and Quality of the Use: And herein it is to be known, that a man may at this day by act executed in his life time, or by his last Will and Testament at his death, give his Lands, Tenements, or Hereditaments to any person or persons not corporate, and their heirs, for any Religious, Charitable, or Civil Use, as well as for any private Use. *Cook 1.*

Eightly, in respect of the Nature and Quality of the Use. Charitable uses.

And therefore a man may so dispose of his Lands for the finding of a Preacher, erecting or maintenance of a School, Relief and comfort of Maimed Souldiers, sustenance of poor people, reparations of Churches, High-ways, Bridges, discharging of the poor Inhabitants of a Village of the common charges, to make a stock for poor Labourers in Husbandry, and poor Apprentices, and for the marriage of poor Virgins, or other such like uses, and these uses are not prohibited by any Statute.

And it is good Policy upon every such Feoffment or estate to reserve to the Feoffer and his heirs some small Rent, or to set down some small Consideration: But these uses are not such uses as are executed by the Statute of uses, neither are they to be resembled to the uses aforesaid; for in this case, if there be any mil-employment of the Lands, or breach of the Trust by the parties trusted, Redress is to be had by the Lord Chancellor or Lord Keeper by a special course of proceeding. For which, see the Statutes of 39 *Eliz. chap. 6.* 43 *Eliz. chap. 9.* 7 *Jac. chap. 3.*

Superstitious
Uses.

But if any man have heretofore given, or heretofore shall give any Lands, Tenements or Hereditaments by act executed in his Life, or by his last Will at his Death to any person singular, or corporate, in Fee-simple, Fee-Tail for life, or years, to the intent, or upon condition to maintain any superstitious Use, as to finde a Chaplain, and have the service of a Priest to say Masse, or to have a Priest or other man to Pray for the Soul of any dead man in such a Church or other place, or to have or maintain perpetual Obites, Lamps, or Torches, &c. to be used at certain times to help to save the Souls of men out of the supposed Purgatory; all these and such like uses are void: And the Lands that are so given to such superstitious uses, are to be forfeited, and given to the King, and he shall have them; and yet so, that if there be any charitable use intermixed with the superstitious use, and they may be distinguished, the King shall have only so much as is given to the superstitious use, and not that which is given to the charitable use also: For which, see *Adams and Lamberts Case* at large, *Cook* 4 104. *Stat. 15 Rich. 2 chap. 5* 37 *Hen. 8 ch. 4.* 1 *Edw. 6. ch. 14.*

5. Declaration
of Uses: And
where a use of
Land may be
declared upon
any Assurance,
and what shall
be said a suffi-
cient declarati-
on of such a
use, or not.

As touching the Declaration of Uses, i. e. the manifestation or agreement of the Parties, to what uses and intents the Assurance made shall be, these things are to be known:

1. That uses may be declared or averred on a Fine, Feoffment, or recovery of Land; but on a bargain and sale of Land, no use may be declared or averred, but what the Law doth make, *Cook* 1. 175, 176. *Dyer* 169.

And upon a Covenant of uses, no other use may be declared or averred, but what is contained within the Deed.

2. Every one may declare and dispose the use of Land according to the estate that he hath in the Land; for the declaration and disposition of the use doth ensue the ownership of the Land *sicut umbra sequitur corpus*, *Cook* 2. 55. *Dyer* 290.

And at this day the use doth draw the Land to it, as the body or principal the shadow or accessory: And therefore the owner of the Land, or he from whom the land doth move, ought to limit and declare the use of the land; as if the Husband and Wife levie a Fine of the Land, whereof he is seised in the right of his wife; the Husband alone may declare the use of this Fine, and this declaration shall binde the wife, albeit her assent to the limitation of the uses do not appear, if her dissent doth not appear; but in this case, it is most proper to have a declaration of the uses by the husband and wife both; for she alone, because she is *sub potestate viri*, cannot alone declare or limit any use; neither can the husband alone limit any use against her good will, because he hath not the estate of the Land: And therefore, if A and B his wife be seised of land in the right of his wife, and she without the consent of her husband, covenant by Indenture with C and D, 14 *Marris* 14 *Eliz.* that a fine shall be levied of this Land, and that it shall be to the use of her self for life without impeachment of waste, and after to the Comsees for their lives, to the intent that they shall suffer 1 s to take the profits for his life with divers remainders over; and afterwards, and before the fine levied, the husband alone by another Indenture 31 *Febr.* 22 *Eliz.* (wherein the wife is named a party) without the consent of his wife, doth agree that a fine shall be levied to the use of him and his wife, and after to the uses limited by the wives Indenture, and after the fine is levied accordingly; in this case, albeit the variance be in one particular only, and the limitations in all the rest of the uses and estates do agree, yet all the same limitations by both Indentures are void, and the use upon the conveyance is left to construction of Law, and therefore shall be to the wife and her heirs for ever: And yet if the husband and wife agree in the limitation of the uses for part of the land, and differ in the rest, the limitations for so much as they agree in, are good, and void for the residue: And in these cases where the declaration is good, the wife and her heirs shall be bound by it. So if two Joynt-tenants are, and they, or two others having several estates, joynt in a fine, and one of them declare the use in one manner, and the other doth declare the use in another manner; this declaration is good for either of their parts, for the declaration shall be governed according to their estates. And if an Infant, or a man *de non sane memorie*, doth declare the use of a fine levied by him, this declaration is good, and shall binde him so long as the fine shall continue in his sorte.

Husband and
Wife,

Joynt-tenants,

Infant.
De non sane
memorie.

3 This declaration of Uses may be made either by Deed indented (which is the most usual and safe way,) or by Deed Poll: As where the parties do by such a writing agree that an Assurance passed, or to be passed, shall be to such and such uses: as that a fine shall be levied by such a time, and that it shall be to the use of one for life, another in Tail, and another in Fee. *Cook* 2 73. 5 29

Or it may be made by a verbal agreement without any writing at all; as where an agreement is so had and made between two or more, that a Fine or Recovery shall be had, and it shall be to such and such uses, and the same is had accordingly; in this case, this is a sufficient declaration being proved; but it is not safe in these cases to depend upon slippery memory.

4. This declaration by word or writing, may be made before, at, or after the time of making the Assurance: and therefore one may covenant or agree that *I* shall recover against him, or that he will levy a Fine, or make a Feoffment to *I* of such land, and that the same shall be to the use of &c. *Cook* 2 69 70. 6 29 63 *Dyer* 290 *Co.* 7 40. *Co.* 98. *Dyer* 136.

And if one make a Feoffment; he may declare the uses of it at the same time, and that within the same, or in another Deed at his pleasure: And if the Assurance be past, and no declaration of uses had before, or at the time of passing it, a declaration may be subsequent, *viz.* That the same Assurance was, and shall be, and the Recoverers &c. shall stand and be seized to such and such uses; for an Indenture subsequent may direct and declare the uses of a Fine or Recovery precedent. But herein these diversities are to be observed; when precedent Indentures are made to direct the uses of a subsequent Assurance, and after the assurance made accordingly, there no Averment shall be taken by word, that the same Assurance was to other uses then are declared by the Indenture: But against an Indenture subsequent, declaring the uses of an Assurance precedent, an Averment may be taken, that there were other uses expressed and limited, before or at the time of the Assurance, then are contained in the Indenture. If a precedent Indenture be made to direct the uses of a subsequent Assurance, when the Assurance comes, the land is bound, and the Conusor or Recoverer cannot by any act of his, after the Recovery had, charge or avoid it; but if the declaration be subsequent; if in the interim, between the Assurance had, and the declaration of the uses, the Conusor or Recoverer sell, give or charge the Land to others; this subsequent declaration will not subvert the mean estates, charges or interests, unless it can be otherwise proved, that by a certain and complete agreement of the parties, the Assurance was had and made to these uses.

Averment.

5. When the agreement for the limitation of uses is precedent, whether it be by writing or word, it is but directory, and doth not bind the estate until the same Assurance be afterwards had, and therefore by a new agreement or declaration made in the same manner as the former, *viz.* in writing, if the former be so, and between the same parties either before, or at the time of the same Assurance passed, new uses may be made, and the former uses changed; but when the same Assurance is pursued accordingly, and no intervenient alteration is made, it shall be expounded to be to the same uses, and shall bind the parties, and no naked Averment shall be received of any latter or other agreement contrary to the Indentures.

6. The declaration of the uses must be certain, and that especially in three things; in the persons to whom, in the Lands, &c. of which, and in the estates by which the uses are declared; and if there want certainty in either of these, the declaration is not good; and it must be complete of it self without any reference to Indentures or other writings to be made afterwards; for then it is but an imperfect communication, and no complete declaration.

7 Where an Indenture precedent is to limit the uses of a subsequent Fine or Recovery, and it is not pursued in some circumstance of time, person, quantity or the like; yet if no other new mean agreement may be proved, the Assurance shall be in judgment of Law to the uses contained in the same Indenture; but if the variance be in these particulars, and the form of the Indenture be not pursued, there an Averment without writing may be taken, that the fine or other Assurance was to other uses then are contained in the Indenture; and if none such can be made, then it is left to

construction.

construction of Law. And therefore if *A* be seised of divers Manors in Fee, and by his Indenture dated 10. *Martii*. 21. *Eliz.* doth covenant with *B* and *C*. That he, before the end of Trinity Term next, will by Fine or other Conveyance assure one of these Manors to them, and that the same Assurance shall be to the use of *A* and *E* his wife, and of the heirs of *A*, and the 28 day the Deed is inrolled, and the 29 day of the same month, he doth by another Indenture covenant with the same *C* and *D* to convey all the same Manors to the same *C* and *D* before the Annunciation next, and that the same Assurance shall be to the use of *A* and his heirs males of his body, and for default of such issue, to the use of divers others in remainder, and by this Indenture doth covenant, that if he shall not sufficiently convey this land by the day, that he will stand seised to the same uses &c, and no Fine is levied by the end of Trinity Terme, but the 17 of *September* following, a note of a Fine is acknowledged to *B* and *C* and the heirs of *B*, of the land within the first Indenture, and the 18 of the same month, another note of a Fine is acknowledged to *C* and *D* of the same, and other land in the last Indenture, and both these Fines are entred in *Ostabis Mich.* following, in this case, these Fines cannot be directed and declared by both Indentures, and therefore it seemes the declarations are void.

6. Averment of Uses; & where a use of land may be averred upon any assurance; And what shall be said a sufficient averment, or not.

As touching Averment of Uses; i.e. the proof of uses by witnesses, these things are to be known, That where any use is expressed upon a Charter of Feoffment, no other use *contra* or *preter* the use which is expressed, shall be admitted. But in cases of Fines and Recoveries, wherein no uses are expressed, other uses then what Law construction will make, may be shewed and proved to be agreed upon, and the same assurances shall be to such uses, as by proof shall be made to appear to be the intent of the parties: As if a man and his wife sell her land for money, and after levy a Fine to the Vendee and his heirs; in this case it may be averred it was for money, and this shall carry the use to the Vendee without any declaration of use, which otherwise would result to the woman and her heirs; and yet if a Fine be with a Grant and Render, no averment to prove it to be to other uses, then what are contained in the Fine, shall be received. *Cook* 9 8 5 20 25. *Doll. & St.* 95. *Cook* 2 57.

And where the uses of a Conveyance be declared by Indenture before, or at the time of the same Conveyance, no averment shall be received of any other uses then what are contained in the Indenture: But if the Indenture of declaration be subsequent, there an averment lyeth and shall be received that there were other uses agreed upon, at, or before the time of the conveyance made. *Cook* 9 8.

And where no agreement is made to levy a Fine, or suffer a Recovery, before, or at a time certain, and that it shall be of such and such lands, and to such and such persons, and after it falleth out the Fine or Recovery is not had by that time, or not of the same land, or not between the same persons; in these cases an averment may be had of other uses and of another agreement.

7. To what use an assurance of land shall be by construction of Law, and how the limitation of the Uses of land by a Deed shall be construed.

Where the uses of an assurance are certainly agreed upon and declared between the parties thereunto, there regularly it shall be to such uses as are declared and agreed upon, and to none others. But if a conveyance be made of land by Fine, Feoffment or Recovery, and no uses thereof declared and agreed upon, the Law will limit and appoint the use according to equity and conscience. And therefore if a man levy a Fine, make a Feoffment, or suffer a Recovery of Land without any consideration, the Law will adjudge the use to be in the Feoffor, Conusor and Recoverer who doth part with the Land. And so if a man make a Feoffment to the intent to perform his last Will, or to the use of his last Will, or to such persons as he shall limit by his last Will; in all these cases the use shall be in the Feoffor and his heirs whiles he doth live, to dispose at his pleasure. *Doll. & St.* 95. *Park. Sett.* 533. *Cook* 1 24. *Dyer* 18. *Crompt. Jur.* 62. *Cook super. Litt.* 271.

And so if one make a Feoffment of Land to *I. S.* and his heires, to the use of *W. S.* for 20 years, and limit the use no further, in this case the residue of the use after the 20 years, shall be to the Feoffor and his heirs: But if in these cases there be any consideration of money or the like, though never so little given, or any rent reserved upon the Feoffment, the Law will adjudge the use in the Feoffee, Conusee, or Recoveror. *Bakers Case Co. B. Hill.* 37. *Eliz.*

And

And yet in that case also, if other uses be expressed upon the Deed, it seems it shall go to the uses expressed; as, if *A* for 20 l. paid by *B*, enfeoff *B* and his heirs to the use of *C* and his heirs. *Doll. & St* 95.

If the husband and wife levy a Fine of the wives land without consideration, and without any declaration of use, the Law will adjudg this to be to the use of the wife and her heirs; but if they sell her land for money, and after levy a Fine thereof to the Vendee, this shall be to the use of the Vendee and his heirs. *Coo. 2. 57. 58.*

And if a man be seised of Land, of the part of his Mother, and without any consideration make a Feoffment in Fee of it, this shall be said to his use in the same nature he had it before.

So if two Joint-tenants be of land, the one in Fee simple, the other but for life, and they without any consideration levy a Fine of it, and make no declaration of use; the use shall be to them of the same estate as they had before in the land.

So if *A* tenant for life of land, and *B* in reversion or remainder, levy a Fine of this land, generally this shall be to the use of *A* for life, and to the use of *B* in Fee afterwards as it was before.

So if *A* be seised in Fee of an Acre of ground, and he and *B* joyn together and levy a Fine of it to another without any consideration; this shall be to the use of *A* and his heirs only.

If one make a gift in taile, or Lease for life, or years, albeit it be without any consideration of Fine or Rent, yet the Law will adjudg the use in the Donee or Lessee, and not in the Donor or Lessor. *Perk. Sect. 533.*

If one at this day by Deed indentured, bargain and sell his land to another for money, and doth limit no estate, but the Deed is *Habendum* to him only, and not *Habendum* to him and his heirs, or to him and the heirs of his body, or to him for life: howsoever in this case, before the Statute of uses was made, it was otherwise; yet now the common received opinion is, that by this there doth passe only an estate for life, and not a Fee simple. *Plow. 539. Cook 1. 87. Yet see Litt. Broo. 538. Crompt. 7th nr. 47. 27 H. 8. 6. Cook 1. 110.*

If a Feoffment be made to *IS* and his heirs to the use of *ID* without any more words; by this limitation *ID* hath only an estate for life: So if a Feoffment be made to *IS* and his heirs to the use of *ID* for ever, without saying, [*And his heirs*] hereby *ID* hath only an estate for life: and so of other uses the construction shall be according to the rules of Law. *Cook super Litt. 42. Dyer 169.*

If a use be limited to *IS* and his heirs until *A* shall come from beyond the Sea, and attain his full age and dye, in this case if he come from beyond Sea, attain his full age or dye, the use shall cease. *Pasch. 3 Eliz. B. R. the Lord Mordants Case.*

If one covenant to stand seised to the use of *A* his eldest son, and the heirs males of his body, and after to the use of *B* his second son in taile in the same manner, or according to the limitation to *A*; by this, *B* hath an estate taile to him and the heirs males of his body. *Hil. 17 Jac. B. R. Rigways case.*

If a Feoffment in Fee be made to the use of a man and his wife for their lives, and after to the use of their next issue male to be begotten, in taile, and after to the use of the husband and wife, and of the heirs of their two bodies begotten (they having no issue male then;) by this the husband and wife are tenants in special Taile executed; and after they have issue male, they are tenants for life, the remainder to the son in taile, the remainder to them in special taile. *Cook super Litt. 28.*

If one make a Feoffment to the use of himself for life, and after his decease to the use of *A* her whom he doth intend to marry, until the issue he shall beget of her shall be of the age 21 years, and after the issue cometh to that age, then to the use of the wife during her widow-hood, and the husband dye without issue: by this the wife shall have an estate, at least during her widow-hood. *Dyer 300.*

If I covenant with *B* that in consideration he will marry my daughter, that from the time of the marriage I will stand seised to the use of my self for life, and after to the use of *C* a stranger, and the heirs males of his body, and after to the use of *B* and my daughter, and the heirs of their two bodies; in this case albeit the use limited to *C* the stranger be void, yet it seems *B* and my daughter shall

not

not have the Land till the death of *C* without issue, but that my heirs shall have it till that time. *Cook* 1.

If I covenant with *B* to stand seised to the use of my self for life, and after my death to the use of *C* (a stranger) for the term of 20 years, and after the end of the term to the use of my son in tail; in this case the use limited to *C* is void, and my son after my death shall have the land: But if the words of the Covenant be, [*And after the end of 20 years,*] in stead of, [*And after the end of the term,*] my son shall not have the Land until the 20 years be expired. *Cook* 1. 155. See more in exposition of Deeds.

8. Where and how uses of Land may be extinguished and destroyed or suspended, or not; and where the ancient uses shall be revived by the entry of the Feoffees, or not.

All such uses as are not within, nor executed by the Statute of 27 H.8. but remain at the Common Law, may be destroyed, discontinued or suspended as uses before the Statute might have been. And therefore contingent uses may be extinguished or suspended at this day. As, if a man seised of land in Fee have three sons, *A*, *B* and *C*, and he make a Feoffment of his land to divers Feoffees to the use of them and their heirs during the life of *A*, and after to the use of the first son that *A* shall beget, and the heirs males of the body of such first son; or if a Feoffment be made to the use of a man and the wife that he shall marry, or the like; if in these cases the Feoffees make a Feoffment over, before the contingent uses happen to be in esse, as before *A* have any son, or the man take a wife, &c. albeit it be to one that have notice of these uses, yet the uses are destroyed for ever, and the Feoffees cannot enter and revive them contrary to their own Feoffment. And if in these cases the Feoffees before the contingent remainder vest be disseised, hereby the uses are suspended; but then by the Re-entry of the Feoffees the ancient uses will be revived again: And therefore if the Feoffees release to the Disseisor, and so bar themselves of their entry, the uses are extinguished and shall not be revived, and the party grieved hath no remedy but in Chancery against the Feoffees for breach of trust. And if the Feoffees in the first case before, dye before *A* have any son born, the contingent remainder is gone: As where a Feoffment is made to the use of the Feoffor for life, and after to the use of the right heirs of *I S* in Fee, and the Feoffor dye before *I S*; in this case the remainder is gone, for a remainder cannot be without a particular estate no more of a use than of an estate made in possession: and such a remainder must vest during the particular estate, or at least *eo instanti*, when the particular estate doth end. *Cook* 1. *Chudleighs case*.

If a Feoffment be made to the use of *I S* and the wife he shall afterwards marry, and of the heirs males of their bodies; and *I S* make a Feoffment of this land to another before he take a wife; hereby the contingent remainder is destroyed. *Co.* 1. 136.

If *A* enfeoff *B* and his heirs to the use of *C* and *D* his wife, and the heirs of the survivor of them, and *C* makes a Feoffment to *E* and dyeth; this Feoffment doth destroy the contingent remainder. *Hillar. 2. Carol. Scaccar Adjudged.*

When the estate out of which the uses do arise is gone, the uses are gone also: As, if a Lease be made to *A* for his life to the use of *B* for his life, and *A* dye; hereby the estate of *B* is gone. *Dyer* 186.

Also uses of lands may be gone by Revocation, whereof see in the next part.

9. Where a power to revoke uses of land shall be good, and how they shall be taken; and what Revocation by reason of such power shall be good, and what not. *Brownl. Rep. 2. part 157.*

Provisoes and Powers of revocation of uses of lands are very frequent in voluntary conveyances (whether by Feoffment or otherwise) that passe land by way of raising of uses, and are executed by the Statute of 27 H.8. and the inheritances of many depend thereupon. *Cook super. Lit. 237. 7. 11. 12. 10. 143. 1. 110. 173. 107. Dyer 372.*

As, if a man seised of land in Fee have divers sons, and he covenant to stand seised of that land to the use of himself for life, and after of his eldest son in tail, and for want of such issue, to the use of his second son in tail, &c. with a Proviso, that it shall be lawful for him at any time during his life to revoke any of the said uses, and to limit and appoint other uses, &c.

Or if *A* by Indenture between him and *B* his heir apparant an Infant, covenant

with *B* for the advancement of his blood, &c. to stand seised to the use of himselfe for life, and after to the use of his said heire apparant, and the heires males of his body, and after to the use of his right heires; provided that if *A* by himself or any other during his life shall deliver or offer to *B* a Ring of gold, to the intent to make void all the said uses, that then the same uses shall be void, and he may limit new uses. Or if *A* by Indenture Covenant with *B* to stand seised to the use of himself, and his wife, and his daughter for their lives, and after &c. provided that if the said *A* during his life, and after the debts mentioned in the Schedule annexed to the Indenture shall be paid, shall be disposed to determine, disannul, change, alter, enlarge, diminish or make void the uses or estates, or any of them, of the premises or any part thereof, and by writing indented under his Hand and Seal subscribed in the presence of three Witnesses shall declare his mind to be so, that then the same uses shall be void: All these and such like Provisoes being coupled with a use, are allowed to be good, and not repugnant to the former estates. But in case of such a Feoffment or other conveyance whereby the Feoffee or Grantee is in by the Common-Law, as where *A* doth enfeoffe *B* and his heires to the use of *B* and his heires, it said such a Proviso is meerly repugnant and void.

And as touching these Provisoes or Revocations, these things are to be known;

1. These Revocations are favourably interpreted, because many mens Inheritances depend upon it: And therefore he that hath this power may revoke part of the uses at one time, and part at another time; and the revocation of the old may be made by the making of new uses without any expresse revocation: And by the same conveyance whereby the old uses be revoked, the new uses may be created and limited, and then the former uses do cease *ipso facto* by this revocation without any entry or claim. As if one covenant to stand seised to the use of himself and his wife for their lives, and after to the use of *A* his daughter for life, and after to the use of *B* his Daughter in tail, &c. provided that if he shall be minded, &c. he may by writing &c. make void the same uses, and declare the uses to others; and he doth make void the use to his wife at one time and no more, and after by deed doth limit and appoint new uses of the whole by a new Covenant to stand seised to other uses; these are good revocations; for there needs no real and expresse revocation of former uses, but the creating of new uses is in Law an actual revocation of the old uses, as the making of a latter is *ipso facto* a revocation of a former Will.

2. The Proviso must for the substance of it be pursued in the revocation, and all incident circumstances thereof must be observed, as sealing, subscription of names, witnesses, and the like; otherwise the revocation will not be good. And therefore if the Proviso be, that if the Covenantor shall be minded to revoke, and shall declare his mind by writing indented under his Hand and Seal, delivered before three Witnesses, the uses shall be void; in this case a revocation by word without writing, or by a writing and not indented, or by writing indented and not under Hand and Seal, or under Hand and Seal, and before two witnesses only, is not good. And yet if a Proviso be, that if the Covenantor shall at any time during his life by writing, under his Hand and Seal, delivered before two witnesses revoke the same &c. the old uses shall be void, and the Covenantor by his last Will and Testament in writing under his Hand and Seal before two Witnesses doth give the Land to another, and make no expresse revocation of the former uses: this is a good revocation in Law. If the Proviso be, that if the Covenantor be minded at any time during his life to revoke the same uses &c. and shall pay or render to *A B* 20s. in such a place; in this case tender of this 20s. in that place at any time is not good, unlesse he happen to meet with *A B* at the place, for then tender at any time is good, but otherwise the Covenantor must give notice to *A B* what time hee will render the twenty shillings, in that place, otherwise the revocation is not good. *Trinit. 18. Jacob. Com. B. Tibbit and Lees Case. Cook 8. 921.*

• If one be to marry his daughter to the son of another man, and they do mutually covenant to stand seised of their lands to the use of their son and daughter

Xxxxxx

with

with Proviso to revoke the uses with the consent of the mothers, if they or either of them be then living, and one of them dye; in this case a revocation, by the consent of the surviving mother is sufficient. *Trin. 18 Jac. B.R. Savil and Sterlings case.*

3. When the Covenantor doth make void such uses by vertue of such a revocation, he is seised again of the Land in Fee-simple, as he was at first, without any entry or claim.

4. This power of revocation, whether it be present, as those before and most are, or future, as when they are upon contingent, as if the Covenantor over-live *I S* or the like, when it is reserved to the party himself that made the uses, may by his Fine or Feoffment be utterly extinguished: As if he make a Feoffment, or levy a Fine of the land, whereunto the uses and Proviso are annexed, by this the Proviso is extinct: and yet so, as if he make a Feoffment, or levy a Fine of part of the Land only, this shall extinguish his power but to that part only: But if the power be reserved to a stranger, it seemes the Fine or Feoffment of him that made it, will not extinguish it. This power also when it is present may be extinguished by a Release made by him that hath the power, to any one that hath any estate of Franktenement in the land in possession, reversion, or remainder; or it may be avoided by Defeasance, whether it be present or future. *Cook 1. 111. 112. 113. super. Litt. 237.*

Release.

Defeasance.

10 Other trusts and Confidences of lands and of chattels real and personal, the nature of such trust, the duty of them that are trusted, and the remedy to be had against them for breach of their trust.

If one convey his lands to certaine friends in trust, to the intent that they shall convey it to such persons as he shall set down in his last Will and Testament; Or if a man deliver money to a friend in trust to purchase land for him and his heires, to the end that he may have the profits thereof for his life, and to the end it may be conveyed to them afterwards: Or if a man deliver money to his friend to buy land for him that doth deliver the money in his owne name: Or if a man enfeof his friend and his heires of land, to the intent that he shall alien the Land to whom *I S* shall appoint; Or if land be conveyed to me in Mortgage, and I pay all the money, but I (to prevent the Joynture of my wife, or for some such like cause) name a friend Joynt-Purchasor with me, and so the conveyance is made to us both; if in any of these cases, or in any other such like case the friend trusted prove false, and do not perform the trust, but turn the profits of the land to their own use, or refuse to settle it according to the trust, or the like, the party grieved must have his remedy in Chancery, for these are not Trusts or Uses within the Statute, nor such for which there is any remedy at the Common-Law: And in that case where the land is settled to the intent that the friends trusted shall settle it where *I S* shall appoint, if *I S* do not appoint how it shall be settled, it seems the Possessors shall have it to their own use. *Cromp. Jur. 48. 59. 58. 54. Dyer 160. Fitz. Accompt. 122.*

And if a man give or grant his goods or chattels, as Leases for yeares or the like, to friends in trust, to the use of himself for life, and after to perform his Will, or the like; these are such uses and trusts as are not within the Statute of uses, and for the breach of which there is no remedy at the Common-Law, but in Chancery only. So if an Obligation or Statute be made to *A B* to the use of *C D*; this is a trust of the same nature: and if *A B* release the Obligation without the consent of *C D*, or get the money into his own hands, *C D* shall have relief in Chancery. *Cromp. Jur. 65. Dyer 369. Broo. Feoffment at use 60. Cromp. Jur. 62. 45. 11. Ed. 4. 2. 7. Ed. 4. 29.*

And in all these cases, and such like cases, the general rules by which uses were governed at the Common-Law are still in force and to take place, as those by which uses and trusts are now for the most part governed.

As, 1. If there be any cause to sue for or about the lands or goods wherewith the parties are trusted, as if they deny or delay to perform the trust, they must be compelled thereunto by Suit in Chancery. *7. E. 4. 29. Cro. Jur. 62. 63. 65. 11. E. 4. 24. E. 4. 37.*

2. The *Cestuy que use* or party for whom the trust is, cannot of himself dispose of the lands or goods, for the property and interest in Law is in the Trustees; and if it be an Obligation or Statute that is made to the use of another, *Cestuy que use* cannot release

release it, but the Trustee must release it. *Cromp. Jur.* 62, 63, 65. 11. *Ed.* 4. 24. *Ed.* 4 37.

3. If the party trusted so with lands, goods or chattels, give, grant or sell the same lands, goods or chattels to one that hath knowledge of the same uses or trusts (as it is alwaies presumed he hath where the trusts are expressed upon the same Deed, by which the lands, [goods or chattels are given or granted,) or if the things so given or granted, be granted upon the same trusts, or to the same uses, or without any consideration at all; in these cases he to whom the thing whereabout the trust is, shall have the same thing upon the same trust, and to the same use as he that did give or grant the same had it. But in case where no trust or use is expressed upon the Deed, the Purchaser or Buyer hath no notice or knowledge of the use or trust, and he gives a valuable consideration for the thing, there for the most part the sale is good, and the party grieved thereby hath no remedy, but against the party first trusted in Chancery, and the Purchaser shall have and enjoy the thing so bought to his own use for ever; but he that is the party trusted will be forced in Chancery to make the party grieved an amends in damages for this breach of trust: And if there be any practice, packing, or combination between the buyer and the seller in the matter, there perhaps the Suit may hold against them both, and the Buyer may be forced to restore the thing it self. And yet if A enter into a Statute to B and C to the use of B, and A having notice of this use doth get a release from C: in this case it seems B must have his whole remedy against C, and shall have no remedy against A. 11 *Ed.* 4. 8.

4. If the Trustor or *Cestuy que use* in these cases commit Felony, &c. so that the things if he had the property of them were forfeit, in this case it seems that neither they nor their heirs, executors &c. nor yet the Lord, &c. shall have them, but the Trustees shall keep them for ever. *Broo. Feoffments at use* 34.

5. If the *Cestuy que use* or Trustors dye, and appoint how the same things shall be disposed of, the Trustees are bound to see it done; as if the Trustor appoint it shall pay his debts, or provide Legacies, the parties trusted must take care it be so employed; and in this case the Debtors and Legatees also may compel the Trustees in Chancery. 15 *H. 7. 12. Cromp. Jur.* 54.

6. In all these cases regularly the thing whereof the trust is, is in equity at the disposing of him that is the *Cestuy que use*, unlesse he do otherwise appoint it, and if at his death he make no disposition thereof it shall go to his heire, executor &c. *Dyer* 49.

7. In all these cases the Trustees shall have their reasonable allowance in Chancery for whatsoever they have laid out about the land, &c. in Suits or otherwise for the profit of the Trustor. 8 *H. 7. 11.*

Out of all which may appear how dangerous it is for a man to meddle with any lands, goods or chattels so conveyed or settled in trust, for the *Cestuy que use* or Trustors have no property in the thing; and therefore they cannot sell or give it, and the Trustee hath it but to anothers use: And it is not safe therefore to deal with either of them alone, nor yet indeed safe to deal at all in these cases, unlesse the buyer may have the Consent, sale, and assurance, or the Release, &c. of the Trustors and Trustees altogether: And if there be any woman Covert, or Infant within the Trust, it is most of all dangerous. And if goods or chattels be given to, or to the use of a Feme Covert, or Infant, and certain friends are trusted therewith, if they do sell or give away these goods or chattels contrary to the Trust, they must be sure to answer it: if therefore they sell them, let them see that the money made thereof be as beneficial, and be bestowed for the wife or children, for it seems it is not sufficient in this case, that the money made thereof be paid to them. *Mar. f.* 44, pl. 69. 7 *Ed.* 4. 14. *Fitz. Subp.* 5.

CHAP. CLXIV,

Of Usury.

Usury, what.
The kinds.

Sec. 1.

Lawful Usury.

Unlawful usury.

The punishment of it.

1. What Contract shall be said to be usurious, against the Statutes and void. Or not.



Usury is the certain gain of a thing above the Principal, or that which is lent, exacted only in consideration of the loan, whether it be of money, corn, meat, apparel, wares or the like. Or (as another defineth it) it is a certain profit that is received for the use of a thing lent.

Of this there are two parts, a tolerated or lawful Usury, or a forbidden and unlawful Usury.

The first is where there is no more taken directly or indirectly for loan of any moneys, wares, merchandize, or other Commodities whatsoever, then the value of six pounds for the forbearance of one hundred pounds for a year, and so after that rate for a greater or lesser sum, or for a longer or shorter time.

The unlawful Usury, is, Where there is taken directly or indirectly for loan of any money, wares, merchandize, or other Commodities whatsoever, above the value of six pounds for the forbearance of one hundred pounds for a year, and so after that rate for a greater and lesser sum, and for a longer and shorter time.

And the punishment of it is this, That he that takes it, is to lose three times so much as the value of that which he did so take; and all the Bonds, Contracts and Assurances for the having of more then after the rate of six pound for the hundred, are void. *Stat. 21. Jac. 17. 37 H. 8. 9. 39. Eliz. 8. 13. Eliz. 8. Aft. 8. Aug. 1651. Plow. 282.* He may be punished also by Indictment and Fine. See my *Just. of Peace*. And so some hold of all Usury, and that all Usury is against our Law, which seems to be the better opinion. See *Cook 1. part. Inf. cap. 70.*

For the answer of this Question, and Exposition of the Statutes concerning Usury, take some Rules, and some Cases. The Rules are these.

1. That an usurious Contract may be made up by Fines, Recoveries, or any kind of Assurance, as well as Bonds, and they are all void, of what kind soever they be, *Cook 1. 80.* But a Judgment cannot be avoyded by a plea of an usurious Contract, as that the Defendant had one hundred pound of the Plaintiff, and agreed to give him twenty pound for the loan of it a year, and therefore that the Plaintiff desired a Judgment for the same, which is that for which the Suit is by *Scire Facias*. *Adj. Judg. Midleron v. Huth. 11. 39. 40. Eliz. B. R.*

2. Where the first Contract is usurious, all the Assurances that depend upon it are void. *Pasch. 7. Jac. B. R. Corstess case.*

3. If a man do not pursue his Contract, and take what he hath agreed upon, he cannot be punished by the forfeiture of the treble value, but the Contract and Assurances thereupon are void. *Curia B. R. Trin. 3. Car.* and cannot be by taking something in the by, as a pawn for a Security. *Trin. 13. Car. B. R.*

4. Nothing that is given to the Broker in the by, will make the Contract usurious, By *Just. Bridgman, Hill 7. Car.*

6. No usurious Contract can be regularly where the Principal is lost, especially if it be in a bargain of Land, unless it be where by notorious circumstances the contract doth appeare corrupt. *Corstess case Pasch. 7 Jac. B. R. Brownl. 1. part 180.*

7. If the Original Contract be not usurious, no matter *ex post facto*; .i. no matter done afterwards can make it so. *Thurslies case Hil. 7 Jac. Com. R. Brownl. 1. part 73. 8. No*

8. No Stranger not privy to the corrupt contract shall be punished for it. *Brownl. Rep. 1. 85.*

9. He that is bound in a Counter-bond to his Surety, cannot Plead in discharge of that, that the first Obligation was upon an usurious contract. *Adj. Robinsons versus May. M. 39. 40. Eliz. B R.*

10. When a Deed is perfected and delivered as a Deed, it cannot be avoided by any subsequent agreement as usurious; but if it be part of the original contract, and made together, it may make all void, and may be pleaded in avoidance of any Deed. *Brownl. Rep. 1. part 491.*

11. A Woman that hath a Husband, or a man and his Wife and Third person cannot make an usurious contract within these Statutes. *Trin. 13. Carol. Feme Coverts. B. R.*

12. Where, upon the first Contract the Lender is not sure of any benefit, but he doth secondarily hope for some at the will of the Borrower only, this is not corrupt. *Cook. 5. 69.*

For the further Opening and Illustration of which Rules, take these Cases:

1. One borrowed 100*l.* and for this, mortgaged Land above 8*l.* value by the year, on condition, that if the Mortgagee pay such a day (which is at the years end) the money, the estate to cease; this was an usurious contract. But if it were on condition, that if he pay the 100*l.* before that day, *contra*, for then he may pay it when he will, and have his Land, and the Lender is not sure of any such recompence, as the nature of Usury is; for hear it shall be taken only to be a penalty to the Borrower, and an Assurance to the Lender: So also, if one lend 100*l.* and take security by Statute or Obligation, that the Borrower at a years end shall pay the Lender 20*l.* for it, this is usurious: But if it be, that if he pay it not within a year, then he shall pay him 20*l.* it seems this is not usurious; If one come to another to borrow 500*l.* of him and tell him he is unable to pay it together, and therefore desires to pay it in 12 or 13 years, and offers for his kindness to give him 200*l.* over and above, if so be he will let him have it so with the use of it, and then they cast the Principal, Use, and the 200*l.* in an Annuity, and so agreed at last upon an Annuity for 14 years of 80*l.* per annum, which they agreed would pay the Principal, Use, and 200*l.*; this is an usurious contract, and therefore all Statutes and Bonds made to perform it must needs be void. *Adjudge Corflets case, Pas. 7. Jac. B R.*

2. If one take 10*l.* in the 100*l.* for use, and also in the same Contract, he cause the Obligor to take from him a Lease for 30 years of a House, at 60 pound Rent, whereas in truth it is worth but 20*l.* by the year, this is an usurious contract. *Carria. Sanders case, B R.*

3. If upon the Loan of Money a Fiefment be made of Land for security of the Money, and Bonds besides for the payment of the Interest after the rate of the Statute, and the Land be worth by the year more than the Interest, this is a corrupt contract: But if it be agreed the Fiefor shall take the profits of the Land, *contra*; and if the Fiefsee take not the profits it shall be presumed to be so, unless the contrary be shewed. *Witchel and Guisel, M. 8. Car. B R.*

4. The 17 of July 1579. a Rent of 20*l.* by the year was granted for the Loan of 100*l.* and it was to be paid every half year, the first payment to begin at Christmas, 1580. on condition, that if he pay the 100*l.* the 17 of July 1580. then the Rent to cease; this contract was not usurious; for the Grantor might have paid the 100*l.* before the first day of payment of Rent, and then the Grantee had had nothing for the Loan of his 100*l.* all that time: But if there had been a private collateral agreement between the parties, that they should not pay the 100*l.* or redeem it, and that Clause were put in to evade the Statute, then the contract had been usurious notwithstanding, and so in all like cases. *Cook. 5. 9.*

5. One, the 6 of December, borrowed 30*l.* till the second of June then next following, to be paid then for it 33*l.* for the Principal and Loan, if the son of the Obligor shall be then living; and if he die before, then that he shall pay 27*l.* which is less than the Principal; this contract was agreed to be usurious and naught. *Cow. 5. 70.*

6. If

6. If one borrow 100.l. after the rate of the Statute, and the borrower do after pay part of the Principal, and all the Use within the year, and the lender receive, or the lender sue for it within the year, this is no usury; for if the original Contract be not usurious, no matter *ex post facto*, that is, afterwards, can make it so. *Hill. 7. Jac. B R. Curia et H. 7. Jac. Cook, B.*

7. If one borrow of me 6.l. and bind himself to pay me 6.l. by a day; and bind himself moreover, that if he do not pay me the 6.l. by the day, that then he shall pay me 10.l. for that 6.l. this is no usurious Contract; for all Obligations with Conditions for Money lent, are to this purpose. *Thurflies case, Br. Oblig. 79.*

8. If *A* enfeoff *B* upon loan of 100.l. to the use of *B* and his heirs, provided, that if *A* pay 100.l. at the years end that it shall be to the use of *A* and his heirs, and that land is of the value of 20.l. by the year, if in this case it be agreed the Feoffee shall take the profits, this is usury; but if it be agreed the Feoffee shall take it as it may be besides the Deed, *contra. ch. just. M. 4. Car.*

9. *Scire facias* was to execute a Judgement; The Defendant pleaded, that he borrowed of the Plaintiff 100.l. to give him 120.l. for the loan thereof a year; and the Plaintiff for his Assurance would have the Defendant confess this Judgement of 120.l. and so pleaded the statute of Usury in Bar, upon which the Plaintiff demurred, and Judgement was given for the Plaintiff, and agreed to be too late, and that it should have been pleaded in the first Suit. *Middletons and Halls case, Trin. 39. Eliz. B R.*

10. — Debt was brought for 60.l. on an Obligation; The Defendant pleaded the statute of Usury, and shewed, that a Ship went a Fishing to the *New found land*, which Voyage might be performed in 8 Months; and the Plaintiff delivered 50.l. to the Defendant to pay 60.l. upon the Return of the Ship to *Dartmouth* from Fishing; and if the Ship should not come to the *New found land*, but by reason of Leakage or tempest should return to *Dartmouth*, then that he should pay the Principal Money, and if the Ship should never Return, that he should pay nothing; and it was adjudged no usury: for if it staid two years at the *New found land*, he was to Pay but 20.l. *Pasch. 6. Jac. Sharpley versus Hurrel. Co. B.*

11. *Warnes* was indebted to *Ader* 100.l. upon an usurious Contract; and *Ader* was indebted to *Ellis* in 100.l. just debt, for which *Warnes* and *Ader* were bound to the Plaintiff, and debt being brought upon this Obligation, *Warnes* pleaded the usury between him and *Ader* to avoid the Bond; and *Ellis* replied, that he knew nothing of it; and it was adjudged against the Defendant. *Trin. 2. Jac. Co. B.*

12. A Replevin was brought, and the Defendant avowed for an Annuity of 20.l. granted for years: payable upon demand, and alleged a demand, the Plaintiff demands Oyer of the Deed, where it appeared, that for 100.l. a Rent of 20.l. was granted for 8 years; and another of 20.l. for 2 years if *E R* and *T* should so long live, and the plaintiff pleaded the statute of usury; and it was Ruled, that if it had been laid to be upon a loan of Money, it had been usurious; but if it be a Bargain for an Annuity, it is no Usury. *Cottrel against Harrington, Pasch. 6. Jac. Cook B.*

13. An Action of Debt was brought for a Debt on a Bond, the Defendant pleads the Statute of Usury, and shews a corrupt Lending in the year 32, to be paid in 33; and after a new Bond in 35 for part of the first sum; And it was judged that this new Bond could not be corrupt if the first Contract were not corrupt. *Brownl. Rep. 1. part 73.*

3. These words, Dry Exchange, seem to be a cleanly term invented for the disguising of foul Usury, in the which something is pretended to pass of both sides, whereas in truth nothing passeth but on the one side. *Stat. 3. H. 7. 5.*

4. Brokers are such as make Bargains, and drive Contracts between Buyers and Sellers, Borrowers and Lenders of Money.

No such kind of person; as a Broker, Scrivener, or Soliciter, may take directly, or indirectly, for driving any Bargain for loan or forbearance of Money, above the Rate of 5.s. for the forbearance of 100.l. for a year, and so rateably for more or less:

Nor

Not above 12.d. for the making or renewing of a Bond or Bill, or for a Counter-Bond, under pain of 20.l. *Act. 8. August 1651.*

If a Broker that hath received any Goods wrongfully taken in *London, Westminster, Southwark*, or within two miles of *London*, do not upon request of the true owner thereof, discover of who he had them, and what is become of them, he shall lose to the owner the double value thereof. *Stat. 1. Jac. 21.*

CHAP. CLXV.

Of an Outlawry.



IT is the punishment of a man, that being called into Law, and lawfully sought, doth contemptuously refuse to appear. And this is, and may be in and upon personal Actions, or in and upon Appeals and Indictments. In personal Actions, as Account, Debt, Replevin, Detinue, Action upon the Case, Trespass, Covenant, Annuity. And in personal Actions it is and may be either before Judgement had in the Suits, or after Judgement; and in both Cases it is after Writs of Exigent and Proclamation go forth, and upon the

Outlawry, what.

Stat. 1.

In what Actions it lyeth.

Proclamation in personal Actions the party hath been required to appear five several County Court dayes in the open County Court, and once in the open Sessions, and once at the Church door where he hath or did lately dwell; And then, and thereupon if he appear not, Judgement is given by the Coroners of the County Court, that he shall be Outlawed, *extra legem positus, & pro exlege tenebitur cum principi nec legibediatur.* And thereupon doth issue forth against him the Writ of *Capias ut legatum*, which is defined to be

The Kinds.

A Writ that lyeth against a man that is Outlawed in any Suit, commanding the Sheriff to take the Party for not appearing on the Exigent, and to bring him to prison, that he may answer for his contempt, and there he must stay without Bayle or Mainprise, which is called a general *Cap. ut legatum*.

Or else, there may go forth a Writ called *A Capias ut legatum ut inquiras de bonis et cattellis*, for a special *Capias ut legatum*, to require the Sheriff to take his Body (as before) and withal to enquire of his Goods and Chattels which are forfeited by the Outlawry, and to seize them into the Kings hands, and to his use: And this may be directed to the Sheriff of any County.

And by this Outlawry, all his Goods and Chattels are not only forfeit, and therefore he can make no Testament of them; but he is disabled to sue in any Action as long as the Outlawry is of Record against him.

Testament.

Disability to sue.

And in this case hath a man no remedy but to Reverse the Outlawry, if he can finde any Error in the proceedings, or else to get the Kings pardon.

How to be avoyded.

But if it be after Judgement, he must pay the Debt, or agree with the party plaintiff before he can have any pardon from the King.

And if it be before Judgement, the party must first come into the Court, and yield his body to the Prison, and the Plaintiff shall be summoned to come in by *Seire facias*, to proceed upon the first original; and if he come not, the Pardon shall be allowed; if he do, they shall Plead.

And if it happen to be Reversed for Error, the party Outlawed shall have Restitution of his Goods that are in the Sheriffs hands, or were sold by him before.

And

And the Outlawry for Felony and Treason, or for Trespass in an Appeal or Judgment, if after two *Capias* one after another, then if he appear not to answer the Fact, he is Outlawed.

Proces.

For in Indictments of Felony, if the party indicted appear not, the Proces are 1. a *Capias*, and upon a *non est inventus* returned, another *Capias*; which being so returned, there goeth out an Exigent, and the Sheriff is commanded to proclaim him 5 County dayes, and then if he yield not his Body, he is to be Outlawed by the Coroners, which the Sheriff is to return.

Attainder.

And then is the Party indicted Attainted, and from that time doth lose his Land by Escheate.

Forfeiture.

Relation.

But for his Goods, he loseth them as soon as the Proclamation is Awarded. *Dor. & St lib 2 chap 3 FNB 161 Dyer 223 Stat 6 Hen 6 cap 1 31 Eliz 3 5 & 6 Ed 6 26 7 Hen 5 1 19 Hen 7 5 5 Rich 2 23 Hen 8 14 8 Hen 6 20 10 H 6 6 5 Edw 3 13 1 Hen 5 5 War 2 chap 11 25 Edw 3 17 6 Hen 8 4 49 18 Edw 3 Stat 1, 2, 3. Cook 5 85 7 1 Cook upon List 288, 289*

The condition of a man Outlawed, & what he forfeits by it.

For Felony.

If a man be Outlawed for Treason or Felony upon an Indictment; by this he forfeits all his Lands, Goods, and Chattels: his Land from the time of the Return of the Outlawry by the Coroners upon the Exigent; and his Goods from the time of the Awarding of the Exigent. But as to the Lands, there is a Relation to make a Forfeiture of all the Lands he hath to the time of the Offence committed. For which, see *Relation and Forfeiture. Broo. Forfeiture 400 447*

If a man be Outlawed in a personal Action, or upon an Appeal of Maim, or Indictment of Trespass; by this the Party Outlawed doth lose and forfeit to the Lord Protector, all his Goods and Chattels that he hath at the time of the Outlawry pronounced, as Leases for years, Wardships of Tenants in *Capite*, (if any were) Cattel; Household-stuff, Plate, Money, Jewels; also, all Debts by Especialty and otherwise, all Statutes, Recognizances, and Obligations, and all things else as Emblements of Corn and Grass, and whatever else is included within Chattels, that he hath to his own use, and in his own right.

So also he loseth the profits of his Land for his life, the which the Lord Protector may take so as notwithstanding he may not Manure it. *9 Hen 6 20 30 H 6 20 19 H 6 47 30 Ass pl 1 Stamf lib 3 chap 27 Cook 7 1 22 4 95 5 59 63 5 Hen 7 16 Plow 541 Broo Forfeiture 75 24 26*

And if two, or more persons have joyntly, or in common, any Goods or Chattels, Bonds, or Debts, and one of them be Outlawed, all the Debts, Bonds, Goods, or Chattels, are forfeited to the Lord Protector, and the other Joynt-tenants or Tenants in Common, cannot be holpen. *Plow 343 322 Dyer 11*

And yet in 6 *Car.* in the Court of Wards in the Lord *Brooks* case, it was held by the Judges assistants, That where the Lord *Brook* had bargained and sold Land to *A B C* and *D* for years, and *C* and *D* were Outlawed, that by this *C* and *D* had forfeited but their Moyitie, and that they were Tenants in Common with the King.

But Inheritances and Freeholds, nor the Trees upon the Land, Doors, and other incidents annexed to the Land, nor Debts upon a simple Contract, nor such causes of Action as for which Damages onely are to be recovered, as for Battery; nor Actions for Goods taken away, nor for matters of Account are not forfeited hereby.

So neither are things wherein the party Outlawed hath only a special Property, as a Pledge, Distress, Lease mortgaged, or the like, these are not forfeited hereby.

So neither are those things forfeited which one hath to anothers use, as the Goods or Chattels one hath as Executor or Administrator to another. *Park 388 5 H 7 16 Cook 4 63 20 H 7 13 16 Edw 4 4 50 Ass pl 1 29 Ass pl 47 50 Ass pl 5 28 Edw 3 92*

And yet in *M 9 Car.* in *Asbforths case* in the Exchequer, the Case was this, There were divers Leases for years in Trust for *IS*, and one of them was Outlawed: It is said it was adjudged that the whole Lease was forfeit.

Excom-

Of Excommunication:

EXcommunication was a censure by the Ecclesiastical Judge, by which a man was deprived of the use of the Sacraments, and sometimes of the fellowship of men. And thus if a man had remained forty dayes, and had not reconciled himself to his Ordinary, upon a Certificate of the Bishop into Chancery, there did issue out thence a Writ called an *Excommunicato capiendo*, to the Sheriff to apprehend him, by which he was to be imprisoned without Bayle or Mainprise until he did submit and were absolved, and then he had a Writ of *Excommunicato Deliberando*; And by this he was to be delivered again after he had submitted. But these things about Excommunication, now that Bishops are gone, are out of use.

Excommunication, what.

Excommunicato Deliberando, what.

See *Throld Statutes* of these things, *Articuli super Chartas*, 7. 12. 9 Ed. 3. 5. Eliz. 23.

CHAP. CLXVI.

Of Waiver, Waif, Estray, Treasure-Trove and Warranty.



His word Waiver (as it seems) is sometimes applyed to an estate or something that is made and conveyed to a man, and so it signifieth nothing else but the refusal to accept of the thing so made and conveyed. And sometimes it is applyed to a plea, and then signifieth a refusal to stand to a former plea pleaded, and the pleading of a new: for which, last sense tread 13 Ed. 4. 8. 20 H. 6. 22. *Relw.* 37. 21 Ed. 3. 49. 5 H. 7. 9.

Waiver, what.

Sect. 1.

For answer to this Question, take these Cases.

1 If a Joynture be made to a Woman after marriage, she after her husbands death may waive it by word in the Country; and this is good. *Cook* 3. 27. *Dyer* 61.

Where one may waive a thing fallen to him, and how, or not.

2 If an estate be made to a man and his wife in special Taile, and the husband devise to the wife for life; in this case if she will, she may waive the estate tail, and take by the devise. *Cook* 9. 140.

3 A man or a woman cannot by the Common-Law waive or refuse any estate of inheritance made to him or her by any verbal Waiver or disagreement in the Country, but that he or she may afterwards again in a Court of Record accept it. See more in other Titles. *Cook* 3. 26. *Dyer* 51.

4 Where a particular estate is given with a remainder, there regularly he that hath the particular estate shall not be allowed to waive it, for the prejudice of him in remainder; but if one have a reversion, *contra*, for that is not hurt by the waiver. 41 Ed. 3. *Ch. Inst.* B. R. 13. *jur.*

5 Infant, or if he dye before agreement, may waive an estate made to him. So may not a man; *De non sana memory*, after he hath purchased Lands; but if he dye before agreement, his heire may avoid and waive it. *Cook* 1 part. D. & S. *Inst.* fol. 23.

6 One cannot waive, or alter a Title of Inheritance that a man hath in the Country, though his title be but by Prescription or Custome. *Cook upon Litt.* fol. 114.

If a Feoffment be made to an Infant issue in tail, he may waive it at his full age. *Cook on Litt.* 348.

Of Waif, Estray, &c.

Waif, what.

WAif is, when a Thief hath Feloniously stolne goods, and being neerly followed with Hue and Cry, or else overcharged with the burden or trouble of the goods, for his ease, or more flyeth away, and leaveth the goods or any part of them behind him; then the Kings Officer, or Reeve, or Bailiff of the Lord of the Manor, who by Custome, Prescription or Charter hath such a Franchise of Waif, may seise the goods so waived to the Lords use, who may keep them as his own proper goods.

For the further opening of which, these things are to be known,

Restitution.

1. That if the Owner come with fresh Suit after the Felon, and sue an Appeal, or he or any other for him, do give in evidence against him at his Arraignment upon the Indictment, and he be by this meanes attainted thereof, &c. or outlaw him for want of appearing; in these cases the owner shall have restitution of his goods so stolen and waived.

2. In this case it is wisdom in the Lord to seize the goods presently, for if the owner seize it before him, though it be twenty years after, he shall have it, though he made no fresh Suit after the Felon; but if a stranger take it away before seisure, an Action of Trespass doth lye. See *Doff. & St.* 176. 177. *Stat.* 21 H.8.11.

3. And it seems, that Lords that will have these Waifs, must cause them to be cryed in Churches and Markets thereabout; and then if they be not claimed within the year and day after, they are forfeit. *Dalton De Officio Vice-Comitis*, fol. 34.

4. But if the Prisoner had not the goods with or about him at the time of his flight, having hid or left them in his own or any other house, or left them in any ones custody, or in any Manor, or hid them in any place before his flight, then they are no waifs nor forfeit, but the owner may take them. *Cook* 5. 109. 21. H.8.11.

5. These Waifs belong to the King, unlesse there be some that have a Patent from the King for it, or can prescribe for the having of them time out of mind; and the only Remedy of getting them is by seizure only. *Cook of Coppholds* 51.

Soll. 2.

6. If Cattel stolen be driven by the thief, and men coming to take him, he flyeth and whiles they run after him; the goods go out of one Manor into another, now the Lord of the Manor where they were left first, by his Bailiff must seize them in the other Manor, before the Bailiff of that Manor had seized them, unlesse that other Manor were the Lord Protector, for there the Law gives him seison without any actual seizure. *Dyer* 338.

Wrack.

Wrack is where a Ship laden is cast away upon the Coasts, so that no living Creature that was in it when it began to sink escapeth to land with life; then all these goods are said to be wracked, and they belong to the Lord Protector, if they be found, except the Lord of the Soyl adjoyning can entitle himself to them by Custome or Charter. See *Admiral*.

Estray, what.

An Estray is where any tame Beast is found wandring about from its place within any Lordship, and not owned by any man.

As touching which these things are to be known,

1. Estrayes were Originally the Kings, and came from him; now may be had by Prescription, as Waifs may; or they may be claimed and had by the Kings grant, and he that hath the one shall have the other.

2. It is to be ordered thus; The Lord of the soyle, after he hath seised it, and put a Withe about its neck, and made open Proclamation two Market dayes adjoyning at three Market Townes, as some say; and (as others say) at two of the next Market Villages, shewing the Marks of the Cattle, if the Owner do not come within a year and a day after and claim them, it is the Lord Protector, the Lords of the soyle, or his that hath a Charter from any King, or can prescribe for it. And if the owner do

come

come within the year and the day, he is to give reasonable satisfaction for the keeping of it, and to have it again. And they that have it may detain it till he pay for the keeping of it.

3 Till the year and day be expired, the Lord hath no Property in it; and therefore if it be taken away before this time, the Lord or his Bailiff may not have an Action of Trespass for it, but the Owner of it may have an Action of Trespass. Property.
Trespass.

4 If the thing be the goods of an Infant, woman covert, Executrix or one beyond the sea, or in prison, yet are they subject to this hazard and loss, as much as the goods of any other person.

5 If the thing before the year be out, and after Proclamation, estray into another Manor, and be seized there as an Estray, the first Lord hath lost it, and he cannot go in to the other Manor to re-take it.

6 The Lord or his Bailiff is bound to give the Beast meat till the year and day be up, and he cannot use it; if an horse or ox, may not work it, if a Gelding he may not fetter him, but if it be a Cow he may milk it.

For all this, see *Broo. Estray* 3. 4. *Dyer* 338. 12 H. 8. 10. *Fitz Nat. Brev.* 90. *Cook* 9. 23. 5. 108. 7. 16. *Doll. & Stat.* 176. *Brownl.* 1. *Rep.* 236. 2 part 219.

Of Treasure-trove.

Treasure Trove is where any Money, Gold, or Silver, Plate or Bulloigne is found in any place under ground, and no man knoweth whose it is, in this case the Lord Protector will have it: But if any have a Patent from any King for it, or can prescribe for it, he will have it. Treasure trove,
what.

But if it be found above ground or in the sea, it is the mans that found it, and no Treasure trove: and yet it is held, that if it be Gold, Silver, Coyn, Plate or Bullion, where-ever it be found, it is Treasure trove. But for Mines of mettall (unless they be Mines of Gold and Silver, or Mines mixt wherein is most of the Gold and Silver Oar, which belong to the Lord Protector) they do belong to the owner of the ground wherein they are. *Plow.* 322. 314. *Stamf. Prer. ch.* 42.

Of a Warranty.

A Warranty is a certain Covenant real annexed to lands or tenements whereby a man and his heirs are bound to warrant the same. Or it is where a man is bound to warrant the land or hereditament that another hath. And he that doth make this Warranty is called the Warrantor, and he to whom it is made the warrantee. *Finch. lty* 39. *Cook super Litt.* 365. 1 Warranty,
what.
Warrantor.
Warrantee.

There are two kind of warranties,

1. A warranty in Deed, or an expresse warranty, which is when the same is expressed; .i. when a Fine or Feoffment by deed is levied or made in Fee, or a lease for life is made by deed, comprehending warranty, or which hath an expresse clause of warranty contained in it, as when a Conusor, Feoffor or Lessor doth covenant to warrant the Land to the Conussee, Feoffee or Lessee; which is in these words, *Ego IS & heredes mei warrantizabimus & in perpetuum defendemus VV S & heredibus suis tenementa predicta contra omnes homines in perpetuum.* And by the Statute of *Bigamis Dedi* is made an expresse warranty during the life of Feoffor. *Cook* 1. 2. *super Litt.* 365. 4. 18. 2. The kinds,

2. A warranty in law, or an implied warranty, which is when it is not expressed by the party but *sacite* made and implied by the Law, whereof see divers examples *infra*. The warranty in Deed also is either lineal, which is thus described, A Covenant real annexed to the Land by him which either was owner, or might have

Yyyyyy 2

inherited

inherited the Land, and from whom his heir lineal or collateral might by possibility have claimed the Land as heir from him that made the warranty. Or else it is collateral, which is thus described; A warranty made by him that had no right, or possibility of right to the Land, and is collateral to the title of the Land. Also there is a warranty which doth commence by disseisin or wrong, of all which see divers examples afterwards. And note that all these things here are to be applied to warranties of Lands and concerning freeholds, and inheritances, for there is a warranty of Goods and Chattels in contracts, of which we treat not here. *Cook super* 383, 384, 370, 365.

3. The fruit and effect of it, and what use may be made of it.

The fruit and effect of this warranty in deed is, that it doth always conclude and bar the warrantor himself of the Land so warranted for ever, so that all his present and future Rights that he hath or may have therein are hereby extinct. *Cook super Litt.* 265. 372. 365. 384.

And therefore, if the Father be disseised, and the son in his life time release all his right to the Land to the disseisor, and make a warranty of the Land in the Deed, and then the father dieth, and the right of the Land descendeth to the son; in this case albeit the release doth not bar the son, yet the warranty doth bar him. *Cook* 4. 121. 10. 97.

And for the most part also, it doth conclude and bar the heirs of him that made the warranty, to whom the same warranty doth descend, to demand the same Land against the warranty; for if it be a lineal warranty, it is a bar of an estate in fee simple without any Assets, i. without any other Land descended to him in fee simple from the same ancestor that made the warranty; and with Assets, it is a bar of an estate in tale. And if it be a Collateral Warranty, it is with or without Assets a bar of an estate in fee simple or fee tale, and all possibility of right thereunto, and yet so as it doth not pass any estate or right, but only bind the right so long as the warranty is in force: for if the warranty be avoided, the right may be revived. But neither the lineal or collateral warranty can enlarge an estate.

And therefore if a Lessor by Deed release to his Lessee for life, and warrant the Land to him and his heirs, this doth not make his estate greater, neither will it bar Titles of Entry or Action in cases of Mortmain, consent to a Ravisher, Mortgage, or Dower. *Cook super Litt.* 389. &c.

And therefore if an Ancestor of the Lord hath title to enter upon an Alienation in Mortmain, and he release, or make a feoffment with warranty; this warranty will neither bar him nor his heir.

So if a collateral Ancestor will make a warranty which doth after descend upon one that hath title of entry upon a condition broken; this will not bar his entry, &c. neither will it bar any Right that shall commence after the warranty made. And the warranty that doth commence by Disseisin, doth not bind or bar any estate with, or without Assets.

And in Cases where the lineal or collateral warranty is a bar, there if the party be impleaded by him or his heirs that made the warranty, the party impleaded that is Tenant of the Land, may plead and shew forth this warranty against him, and demand Judgement, whether he contrary to his own warranty shall be suffered or received to demand the thing warranted; and this in pleading is called a Rebutter.

Rebutter, what.

Cook super Litt. 265. *Cook* 10. 98, 99. *Dyer* 42. *Cook super Litt.* 101.

And if he be impleaded or sued by another for the Land, then he to whom the warranty is made or his heirs may vouch, i. call in the warrantor or his heirs to warrant the Land.

Voucher, what.

And this is an interpleader in the nature of an Action brought by the warrantor against the warrantee, wherein he that doth vouch, (called the voucher) is demandant, and he that is vouched (called the vouchee) is made tenant or defendant to the Action, and the voucher is as it were out of the suit.

Voucher.

Vouchee.

Tenant by the Warranty, what.

Summons ad Warrantum, what.

And this second Tenant the vouchee is called the Tenant by Warranty.

And hereupon shall issue forth to the Sheriff a Writ to summon the Vouchee to appear, called a *Summons ad Warrantum*.

And if the Vouchee appear, he must plead to the Voucher; and if he shew cause why

why he should not warrant; that must be tried, and this shewing of Cause is called a Counterplea to the Voucher: but if he plead in avoidance of the warranty, it is called a Counterplea to the warranty.

Counterplea to the Voucher. what.
Counterplea to the Warranty. what.

And if he cannot gain say the warranty, the stranger shall recover the Land demanded against the Voucher; and he shall recover as much other Land against the Vouchee of the Lands he hath or had at the time of the voucher.

Recovery in value, what.

And this Recovery of other Land is called a Recovery in Value.

And if the Vouchee hath at the time of the Voucher and Recovery no Lands descended to him to answer the warranty, but hath afterwards Land happening to him by descent from that Ancestor, then he may have a resummons and recover the Land that doth after happen.

But if the Sheriff return upon the summons, that the Vouchee is summoned, and he doth make default, then he shall have a *Magnum caput ad valentiam*, when if he make default again, the Judgement shall be given against the Voucher, and he shall recover over in value against the Vouchee; and if the Vouchee appear and then make default, the Voucher shall have a *Parvum caput ad valentiam*; and then if he make default, Judgement shall be given as before.

But if the Sheriff return upon the summons, he hath nothing whereby he may be summoned, then may the Voucher have a Writ called *Sequatur sub suo periculo*; whereupon shall go an *Alias* and *Pluries*; and if the like Return be made, the demandant shall have Judgement against the first tenant, but he cannot recover in value against the Vouchee.

Sequatur sub suo periculo, what.

And if the case be so the Vouchee had a Warranty from some other for the Land, he may Deraign. i. maintain the Warranty over, and shall recover in value over also against his Voucher in the same manner as before.

Deraignment del Warranty. what.

Or the Warrantee to whom the Warranty is made or his heirs may at any time before they be impleaded for the Land, if they will bring a *Warrantia Charta* upon the Warranty in the Deed against the Warrantor or his heirs; and hereby all the Land the heir of the Warrantor hath by descent from the Ancestor that made the Warranty at the time of this Writ brought, shall be bound and charged with the warranty into whose hands soever it go afterwards; so that if the Land warranted be after recovered from the warrantee, he shall recover so much land over again of the other land of the heir of the warrantor or of the warrantor himself if he be living. And albeit the warrantee or his heirs do recover in this Writ, yet he may after upon occasion Vouch the Warrantor or his Heirs notwithstanding. *F.N.B. 134. Cook super Litt. 102.*

Warrantia Charta, what.

And herein observe it is good Policy, if a man suspect any thing, to bring this Writ of *Warrantia Charta* betimes, because it binds all the Land of the warrantor from the time of the Writ brought, and not any of his other Lands he had before that time, that are now aliened.

The words *Dedi & concessi*, or *Dedi* only in a Feoffment do make a warranty when an estate of franktenement or inheritance doth pass by the Deed. But the word *Concessi* only, or *Demisi & concessi*, do not make such a warranty. And by force of the Statute of *Bigamis* chap. 6. *Dedi* is made an exprels warranty during the life of the Feoffor. *Cook super Litt. 383, 384. Cook 4. 81.*

4. What words and clauses in a deed will make a warranty. Or not.

The word *Warrantize*, or warrant, is the only apt and effectual word to make an exprels warranty or a warranty in Deed, and therefore this word only is used in fines. And the words *Defendo*, or *Acquiesco*, albeit they be commonly used in Deeds, yet of themselves without the other will not make a warranty. *Litt. Sect. 733. Cook 5. 17, 18.*

If a man by Deed doth grant to warrant Land to *IS* and his heirs, and the warrantor doth not bind his heirs to the warranty; or doth not warrant to *IS* and his heirs, but to *IS* only; or doth warrant to *IS* and his assigns, and not to *IS* and his heirs; or doth bind himself and his heirs to warrant the land, but doth not say how long, nor against whom; these are good warranties, but how they shall be taken, see afterwards. *Dyer 42. Cook super Litt. 383.*

A war-

5. To what things a warranty may be annexed and extended. And to what not. And how.

A warranty in Deed may be annexed to estates of inheritance or freehold, and that not only of corporeal things which pass by livery, as houses, lands, and the like, but also of incorporeal things which lie in Grant, as Advowsons, Rents, Commons, Estovers, and the like, which issue out of Lands or Tenements, and that not only to inheritances in *esse*, but also to such as are newly created, as a man (some say) may grant a Rent &c. *de novo*, out of land for life, in taile, or in fee, with warranty. *Cook super Litt.* 366. 389.

So a warranty in Law may extend to a Rent newly created, and therefore if such a Rent be granted in exchange for an Acre of Land; this exchange and warranty thereunto annexed is good.

But a warranty may not be annexed to an estate or Lease for years, albeit it be a Lease of one thousand years, nor to any other Chattel, and therefore in all actions the which Lessee for years may have as trespass &c., a warranty cannot be pleaded in bar.

A warranty may be made upon any kinde of conveyance, as upon fines, feoffments, gifts, &c. also a warranty may be made by and upon releases and confirmations made to the tenant of the Land, albeit he that makes the release or confirmation, hath no right to the Land, &c. *Cook super Litt.* 372. 385. *Litt. Selt.* 738. 745. 706.

And yet some say, That by a Release or Confirmation where there is no estate created, or transmutation of the possession, a warranty cannot be made to the Assignee.

But if *A* be seised of Land in fee, and *B* doth release to him, or doth confirm his estate in fee with warranty to him, his heirs, and assigns; in this case all men agree this warranty to be good; and so also it seems it is in the case last before, and that both the party himself, and the Assignee may vouch.

6. What shall be a good warranty in Law. And how it shall bar and binde.

A warranty in Law may be good in his creation, albeit it be made without Deed, for if a man by his last Will and Testament devise Lands to another man for life, or in taile rendering Rent; to this estate there is a warranty in Law annexed. *Cook super Litt.* 384. 386.

The words *Dedi & concessi*; or *Dedi* only in a Feoffment, make a good warrant in Law. *Cook super Litt.* 384.

But the word *Concessi* only in fine or feoffment, doth not make a warranty in Law. *FN B* 134. *Cook* 4. 80.

And albeit there be an expresse warranty in the Deed, yet this doth not take away the implied warranty of the Law.

And this warranty in Law by *Dedi & concessi*, or by *Dedi* only, is a general warranty during the life of the Feoffor.

Partition. Exchange.

Every Partition and Exchange implyeth in it, and hath annexed to it a special warranty in Law, and how it shall bar and be extended, see in *Exchange*. *Cook super Litt.* 102. 384.

Every Tenure by Homage Ancestrel, *i.* where a Tenant and his Ancestors have held Land of a Lord, and his Ancestors time out of minde by Homage hath a warranty in law annexed to it, by which the Lord is bound to warrant it to the Tenant and his heirs. *Cook* 4. 80.

If one make a Gift in Taile or Lease for life of Land by Deed, or without Deed, reserving a Rent, or of a Rent-service by Deed; in these cases there is annexed an implied warranty against the Donor or Lessor, his Heirs and Assignes. *Cook super Litt.* 334.

When Dower is assigned to a Woman, there is a warranty in Law included, which is that the Tenant in Dower being impleaded, shall Vouch and recover in value a third part of the two parts whereof she is Dowable. *Cook super Littleton*, 384.

And this warranty in Law is of the nature of a lineal warranty, and shall binde as a lineal warrant only, for it doth never bar any Collateral Title. *Cook super Litt.* 384.

And

And hence it is, that this warranty and assents in some cases is a good bar, as if tenant in taile exchange for other lands which are descended to the issue, and he hath accepted of them, or if not, that other lands are descended to him. But if tenant in taile of lands make a gift in tail or lease for life rendering rent, and dye, in this case this is no bar. And yet if other assents in Fee simple descend, this warranty in Law and assents is a good bar.

To every good warranty in Deed that must bar and bind, these things are requisite,

1. That the person that doth warrant, be a person able, for if an Infant make a Feoffment in fee of land, and thereby doth bind himself and his heires to warrant the Land; in this case albeit the Feoffment be only voidable, yet the warranty is void. *Cook super Litt. 367.*

2. That the warranty be made by deed in writing, for if a man make a Feoffment by word, and by word bind him and his heires to warrant the Land, this is not a good warranty. So if a man give lands to another by his last will, and thereby bind him and his heires to warrant it; this warranty, although the will be in writing, is void. *Litt. Sect. 703. Cook super Litt. 386.*

3. That there be some estate to which the warranty is annexed, that may support it: for if one covenant to warrant land to another, and make him no estate, or make him an estate that is not good, and covenant to warrant the thing granted; in these things the warranty is void. *Cook 10. 96. & super Litt. 384.*

4. That the estate to which the warranty is annexed, be such an estate as is able to support it, and therefore that it be a lease for life at the least: for if one make a Lease for years of land, and bind himself and his heires to warrant the land; this is no good warranty, neither will it have the effect of a warranty: but this may amount to a covenant on which an action of covenant may be brought. *Cook super Litt. 378. 26 H. 8. 9.*

5. That the warranty descend upon him that is heir of the whole blood by the common Law to him that made the warranty, and not upon another: for if Tenant in tail in Burrough English (where by custome the youngest son is to enherit) discontinue the tail, and have issue two sons, and the Uncle release to the Discontinuee with warranty, and dieth; this is no good warranty to bind the son. *Cook super Litt. 12. Litt. fol. 161. Sect. 735.*

So if in this case tenant in tail discontinue the taile, with warranty &c. having two sons, and dye seized of other lands in the same Burrough in Fee-simple, to the value of land in taile; the younger son is not barred by this warranty.

So if one give his land to his eldest son, and the heirs males of his body, the remainder to the second son, &c. and the eldest son doth alien with warranty, having issue a daughter, and dye; this is no good warranty to bar the second son. *Litt. fol. 161.*

So if Tenant in taile have issue two daughters by divers venters, and dye, and they enter; and a stranger doth disseise them, and one of them doth release all her right, and bind her and her heires to warrant it; in this case the warranty is not good to bar the sister: but if they had been by one venter, *contra. Litt. Sect. 737.*

So if two brothers be by demy venters, and the eldest doth release with warranty to the disseisor of the Uncle, and dieth without issue, and the younger dyeth; this is no good warranty to bar the younger brother, for a warranty must evermore descend upon him that is heir at the common Law to him that made it. *Cook super Litt. 387. Litt. Sect. 718.*

6. That he that is heir do continue to be so, and that neither the descent of the title nor the warranty be interrupted, for if one bind him and his heires to warrant, and after is attainted of Felony, and dye; this warranty doth not bind his heir. *Litt. Sect. 745. 746.*

So if tenant in tail be disseised, and after release to the disseisor with warranty, and after

7. What shall be said a good warranty in deed. Or not. And how it shall bar and bind. Infant.

after the tenant in taile is attainted of Felony, and hath issue and dye; this warranty will not bind the issue.

7 That the estate of free-hold that is to be barred, be put to a right before or at the time of the warranty made, and that he to whom the warranty doth descend, have then but a right to the land, for a warranty will not barre any estate of Freehold or inheritance in esse, in possession, reversion or remainder, that is not displaced and put to a right before, or at the time of the warranty made, though after at the time of the descent of the warranty, the estate of freehold or inheritance be displaced and divested. And therefore if there be father and son, and the son hath a rent-service, suit to a mill, rent charge, rent-seck, common of pasture, or other profit apprender out of Land of the father, and the father maketh a Feoffment in Fee with warranty, and dyeth, this shall not bar the son of the rent, common, &c. And albeit the son after the Feoffment with warranty, and before the death of the father hath been disseised, and so being out of possession the warranty had descended upon him, yet this warranty should not bind him. *Cook 10. 96, 97. super Litt. 388. 21 H. 7.*

So if my collateral Ancestor release to my tenant for life with warranty and dye, and this warranty descend upon me, this shall not bind my reversion or remainder. But if in the case before, the son be disseised of the rent &c. and affirm himselfe to be disseised by the bringing of an Assize (for otherwise he shall not be said to be out of possession of a rent, or the like) and after the father doth release with warranty and dye; in this case the collateral warranty shall bind and bar the son of his rent &c. And if in the last Case my tenant for life be disseised, and my Ancestor doth release to the disseisor with warranty and dye; this is a good warranty to bar and bind me.

8 That the warranty do take effect in the life time of the Ancestor, and that he be bound by it, for the heire shall never be bound by an expresse warranty, but where the Ancestor was bound by the same warranty, and therefore a warranty made by Will is void. *Litt. Sect. 734.*

9 That the heir claim in the same right that the Ancestor doth: for if one be a successor only in case of a corporation, he shall not be bound by the warranty of a natural Ancestor. *Cook super Litt. 370.*

10 That the heire that is to be barred by the warranty be of full age, at the time of the fall of the warranty: for if my Ancestor make a Feoffment, or a release with warranty, and at this time I am within age, and after he dye, and the warranty descend upon me within age, this warranty shall not bind me: But if I become of age after the warranty of my Ancestor, and before his death; in this case the warranty may bar me. And in the first case it will bar me also, whiles it is in force; but I may by any entry avoid it. And the same Law is of a woman covert. And yet if the entry of an Infant or a woman covert be not lawful, when the warranty doth descend; in this case the warranty shall bind them as well as any other, for such a warranty cannot be avoided but by entry and avoiding the estate. And where the husband is within age at the time of the descent of a warranty to his wife, and the entry of the wife is taken away, there the warranty shall bind the wife. *Litt. Sect. 726. Cook 1. 67. 140. super Litt. 380.*

If Lands be given to A for life, and after to the next heire male of A, and the heires males of the body of that heire male, and A having issue B, makes a Feoffment of the land with warranty to I S; this is a good warranty and a bar to the issue, for a man may be barred of his right by a warranty, which he could never avoid: as where Lessee for life is disseised, and a collateral Ancestor of the Lessor doth release to the Disseisor with warranty and dye, and this doth descend upon the Lessor; by this he is barred. *Cook 1. 66. 44 Ed. 3. 30. 44 Ass. pl. 35.*

A warranty made for life or in tail is good, and shall bind for so long only: as if Tenant in taile of land let it for life, the remainder to another in Fee, and a collateral Ancestor doth confirme the estate of the tenant for life and dye, and the tenant in tail hath issue; this is a bar to the issue during the life of the tenant for

for life. And in this case upon a voucher the recovery in value shall be put for life only. *Litt. Sect. 738. Cook Super Litt. 387.*

If one make a Gift in taile, and grant to warrant the land given according to the Gift; this warranty is good no longer then the estate doth last. And no warranty that a Donor can make in this case can bar him of the land if the Donee die without issue, and the estate determine. *Cook 10 96.*

And where a warranty doth bar, it is entire, and doth extend to all the Land, and to all persons upon whom it doth descend, and is a bar of all the right that every one of them hath in the land; so that if they have all right jointly or severally, or one onely hath all the right, and the rest none, he that hath the right is barred. And therefore if lands be given to *A*, and the heirs of his body; and for want of such issue, to *E* his sister, and the heirs of her body; and *A* doth make a Feoffment with warranty, and die without issue, having two sisters, *E* and *S*; this is a bar to *E* for the whole, albeit the warranty descend on her and another. *Cook 8. 52. Super Litt. 373*

If there be tenant for life, the remainder to his son and heir apparant in tail, and the father doth make a feoffment in fee with warrantie, and dieth; in this case this is a warranty, and will bar the son, albeit it be made of purpose to bar him. But if by agreement and covin between him and *A* and *B*, he makes a lease to *A*, who makes a feoffment in fee to *B*, to whom the father doth release with warranty, thinking by a collaterall warranty to bar his son; this is no bar, for this warranty began by disseisin; and if in the first case the son doth enter in the life time of the father, upon the land, he doth avoid the warranty. *Cook 5. 79*

If the father be tenant for life, the remainder to the next heir male of the father, and to the heirs males of the body of such next heir male; and the father makes a feoffment to *I S* with warrantie, and dieth; it seems this warranty is a good bar to the heir; and in this case the heir cannot enter in the life time of his father; for he cannot be heir male unto his father untill his fathers death. *Cook 1. 66.*

If tenant for life make a feoffment with warranty, or be disseised, and release with warranty, and he in reversion being heir to the tenant for life, doth not enter, but suffers the lessee for life to die, and thereby the warranty to fall and descend upon him: in this case, this warranty generally is a barre without any assents. But if he that doth so alien &c. be tenant by the courtesie, this is no bar to the heir without assents in fee simple, from the tenant by the courtesie; and then it is a bar for so much. *Cook Super Litt. 366, 365. Cook 1. 67. Stat. Glouc. chap. 6. Litt. Sect. 724. 725.*

And if the heir for want of this assents, at the time doth recover the land from his mother, and after assents doth descend from the father; in this case the tenant shall recover the same land of the mother again. And if she that doth so alien, &c. to be tenant for life of the inheritance, or purchase of her deceased husband, or given unto her by any of the Ancestors of her Husband, or by any other person seised to the use of her Husband, or of any of his Ancestors; in this case her alienation, release, or confirmation with warranty shall not bind the heir, whether he hath assents or not. *Stat. 11. Hen. 7. chap. 20. Litt. Sect. 727. Cook Super Litt. 365.*

But if a man convey lands to the use of himself, *B* his wife, and the heires of his body, and they have issue *C*. and the father dieth, and *C* disseiseth his mother, or getteth a feoffment from a disseisor, and then suffereth a recovery with a single voucher, and after the wife doth release to the recoverer with warranty; in this case the warranty is a bar to the issue, and not void by the Statute of 11. H. 7. Co. 3. 58.

If the Husband that is seised of lands in the right of his Wife levie a fine, or maketh a Feoffment in fee with warranty, and the Wife dieth and then the Husband dieth; this warranty shall not binde the heir of the Wife without assents of other land in fee simple from the father, albeit he be not tenant by the courtesie; but it is before her death that he doth make the estate and the warranty. But a Fine levied by the Husband and Wife, in this case is a good bar to the heir. *Cook Super Litt. 366, 381. Stat. Glouc. ch. 6. Litt. Sect. 332.*

If tenant in taile that is in of another estate, either by disseisin, or by the feoffment of a disseisor, doth suffer a common recovery, and a collateral Ancestor of the Tenant in taile doth release with warranty to the recoverer, and after the recoverer doth make a feoffment to uses executed by the Statute of 27 Hen. 8. and after the collateral Ancestor dieth, in this case albeit the estate of the land be transferred in the post before the descent of the warranty, yet it shall binde. So if he, to whom the warranty is made, suffer a common recovery, and after the Ancestor dieth. But if tenant in Dower enfeoffe a villain with warranty, and the Lord of the villain enter into the land before the descent of the warranty, and after the woman dieth, this warranty shall not binde the right of the Heir. So if a collateral warranty be made to a Bastard and his heirs, and living the Ancestor, the Bastard dieth without issue, and the Lord by Escheat doth enter, and after the Ancestor dieth, this warranty shall not binde. *Cook* 3. 62. 22 *Ass. pl.* 37. 29 *Ass. pl.* 34.

A Collateral Warranty may descend upon an issue in taile before the right descend, and yet be good with this difference, that the right be in *esse* in some of the Ancestors of the Heir at the time of the Descent of the warranty: As, if Tenant in taile discontinue the taile in fee, and the discontinuee is disseised, and the brother of the Tenant in Taile releaseth all his right &c. to the disseisor with warranty, and dieth without issue, and the Tenant in taile hath issue and dieth, in this case the issue is barred. But otherwise it is where the right is not in *esse* in the heir or any of his Ancestors at the time of the fall of the warranty, as if Lord and Tenant be, and the Tenant make a Feoffment in fee with warranty, and after the Feoffee doth purchase the Seigniori, and after the Tenant doth cease, in this case the Lord shall have a *Cessavit*, for a warranty doth never bar any right that doth commence after the warranty. *Litt. Sess.* 7 Hen. *Cook super Litt.* 388.

8. What shall be said a lineal warranty. And how such a warranty shall bar.

If the case be so, that if no such warranty had been made by the Father or other Ancestor, the right of the Lands or Tenements so warranted, had or might have descended or come from the same Ancestor, and that from and by him that made the same Warranty, such a Warranty is a lineal Warranty. *Litt. Sess.* 703. 711.

As if a man be seised in fee of Land, and make a feoffment of it to another, and bind him and his heirs to warrant the Land, and hath issue and die, and the warranty doth descend upon the issue, this is a lineal warranty, for that if none such had been, the right of the Land had descended to him as heir to his father, and he must have made his descent by him. *Cook super Litt.* 371.

And if there be Grandfather, Father and Son, and the Grandfather be disseised, and the Father release to the disseisor being in Possession with warranty &c. and dieth, and after the Grandfather dieth, this is a lineal warranty to the Son, and albeit in this case the warranty descend before the right, yet it is a good bar. And if there be two brothers, and the father is disseised, and the eldest brother doth release with warranty, and die without issue, and after the father dieth, and the warranty doth descend to the younger son, this is a lineal warranty to him. *Litt. Sess.* 707.

And if Lands be given to A for life, the remainder to his right heirs, and he doth make a feoffment with warranty and die, this is but a lineal warranty. And if two parcenors be, and the eldest enter into all the Land to her own use, and then doth make a feoffment with warranty and dieth without issue, this, as to her own part, is a lineal warranty, but as to her sisters part is a collateral warranty. *Cook* 1. 66. 67.

And in every case where one doth demand any estate taile, if an Ancestor of the issue in taile, whether he had possession of the Land or not, hath made a warranty, and if the issue, that were to bring a writ of Foremedon, may or might have by possibility by some matter that might have been done, conveyed to himself a title by force of the Gift by him that made the warranty, this is a lineal warranty. *Cook* 8. 32. *New terms of the Law, tit. Warranty.*

As if a man be seised of land of an estate taile to him and the heirs of his body begotten, and make a feoffment of it, and bind him and his heirs to warrant it, and hath issue and dieth; this warranty descending upon the issue is a lineal warranty.

And if lands be given to one and the heirs males of his body, and for want of such issue to the heirs females of his body, and the Donee doth make a feoffment with warranty, and hath issue a son and a daughter and dieth; this warranty is lineal to the son, and if the son dieth without issue male, it is a lineal warranty from the father to the daughter. But if the Brother in his life time release to the discontinuee &c. with warranty &c. and after dieth without issue; this is a collateral warranty to the daughter. *Litt. Sect. 719.*

If Lands be given to the Husband and Wife, and the Heirs of their two bodies engendred, and they have issue, and the Husband discontinue and die, and after the Wife doth release with warranty and die; this is a lineal warranty. *Litt. Sect. 714.*

And if Lands be given to a man and a woman unmarried and the heirs of their two bodies, and they intermarry, and are disseised, and the husband doth release with warranty and dieth, and after the wife dieth; this is a lineal warranty to the issue for all the Land. *Cook super Litt. 375.*

And if Tenant in Taile have issue three sons and discontinue, and the middle brother doth release with warranty, and die without issue, and after the father dieth, and after the elder brother dieth without issue, so that the warranty doth descend to the younger brother; this is a lineal warranty to him. *Litt. Sect. 718.*

And if a father give land to his eldest son and the heirs males of his body, &c. the remainder to the second son, &c. if the eldest son alien in fee with warranty, &c. and hath issue female, and dieth without issue male; this is a lineal warranty to the second son. And in all these Cases of a lineal warranty if the right of the estate to be barred be the right of an estate in fee simple, it is a bar without any assents; for the rule is, That as to him that demandeth fee simple by any of his Ancestors, he shall be barred and bound by a lineal warranty that doth descend upon him, unless he be restrained by some Statute. *Litt. Sect. 711, 712. Doct. & Stud. 152, 153. Cook 8. 52.*

But it doth not bind the right of an estate in fee taile without assents, for in that case the rule is, That as to him that demandeth fee taile by Writ of Formedon in the Descendor, he shall not be barred by a lineal warranty, unless he hath assents by descent in fee simple of other land from the same Ancestor that made the warranty; and then it is a bar for so much only as doth descend to him, no more. And yet if the issue in taile do alien the assents descended and die; in this case the issue of that issue is not barred by this warranty and assents. But if the issue to whom the warranty doth descend, bring his Writ of Formedon, and is barred by Judgement by reason of the warranty and assents; in this case albeit he alien the assents afterwards, yet the estate taile is barred for ever. *Cook super Litt. 393 See Brownl. 1 Part 153.*

If Tenant for life do alien in fee with warranty, or be disseised and release to the disseisor with warranty and die, and the warranty descend on him in reversion or remainder; this is a collateral warranty. So if the Lessee for life be disseised, and a collateral Ancestor of him in reversion release with warranty and die, and the warranty descend on him in reversion; this is a collateral warranty. for that is collateral which is collateral to the title of the Land. *Cook 1. 67. 21 Hen. 7. 10. Litt. Sect. 725.*

And if a man seised of Lands in fee have issue two sons, and the father dieth, and the younger son doth enter, and doth alien the land with warranty, and die without issue; this is now a collateral warranty that is descended on the elder brother. *Litt. Sect. 707. Doct. & St. 152.*

And if a son be disseised of his own land, and bring an Assise, and after the father doth release to the disseisor with warranty and dieth; this warranty that doth descend to the son is a collateral warranty. *21 Hen. 7. 10.*

Z z z z z z z

And

9. What shall be said a collateral warranty. And how such a warranty shall bar.

And if a Father disseise his son of the Land he hath of his own Purchase without any intent to alien afterwards and to bar his son, and after he doth make a feoffment with warranty and die before the entry of his son, so that the warranty doth descend, this is a collateral warranty. *Litt. Sect. 704.*

If there be father and two sons, and the father is disseised, and the younger son doth release with warranty to the disseisor and die without issue, and then the father dieth, in this case the warranty now descended, is a collateral warranty. *Litt. Sect. 707.*

If a Lease be made for life to the father, the remainder to his next heir, and the father is disseised and doth release with warranty and dieth, this is a collateral warranty to the heir. And if the husband discontinue the right of his wife, and an Ancestor collateral to the wife to whom she is heir doth release with warranty and die, and after the husband dieth, this is a collateral warranty, and a bar to her. *Cook super Litt. 388.*

And in every case where a man doth demand an estate taile by a Writ of Formedon, if any Ancestor of the issue in taile which hath or hath not possession, maketh a warranty, and the issue that is demandant cannot by any possibility that may be done convey to him a title by force of the gift from and by him that made the warranty; this is a collateral warranty: as if Tenant in taile discontinue the taile and die, having issue, and the uncle of the issue doth release with warranty to the discontinuee, and die without issue, so that the warranty doth descend on the issue in taile; this is a collateral warranty. So if such a discontinuee make a feoffment in fee, or be disseised, and the uncle release with warranty to the disseisor, or feoffee, and die without issue, and the warranty doth descend on the issue; this is a collateral warranty. *Cook 10. 96. Litt. Sect. 709. Plow. 234. K. 111. 78.*

If a Tenant in taile have three sons, and discontinue the taile in fee, and the middle brother doth release to the discontinuee with warranty, and after the Tenant in taile dieth, this is a collateral warranty to the elder brother. *Litt. Sect. 708.*

If one have issue three sons, and giveth land to the eldest, and the heirs of his body; and for want of such issue to the middle, and the heirs of his body; the remainder to the third, and the heirs of his body; and the eldest doth discontinue the taile in fee with warranty, and die without issue; this is collateral to the middle son. In the same manner it is in case where the middle son hath the same land by force of the same remainder, because his elder brother made no discontinuance but died without issue of his body, and after the middle brother doth make a discontinuance with warranty, &c. and dieth without issue; this is a collateral warranty to the youngest son. And in this case if any of the sons be disseised, and the father that made the Gift, &c. releaseth to the disseisor all his right with warranty; this is a collateral warranty to that son upon whom the warranty doth descend. *Litt. Sect. 716.*

If Lands be given to A, and the heirs of his body, and for want of such issue to E his sister, and the heirs of her body, and A doth make a feoffment with warranty, and die without issue, having two sisters E and S; this is a collateral warranty to E. *Cook 1. 52. Litt. Sect. 713.*

If lands be given to a man and the heirs of his body begotten, who taketh a wife and hath issue a son by her; and the husband doth discontinue the taile in fee and dieth, and after the wife doth release to the discontinuee with warranty and dieth, and the warranty doth descend to the son; this is collateral to him. If Tenant in taile discontinue the taile in fee, and the discontinuee is disseised, and the brother of the tenant in taile doth release to the disseisor with warranty in fee, and dieth without issue, and the tenant in taile hath issue and dieth; this is collateral as to the issue. If tenant in taile have issue two daughters, and die, and the elder enter into all to her own use and thereof make a feoffment in fee with warranty, and die without issue, this warranty as to the other sisters part is collateral, but not as to her own. *Litt. Sect. 741.*

If the husband and wife, tenants in special taile, have issue a daughter, and the wife dye, and the husband by a second wife have issue another daughter, and discontinue

teneth in bee, and dyeth, and a collateral Ancestor or the daughters release to the Discontinuee with warranty and dyeth, and the warranty descend upon both the daughters; this is a collateral warranty to them. *Cook super Litt.* 373.

If lands be given to one, and the heires males of his body, and for want of such issue to the heirs females of his body, and the father dy, and the brother release with warranty, and dye without issue; this is collateral to the daughter.

If tenant in tail make a Lease for life, the remainder to another in Fee, and a collateral Ancestor doth confirm the estate of tenant for life with warranty and dye, and after the tenant in tail die having issue; this is a good binding collateral warranty during the estate for life.

And in all these and such like cases of a collateral warranty, whether the right be the right of an estate tail, or the right of an estate in fee simple that is to be barred, it is a bar without any assents; for in this case the rule is, That a collateral warranty is a bar to him that demandeth fee simple, and also to him that demandeth fee taile, without any other descent of lands in fee simple, so that the heir on whom the same warranty is descended, can never have the land so warranted whiles the warranty doth continue in force, but is bound thereby, except it be in some special cases restrained by Act of Parliament, as where the husband alone during his wives life, or after her death, being Tenant by the courtesie, makes a Feoffment by Fine or Deed of his wives land, which she hath by descent or purchase, with warranty; this will not bar her heir without assents of other Lands in fee simple descended from the same Ancestor that made the warranty. *Litt. Sect.* 712. *Cook super Litt.* 374. *Cook* 10. 96. *Stat. of Glouce.* chap. 3. *Cook super Litt.* 365. *Stat.* 11 H. 7. chap. 20.

Or where a wife after her husbands death shall alone or with her succeeding husband alien, release, confirm or discontinue with warranty, the land she holdeth in dower or in tail of the gift of her former husband, or any of his Ancestors; this warranty is voidable, and will not bind with assents.

If the son purchase land &c. and after let it to his father or any other Ancestor for years or at will, and he by his Deed doth infeoff a stranger, and that with warranty, and after dyeth, whereby the warranty doth descend upon the heir; this warranty doth commence by disseisin. *Litt. Sect.* 699. 700. 701. 702. *Finch.* 82. *Cook super Litt.* 367.

So if tenant by Elegit, Statute Merchant, Guardian in Chivalry, or Socage, or because of Nurture, make a Feoffment with warranty, and this warranty doth descend on his heir; this warranty doth commence by disseisin.

So if one that hath no right at all enter into my land, and make a Feoffment to another with warranty.

So if one Coparcenor enter into the whole land, and make a Feoffment in fee with warranty; this warranty as to the one moyety doth begin by disseisin.

So if father and son purchase lands to them jointly &c. and the father alien the whole to another with warranty &c. and after the father dieth; this warranty as to the one moiety doth begin by disseisin.

But if the purchase be to them two and the heirs of the son, it is otherwise; for if the son enter in the life time of the father, the warranty is avoided for all: but if he do not enter, then as to the fathers moiety it is a collateral warranty. And if the purchase be to the father and son and the heirs of the father, and the father alien with warranty &c. in this case the warranty is good for the whole.

If the father be tenant for life, the remainder to his son and heir in fee, and the father by covin and consent, of purpose to bar the heir by a collateral warranty, maketh a lease for years, to the end that the Lessee should make a Feoffment in fee that the father may release to the Feoffee with warranty, and all this is done accordingly, and the father dyeth, and the warranty doth descend to the son; in this case the warranty shall be said to begin by disseisin. But if the father in this case make a Feoffment in fee with warranty and dye; this is a good warranty to bind the son, albeit it be done of purpose to bar him. *Cook* 5. 80 *super Litt.* 366. 367.

10. What shall be said a warranty that doth begin by disseisin. And what such a warranty doth work.

So if one brother make a gift in taile to another, and the Uncle doth disseise the Donee, and enfeof another with warranty, the Uncle dieth, and the warranty descendeth on the Donor, and then the Donee dieth without issue; this warranty doth begin by disseisin.

So if the father and son, and a third person be Joint-tenants in fee, and the father maketh a Feoffment in Fee of the whole with warranty, and dyeth, and then the son dyeth; in this case as to the part of the third person, and to the part of the son, the warranty shall be said to begin by disseisin.

But releases at this day by a tenant for life to a disseisor or any other without covin, albeit it be to the intent to bar him in reversion, shall bar him; for intent without covin and disseisin shall not avoid a warranty.

And examples of Warranties that do begin by disseisin, have these qualities.

1. That for the most part the disseisin is done immediately to the heire that is bound by the warranty.

2. The warranty and disseisin are *simul* and *semel*. And yet if a man disseise another, with intent to make a Feoffment with warranty, albeit the Feoffment be made twenty years after the disseisin, yet it shall be said to be a warranty, that doth begin by disseisin.

But in all these cases of warranties that do begin by disseisin, this is the rule, That they are altogether void and without force as to all others but to the parties themselves that do make them, and therefore they do not bar or bind any others at all of their right that have any.

And the same Law is of a warranty that doth begin by abatement or intrusion; that is, when an abatement or intrusion is made of purpose to make a Feoffment in fee with warranty.

And so also it is where the tenant dyeth without heire, and an Ancestor of the Lord doth enter before the entry of the Lord, and make a Feoffment in fee with warranty; in this case this shall not binde the Lord, because it doth begin by wrong.

11. How a warranty shall be taken.

All warranties in general are favourably taken in Law, because they are part of mens assurances. Every warranty in Law is taken for, and hath the effect of a lineal warranty.

The warranty that is made by *Dedi & Concessi*, or *Dedi* only in a feoffment, is and shall be taken for a general warranty against all persons to the Feoffee and his heirs, during the life of the Feoffor only, albeit there be no service reserved by the Deed nor heir named: but it shall not extend to the Assignee of the Feoffee. And if there be any service reserved on the Deed, then it shall extend against the heir also. *Cook* 4.81. §. 17.

The warranty in Law that is made upon the gift in tail, or lease for life, rendering rent, is a special warranty against the Donor and Lessor, and his heirs and assigns, so that the Donee or Lessee may vouch the grantor after the grant of the reversion, or the grantee of the reversion after the attornment of the Tenant at his election. *Cook* 4.81. *super Litt.* 384.

The warranty in Law that is made upon an Exchange, is special in divers respects, for it extendeth reciprocally to, and against the heirs of both parties, and it doth extend only to the same land that is given in exchange, and none other, and no use can be made of it but by Voucher, for no *Warrantia Carta* doth lye upon it. So also the warranty that is made in dower is taken to extend only to the other two parts of the land. *Cook* 4.121. *super Litt.* 384.

The warranty in law that is made upon the tenure of Homage Ancestrel, extendeth reciprocally to the heirs, and against the heirs of both parties. *Cook super Litt.* 384.

If a Feoffment be made of land to three jointly, and the Feoffors do warrant the land to the Feoffees, and every of them; this warrantie shall be joint and not several. But if the estate be several, as if one grant white acre to A, and black acre to B, and grant to warrant the land to them, and either of them; in this case the warranty shall be several. *Cook* 5.59.

If a

If a man of full age, and an infant join in a Feoffment with warranty, this shall be taken for a good warranty as to the whole for him that is of full age and void for the infant, and not void in part, and good in part. *Cook super Litt.* 367.

If a man make a Feoffment in fee, and bind his heirs, but not himself to warranty, in this case and by this his heirs shall not be bound, and it seemes also that it will not bind the warrantor himself. But if a man bind himself to warranty, and not his heirs by the Feoffment; in this case the Feoffor himself is bound to the warranty, but not his heirs, for it is a maxime of Law, That the heir shall never be bound to any expresse warranty, but where the Ancestor was bound by the same warranty. *Cook super Litt.* 47. 385. *Dyer* 42. *Kelw.* 108. *Cook* 6. 69.

If one make a Feoffment to B and his heirs, and thereby doth grant to warrant the land, and doth not say to B and his heirs; yet this warranty shall be taken to extend to them. But if the Feoffor doth grant to warrant the land to B, and doth not say to his heirs, this shall not extend to his heirs. And if in this case the warranty be to B and his Assignes, it shall not extend to his heirs, neither shall the Assignes take the advantage of it after the death of B. And if the warranty be to B and his heirs, and not to his Assignes also; this shall not extend to his Assignes. If one make a Feoffment to A, *habendum* to him and his heirs, and bind himself and his heirs to warrant the Land *in forma prædicta*; in this case the warranty shall extend to the Feoffee and his heirs.

If one grant to warrant land to another and his heirs, and doth not say against what persons, this shall be taken for a general warranty against all men. *Cook* 1. 1.

If one make an estate, and grant to warrant the land, but doth not say how long; this shall be taken for as long as the estate to which the warranty is knit doth last.

If a warranty be made against any special persons, it shall extend to them, and no further, and it shall extend in all cases for, and to all titles, and entries upon title; and it shall not, in any such cases extend to tortious and unlawful entries. *Dyer* 328.

If a man be seised of rent-sock, issuing out of the Manor of Dale, and he take a wife, and the husband doth release to the terre-tenant, and warranteth *tenementa prædicta*, and dieth; this warranty shall extend to the rent as well as to the land; and therefore if the wife sue for her thirds of the rent, the terre-tenant may vouch the heir. *Cook super Litt.* 366.

And regularly the warranty doth extend to all things issuing out of the land, *viz.* to warrant it in the same manner and plight as it was in the hands of the Feoffor, and he shall vouch as of lands discharged. And therefore if grantee of a rent grant it to the tenant of the land on condition, and the tenant doth make a Feoffment of the land with warranty; in this case the warranty shall not extend to the rent, albeit the Feoffment be made of the Land discharged of the rent. *Cook super Litt.* 388, 389.

And if a woman have a rent-charge in fee, and she doth intermarry with the tenant of the Land, and a stranger doth release to the tenant of the land with warranty; this warranty shall not extend to bar any action to be brought after the death of the wife for the rent. But if in this case the tenant make a Feoffment in fee with warranty and dieth, the Feoffee in a *curiam vita* brought by the wife shall vouch as of lands discharged at the time of the warranty made.

So if tenant in tail of a rent-charge purchase the land and make a Feoffment with warranty, and the issue bring a Formedon of the rent, the tenant shall not vouch, &c.

All those that are parties to the warranty, *i. e.* such as are named in the Deed regularly, shall take advantage of the warranty; as if one doth warrant land to another, his heirs and Assigns; in this case both the heirs and the assigns shall take advantage of it, and they both may vouch or rebut, or have a *warrantia carta*, so as they come in privity of estate, for otherwise the heirs or Assigns cannot vouch, or have a *Warrantia carta*, and yet he may rebut notwithstanding in divers cases. *Cook super Litt.* 365. 5. 17.

11. Who may take advantage of a warranty And how. And against whom it may be taken. Assignes.

But

But those that are not named for the most part shall not take advantage of the warranty, and therefore if land be warranted to *I S*, and not to him and his heirs, or to him and his assigns, or to him his heirs and assigns; in this case neither the heir nor the assignee may vouch or have a *Warrantia Carta*; and yet in some cases where it is so, the assignee or tenant of the land may rebut.

The warranty annexed to an Exchange, a Partition, by *Dedi*, and by homage Ancestrel, doth alwayes go in Privity, and therefore an assignee in these cases can take no advantage of it. And yet in cases of Exchange and *Dedi*, an Assignee may rebut. But the assignee of a lessee for life may take advantage of the warranty in Law annexed to his estate. *Cook super Litt.* 384.

If one grant to warrant Land to another, his heirs and Assignes; in this case the heirs or Assigns, heir of the Assignee, or Assignee of the heirs of the Feoffee, or Assignee of Assignees *in infinitum*, shall take advantage of the warranty. *Cook* 5.17. *super Litt.* 384.385.

And therefore if one enfeoff *I S* to have and to hold to him, his heirs and assigns, and warrant the land to him his heirs and assigns, and *A* doth enfeoff *B* and his heirs, and *B* dyeth, in this case the heir of *B* shall vouch as Assignee to *A*. And if one enfeoff *A* and *B*, *Habendum*, to them and their heirs, and warrant the land to them, their heirs and assigns, and *A* dye, and *B* doth survive and dye, and his heir enfeoff *C*; in this case *C* shall take advantage of this warranty as Assignee. If one enfeoff *A* with warranty to him, his heirs and assigns, and *A* doth enfeoff *B*, and *B* doth re-enfeoff *A*; in this case neither *A* or his Assigns shall ever take any advantage of this warranty. And yet if *B* enfeoff the heir of *A*, he may take advantage of the warranty.

If one make a Feoffment by deed with warranty to the Feoffee, his heirs and assigns, and the Feoffee doth make a Feoffment over to another by word without deed: in this case the second Feoffee shall have all the advantage of this warranty, for an assignee by word shall have the same advantage that an Assignee by Deed shall have.

If a Feoffment be made with warranty to a man and his heirs and assigns, and he make a gift in tail, the remainder in fee, and the Donee make a Feoffment in fee; this Feoffee shall not vouch as assignee, but he must vouch his Donor upon the warranty in Law; and yet he may rebut.

If lands be given to two brethren in fee simple, with warranty to the eldest and his heirs, and the eldest dye without issue; in this case albeit the other brother be his heir, yet he shall have no advantage at all by the warranty, because he comes in above the warranty. But generally all that claime under the warranty shall take advantage thereof by way of rebutter, albeit they can take no other advantage by it.

If one make a Feoffment to two, their heirs and assigns, and one of them doth make a Feoffment in fee, this Feoffee in this case shall not take advantage as assignee.

An assignee of part of the land shall take advantage of a warranty, as if a man make a Feoffment of two acres with warranty to him, his heirs and assigns, and the Feoffee doth make a Feoffment of one acre of it to another: in this case the second Feoffee shall take advantage of the warranty as assignee. And therefore herein there is a difference between the whole estate in part, and part of the estate in the whole or in any part, for if a man have a warranty to him, his heirs and assigns, and he make a lease for life, or gift in tail; in these cases the lessee or donee shall not take advantage of the warranty as assigns: but they may vouch the lessor or donor upon the warranty in Law. *Cook super Litt.* 385.

But if a lease for life be made, the remainder in fee; such a lessee may vouch as assignee upon the first warranty. *Cook super Litt.* 384.

If the father have a Feoffment made to him and his heirs with warranty, and he make a Feoffment to his son and heir with warranty; in this case the son may take advantage of the first warranty after the fathers death. *Cook super Litt.* 384.

If a man enfeoff a woman with warranty, and they intermarry and are impleaded, and upon the default of the husband, the wife is received; in this case she may vouch her husband. *Et sic e converso.* *Cook super Lit.* 390.

If a woman enfeof a man with warranty, and they intermarry and are impleaded; the husband in this case shall vouch himself and the wife. *Cook super Litt* 390.

He that comes into the land meerly by act of Law in the post, as the Lord by Escheat or the like, shall never take advantage of a warranty; and therefore if tenant in dower enfeof a villaine with warranty, and the Lord of the villain enter: or a Feoffment be to a Bastard with warranty, and he dye without issue, and the Lord enter by Escheat; in these cases the Lord shall never take advantage of these warranties. 26 H. 8. 3. 22 Aff. pl. 37. 29 Aff. 34. *Cook* 3 62 63.

But otherwise it is where a man comes to land by limitation of use or a common recovery, which is by the act of the party, for if tenant in taile being in of another Estate, .i. by disseisin, or Feoffment of a disseisor suffer a common recovery, and a collateral Ancestor of the Tenant in tail doth release with warranty to the recoveror, and after the recoveror doth make a Feoffment to uses, which are executed by the Statute of 27 H. 8. and after the collateral Ancestor dieth; in this case the terre-tenants may take advantage of the warranty by way of rebutter, albeit the estate be transferred in the post.

- So if he to whom the warranty is made, suffer a common recovery, and after the Ancestor dieth; the recoveror may take advantage of this warranty by way of rebutter, for any man that hath the possession of land, albeit he have no deed to shew how he came by the possession of it, or how he is Assignee, may rebut the Demandant, and so bar him and defend his own possession: And therefore the tenant by the courtesie, donee in tail that is in of anothers estate, an Assignee by force of a warranty made to a man and his heires, Feoffee of a Donee in tail may rebut and bar the Demandant by the warranty.

If one enfeof another of an acre of ground with warranty, and hath issue two sons, and dyeth seized of another acre of land of the nature of Burrough English; in this case albeit the warranty descend upon the eldest son only, yet both the sons may be vouched. And so also it is of heires in Gavelkind; the eldest shall be vouched as heir to the warranty, and the rest in respect of inheritance. *Cook super Litt* 376. 1 Ed. 3. 13. 5 H. 7. 2.

And in like sort the heir at the common Law, and the heir of the part of the mother shall be vouched, or the heire at the Common Law may be vouched alone at the election of a Tenant. And in like sort the heire at the Common Law shall be vouched with the heire in Burrough English. And so also a bastard shall be vouched with a mulier. And if a man die seized of certain lands in fee, having issue a son and a daughter by one venter, and a son by another, and the eldest son entreth, and dieth, & the land doth descend to the sister in this case the warranty doth descend on the son, and he may be vouched as heir, and the sister also may be vouched as heir to the land.

If two make a Feoffment with warranty, and the one dye; the survivor shall not be charged alone with the warranty, but the heire of him that is dead shall be charged also. And if two be bound to warrant land, and both of them dye; the heirs of both of them ought to be vouched, and shall be equally charged. And if the heir be vouched in the ward of three several persons, the one of them only shall not be charged, but they shall be charged equally. *Cook* 3 14. *super Litt* 386. 16 H. 7 13. 48 Ed. 3 5.

If a woman an heir of the disseisor enfeof me with warranty, and after she is married to the disseisee; in this case I may take advantage of this warranty against the disseisee and rebut him upon it if he sue me for the land. So if the husband and wife sue me for the land of his wife, and I have a warranty of a collateral Ancestor of the husbands descended to him; in this case I may make use of this to bar the husband and wife. *Cook super Litt* 365.

A warranty lineal or collateral may be defeated, determined or avoided in all or in part. And this is sometimes by matter in law, & sometimes by matter in deed. *Con L* 392

If the estate to which the warranty is annexed be gone, the warranty annexed thereunto is gone also. And therefore if an estate tail to which a warranty is annexed be spent, the warranty is determined. And if a man make a gift in tail with warranty, and after the Donee doth make a Feoffment and dye without issue, the warranty is gone. *Cook*

10 96 1, 2, 3, 62. *Lit. Sess.* 641. *Cook super Litt* 392.

A a a a a a

So

13. When a warranty shall be said to be defeated, determined or avoided. And how. Or not.

So if tenant in tail discontinue the tale, and the discontinuee be disseised, or make a Feoffment on condition, and a collateral Ancestor of the issue release to the disseisor, or feoffee on condition, with warranty, and after the discontinuee doth enter upon the disseisor, or on the Feoffee for the condition broken; in these cases the warranty made by the collateral Ancestor is gone. So if a Seigniority be granted with warranty, and the tenancy escheat so that the Seigniority is extinct; hereby also the warranty is defeated. So if a collateral ancestor heretofore had released with warranty, and then had entered into Religion, this warranty had bound; but if after he had been de-arraigned the warranty had been defeated. *Brownl. 2 part 169.*

If the father make a Feoffment to his son and heir apparant, with warranty and die, so that the warranty doth descend upon the son; hereby the warranty is gone. And yet if a feoffment be made to a man and his heirs, and he dyeth, leaving issue daughters: in this case the warranty shall be divided and is not determined. *Cock super Lit. 384. Broo. Warranty 27.*

If tenant in tail doth make a Feoffment to his Uncle, and after the Uncle doth make a feoffment in fee with warranty &c. to another, and after the feoffee of the Uncle doth re-infeoff again the Uncle, and after the Uncle doth infeoff a stranger in fee without warranty, and dyeth without issue, and the Tenant in tail dyeth; hereby the warranty made to the first Feoffee is defeated. So if the Uncle make the warranty to the Feoffee, his heirs and assigns, and take back an estate in fee, and after doth infeoff another. But if one make a feoffment with warranty to the Feoffee his heirs and assigns, and the Feoffee doth re-infeoff the Feoffor and his wife, or the Feoffor and a stranger; in these cases the warranty is not defeated, but doth continue still. So if two do make a feoffment with warranty to one, his heirs and assigns, and the Feoffee doth re-infeoff one of the Feoffors; in this case the warranty is not gone. And if in the first case the Feoffee make an estate to his Uncle in tail or for life, saving the reversion, or a Lease for life the remainder over &c. in this case the warranty is only suspended. *Lit. Sell. 743. Cook super Lit. 390. Lit. Sell. 744.* If one make a Feoffment or release with warranty, and after is attainted of Treason or Felony; hereby the warranty is gone; and albeit he do afterwards obtain his pardon, yet the warranty is not revived. *Cook super Lit. 391.* If a feoffment with warranty be made to two or more, and they being Joyntenants do after by deed make partition; by this the warranty is determined. *Cook 6. 12.* So if two Jointenants be, and one of them disseise the other, and he that is disseised doth recover in an assise and hath judgment to hold in severalty; hereby the warranty is determined. *Adj. Judg. Hill. 22 Jac. B R Enface and Sholes Case.* So if A and B be Jointenants of white acre for life, and A by fine doth grant to B *totum & quicquid habet in tenementis*, hereby the warranty is gone. But if a partition be made by Judgment upon a Writ by force of the Statute of 13 H. 8. this doth not defeat the warranty fallen to them, but it shall be divided between them, and they shall all of them take advantage of it.

If one infeoff three, with warranty to them and their heirs, and one of them release to one of the other two; hereby the warranty is gone for that part. But if one of them release to the other two; in this case the warranty is not gone, but doth continue, and they may vouch upon it. *Cook super Lit. 385.*

If one infeoff two men and their heirs, and one of them doth make a feoffment in fee; hereby the warranty is not determined, but the other may take advantage of it notwithstanding. *Cook super Lit. 385.* If the party that hath the warranty, or the estate to which the warranty is annexed, release to him that is bound to warrant all warranties, or all covenants real, or all demands; by either of these releases the warranty is gone. So also if by a Defeasance made between the parties it be agreed the warranty shall be void, by this defeasance the warranty may be avoided also. Or if it be so agreed that the Warrantee or his heirs &c. shall not vouch, or have a *Warrantia carta* by this the warranty is avoided in part. *Cook super Lit. 393. 392. Lit. Sell. 748.*

If tenant in tail doth infeoff his Uncle, which doth infeoff another in fee with warranty, if in this case the feoffee release the warranty to his Uncle; hereby the warranty is extinct. But if a gift in taile be made with warranty, in this case a release made by the Tenant in tail of this warranty will not extinguish it. *Cook super Lit. 391.*

Release.

Defeasance.

If the parties between whom the warranty is, intermary, hereby the warranty is suspended during the Coverture in some cases. *Cook super Litt.* 390.

If tenant in tail doth make a Feoffment in fee with warranty, and disseiseth the Discontinuee, and dieth seised, this doth suspend the warranty. *Cook super Litt.* 330.

If two make a Feoffment in fee, and warrant the land to the Feoffee, and his heires, and the Feoffee doth release the warranty to one of the Feoffors; this doth not determine the warranty of the other as to the moyety. So if one doth enfeoff two with warranty, and the one of them doth release the warranty; this doth not extinguish the warranty for the other moiety, but it doth continue still.

A warranty also may lose his force by taking benefit or making use thereof; for after a man hath once taken advantage thereof, in some cases he can make no further use of it: of which read *Cook super Litt.* 393.

CHAP. CLXVII.

Of Wales, War, and Waste!



OR Wales, see *Stat.* 28. *Ed.* 3. 2. 9 *H.* 4. 4. 2 *H.* 5. 2. 26 *H.* 8. 4. 26 *H.* 8. 6. 27 *H.* 8. 7. 33 *H.* 8. 13. 34. 35 *H.* 8. 36. 1 & 2 *Ph. & M.* 15. 18. *Eliz.* 8. 27 *Eliz.* 9.

For propagation of the Gospel in Wales, *Act* 22. Feb. 1649.

For War, Musters, Soldiers, Captaines, Armour and Armed men, see the Statutes, *Magna Charta* 5. 1 *Ed.* 3. 5. 7.

18 *Ed.* 3. 7. 5 *R.* 2. 10. 7 *Ed.* 1. 2 *Ed.* 3. 3. 20 *R.* 2. 1. 4 *H.* 4. 15. 18 *H.* 6. 18. 19. 7 *H.* 7. 1. and 7. 11 *H.* 7. 18. 3 *H.* 8. 5. 2 and 3. *Ed.* 6. 2. 4 and 5. *Ph. & Mar.* 3. 5. *Eliz.* 5. 31 *Eliz.* 2. 19. *H.* 7. 1. 3 *Car.* 1. *Cromp. Jur.* 83. 90. These Lawes are of little use now.

The Militia is governed now by the standing Council of War only.

For the Committee of the Army, see Ordinance January 28. 1653. July 1653.

For the relief of maimed Souldiers and their widowes, and their children. See *Relief of maimed Soldiers.* *Act* 13 September 1651. See my Book of *Justice of Peace*, chap. 35. *Billetting souldiers and Free-Quarter.*

For billeting Souldiers, see 19 Decemb. 1651. 12 May 1649. and Free-Quarter. *Ord.* 24. Decemb. 1647.

Of Waste.

THIS word, (*waste*) is sometimes taken for a wrong done by a Tenant to him in Reversion, where a Tenant for his own or anothers life, in Dower, for years, or by the courtesie of *England*, or a Guardian in Chivalry, when he to the prejudice of him in reversion, or the heir, doth make waste or spoile in the Houses, Woods, Gardens, Orchards or Lands he doth hold. And so it is either voluntary, when the Tenant doth willingly do it: or it is permissive and negligent, when the Tenant doth suffer it to be done. *Termes Ley. Cook upon Litt.* 1. part 53. 57.

This word is sometimes also taken for the Action or Writ that is given to relieve a man against such a wrong done, which is defined to be a Writ lying where any Tenant

Aaaaaaa 2

Writ of Waste what it is.

nant

How many
kinds of it
there are.
Sect. 1.

Locum vastatum

nant for life, years, in dower, by the courtesie, or Guardian in Chivalry, doth make waste, then he in Reversion shall have this Writ.

And this is either in the *Tener*, when it is brought against him that hath the present estate, or in the *Tennis*, when it is brought against him that had but now hath not the estate in the land: and by this Writ in the *Tener*, the waste being found, he shall recover treble damages, and *locum vastatum*, the place wasted, (i.) The Lessee for life or years that is convicted of this offence, shall lose, and the Plaintiff in this suit, if he recover, shall recover treble damages, and the place wasted: that is, if it be in a whole house, the house, the whole house; if it be in one or two roomes *parsum*, those roomes; if it be in a Close, as much of the Close as is wasted; if it be in Trees or Hedge-rows, the circuit of the root and no more; and if it be in the corner of a Wood here and there, that corner of the Wood only; but if it be in divers places of the Woods *parsum & circumquaque*, here and there, perhaps the whole wood; and this he shall recover, discharged of all incumbrances. So that if Lessee for life make a Lease for years, and after enter into the Land and make waste, and the Lessor recover the Land, in this Action he shall avoid the Lease made before the waste done. And if Lessee for life do waste, and after grant a rent out of the Land, and after in this Writ the Land is recovered, the Lessor shall hold it discharged. But if the waste be before the grant of the Rent, *contra. Cook upon Litt. 233.* But if it be in *Tennis* nothing can be recovered but damages. And if the waste be done by a Guardian in the Wards land, to the value of twenty shillings, the Ward may sue this Writ, and shall hereby gain his liberty; and the Guardian shall lose the wardship of body and land: And if this be not sufficient, the Ward also shall recover damages besides. *Martb. chap. 23. Westm. 2. 14. Stat. Waste 10 Ed. 1. Glouc. ch. 5. Old N.B. 36. Cook 1 part 54. Cook 11. 50. Dyer 281. 15 H. 17. 14 Ed. 3. 10. 13. Fitz Waste 62. 75. F.N.B. 49.*

Where this Action lieth or not.

1. In respect of the person wronged; and who may have this Action or not. And for what Waste.
Sect. 2.

This Action lyeth and may be had by him that is in Reversion or next in Remainder, in fee simple or fee tail, after the particular estate for life &c. ended; or by his Heire, or by the Grantee of the Reversion or Remainder, or by the Grantee of such Heire or Grantee: and so by any Grantee of the Reversion *in infinitum. Cook 1 part 53. F.N.R. 57.*

But a Tenant for life, or he that hath a lease estate then of fee simple, or fee-tail, may not have this Action. *Noy 26. Cook upon Litt. 273.* But it will not lye for an heir or grantee, for a waste done by the Tenant in the time of the Ancestor or Grantor: Nor can the Grantor, after this grant, bring an Action of Waste for a waste done by the Tenant before or after the Grant until Attornment; nor after Attornment will it lye for any waste done before Attornment; though it were not punished before by the Grantor. *Dyer 31. Cook 6. 68. Perk. 93. 48 Ed. 3. 15. 9 H. 7. 20.* And yet it is said, it an Action of waste be depending, and the ancestor dye, that the heir may finish this Action. *Stat. 11 H. 6. 5.*

And if two Copartners be of a Reversion, and a waste is committed, and one of them dye; in this case the Survivor and the Aunt may maintain the Action. *Cook 1 part 53.* A body politicke, and the Successor or Grantee of such a body that hath a Reversion, may have this action. But yet such persons cannot have this Action for any waste done in the time of their Predecessors. *F.N.B. 54.*

If a Lease be made for life, the remainder in tail to another, the remainder in fee to Lessee for life, and the Tenant for life do waste; he in the next remainder shall have the action against him, *F.N.B. 90. Cook 1. 45.*

And if there be tenant for life, the remainder to another for years, the remainder to a third in fee, or in tail to a third, or a third have the reversion, and the Tenant for life doth waste; in this case the action may be brought against him presently; but execution for the land may not be had till the Lease for yeares be ended. But if the mean lease be a lease for life, no Action will lye till the death or surrender of the Lessee. *Remoto impedimento emergit Actio, Cook 5. 76. 2. 92. Fitz N. B. 59.*

And if one make a Lease for life, and after grant the Reversion for years, no Action

on will lye during the yeares. But, if after a Lease for life the Lessor shall make a Lease for yeares to begin after the estate for life ended: this is no impediment. *Fitz Waste* 18.

Also the Lord that hath a Reversion by Escheat, and one that had had a Reversion granted from the King, and he that hath a Reversion by devise; though the Tenant have not returned, may have this Action for waste done by Tenant, *F.N.B.* 60. And yet it seems in *Kelw.* 109. That this Action is not maintainable without a privity which is not in the case of the Lord in by Escheat.

If Tenant in tail make a lease for life of the Land, and the lessee for life do waste; the Tenant in tail shall have the Action. *Brownl. 1. part* 238.

If two Jointenants, Partners or Tenants in common be, and one of them before partition made, make a Lease to a stranger, and he do commit waste, they must both of them bring the Action; but he only that made the lease shall recover the damages. *Joynder in Action.*

M.8. Jac. Curia. Cook 1. part 53. *F.N.B.* 60.

And if *A* and *B* be Jointenants for life, the fee simple to *B*, and they two make a Lease for life, and the Lessee do waste; in this case they two must joyn in this Action. *Jointenants.* *13 H.7. 15. F.N.B.* 59. For one Tenant in common of a Reversion cannot have an Action of waste alone without his companion. *Tenants in common.* *M.36.37 Eliz. Cook B. Hill and Harts Case.*

And if Tenant for life and he in Reversion or remainder in Fee joyn in a Lease for life or years, and this Lessee do waste, they must both joyn in this Action, and the first Lessee for life shall recover the place wasted, and the first Lessor the treble damages. *27 H.8.13. 22 H.6.24. Cook 1 part* 42.

If the Lands be granted to two, and the heirs of one of them, and the Tenant for life do waste; in this case the other Jointenant cannot have this Action, but his heirs may. *F.N.B.* 87. *Cook 1 part* 53. 200.

If a woman covert have any cause to bring this Action, she and her husband must joyn in it: and if they two make a Lease of their, or of the wives land, and the husband dye, and she take another husband, and the Lessee do waste, the husband and wife must bring the Action. *Husband and Wife.*

So if three Copartners divide the land, and one of them hath a Reversion to her part, and then she marry a husband, and after the Tenant do waste; in this case the husband and wife must joyn in the Action. *9 H.6.43. F.N.B.* 57.

If there be husband and wife in remainder in special taile, and the wife dyeth without issue; in this case the Husband cannot now have this Writ against the Tenant; and if the Suit were begun, it will now abate by her death. *Abatement.* *Cook upon Litt.* 285.

This Action lyeth against a Tenant for life, either his own or another's life occupant, a general or special tenant in Dower, or by the Courtesie, a Tenant for years, though but for one year or half a year. *Glouc. chap. 5. F.N.B.* 60. *Cook* 109. 6.37 6.73. But not against a Tenant in fee simple, fee tail, in taile after possibility of issue extinct or against him that hath an estate of Frank-tenement only distendible; as if tenant in taile make a Feoffment or bargain, and sell his land to another and his heirs *Cook* 10.98. Nor against a Tenant by *Eligat*, Statute-Merchant, or Staple, Tenant in Mortgage, or Tenant at will. *Cook* 50.89. 1.57. 6.41. *N.B.* 41. *F.N.B.* 59. Nor will it lye against Lessee for years or life after surrender of his estate to the Reversioner, and his acceptance thereof, *Old N.B.* 36. *M.4. Jac.B.R., in Morlayes Case.*

In respect of the persons that do the wrong and against whom it lyeth, or not. And for what waste. *Sec. 3*

It lyeth against Lessees for life and yeeres, for waste done by themselves or strangers, and that whether they come by their estate by lease or devise. *Plow.* 10. *Cook 1 part* 53.

If Lessee for life make a Lease for yeers, and the Lessee for yeers do waste; he in reversion must have his remedy against the Lessee for life, and he shall have his counter remedy against the Lessee for yeers by Action of the Case. *Pasch.* 38. *Eliz. B. R.*

If Lessee for yeeres grant away part of his term, the Action must be brought against the first Lessee, and not against this Lessee of part of the term.

If

If Tenant in Dower, or by the Courtesie, assign or grant over his or her estate, and afterwards the Grantee do or suffer waste, the Tenant, not the assignee, must be sued. *F. N. B. 56.*

If a Lessee for life or yeares grant over his estate in the Land, but doth still take the profits of it, or grant it over to that end, that he in reversion may not know against whom to bring his Action; in this case he may bring his Action against the Lessee or his Assignee at his choice. *Stat. 11. H. 6. 5. Cook 5. 77.*

It lyeth against a Lessee for life or years, after he hath assigned his terme for the waste done by him before the Assignment. But for the waste done after the Assignment, the Action must be brought against the Assignee; and so each of them are to be charged for his own time. And yet if the Lessee begin a waste, and then grant over his estate, and the Grantee continue the wasting; in this case the Action may be laid against the Assignee. *F. N. B. 56 Old N. B. 37.*

If Tenant *per antea* vie do waste, and the life dye; yet the Tenant may be punished in this Action, *Cook 1 part 285. Cook 7 2. 5 12.*

If the Tenant grant his estate over on condition, and the grantee do waste, and the Tenant enter for the condition broken; the Action must be brought against the Grantee, *Cook 1 part 54.*

Executors. It will not lye against Executors or Administrators for a waste done by the Testator, for *moritur cum persona*, *Kelw 105 F. N. B. 57.*

And yet it will lye against the Executors of a Lessee for years, for waste continued by them: as if a Lessee for yeers begin a new waste by digging a Mine or the like, and devise the term to another; and the Executors enter and continue the waste, go to dig in the Mine or the like, and after assent to the Legacy; this Action will lye against the Executors for the continued waste, *Cook 5 12. 10 Ed 4 1. Brownl 1 part 238. 2 part 133.*

Infant. This Action lyeth against an Infant, not only for a waste done by himself, but also for a waste done by a stranger. *Cook 1 53.*

Husband and Wife. This Action lyeth against Husband and Wife. If a Lease be made to the wife alone for life or yeers, and she or her husband do make waste, this Action must be against them both while they are living, and it will not lye against one of them, *F. N. B. 57.* But if it be a Lease for life, and she dye, the Action is gone, and will not lye against the husband, albeit he did joyn in the waste: and yet if the husband be possessed of a term in the right of his wife, and he do waste, and then the wife dye; in this case he may be sued for this waste, *Cook 1 part 54. Cook 5 75. 2 H. 4 3.* And if she be Lessee, and take a husband that doth waste and dye, she may be charged for this. *F. N. B. 58 59. N. B. 36.*

If lands be given to husband and wife, and the heires of the body of the husband, or the heires of the body of the wife, and he dye, and she do waste; or she dye and he do waste; in this case the heire may have this Action against the husband or wife, as the case is *F. N. B. 57.*

It is said, That if a Husband and wife have a joynt estate, and the husband do waste and dye, and the wife agree to the estate, that the Action will lye against the surviving wife, for this waste of the husband. *Sed quare Cook 1 53. N. B. 36 58 59. Brownl Waste 11.*

Tenant in dower by the Courtesie. Sect. 4. If a Tenant in Dower, or by the Courtesie, grant over her or his estate, and afterwards waste is done; for this waste the Action must be brought by the heire against the Tenant, not the Assignee; and yet if such a Tenant by the Courtesie grant over his Estate to a stranger, after he hath attorned to the Grantee of a Reversion upon a Grant thereof made before, and the Assignee doth waste, in this case the Action must be brought against the Assignee, and not against the Tenant by the Courtesie. So if the wife Tenant in Dower grant her estate to a stranger, and after the heir grant the Reversion in Fee to another, and the Tenant attorn, and after the Assignee doth waste; in this case the Action must be brought against the Assignee or the Tenant in Dower; not the Tenant her selfe; for in both cases after the heire hath granted away his Reversion, the Tenants after Assignment of their Estates shall not be charge, *Cook 1 part 54 3 10.*

If there be two Jointenants, or Tenants in common, in Fee or for life, of a Wood or Common of Turbary, or fishing, or the like; and one of them doth waste against the will of his companion, he may sue the other, and he may be sued for this: otherwise it is of Partners. *Cook 1 part 200.*

If Tenant for life be disseised of his estate, and the Disseisor commit waste; the Lessee for life, not the Disseisor shall be charged in this Action for this wrong. *Bro. Waste 36. N B 37.*

If a stranger against the will of the Lessee, Tenant in Dower, &c. do waste; this Action may not be brought against the stranger, but the lessee or tenant for this waste; and he shall by an Action of Trespasse recover as much as he loseth against the stranger. *De St 34 Cook 1 part 54.*

It lyeth against the Guardian in Chivalry, for waste done by himself; but not for waste done by a stranger. *Cook 67. 1 part 54.* And so also his Grantee of the Wardship; but against each of them for the waste in his owne time only. And yet it is said, it will lie against the Assignee of this Guardian, for the waste done by the Guardian. *Cook 5 12. Fitz Waste 10.* If two Jointenants be of a Ward, and one of them do waste, both of them must be sued for it. *Cook 1 part 54.*

It is said it will lye against a Guardian in Socage for waste done by himself; though not for waste done by a stranger. *F N B 59.* But the contrary is affirmed by *Cook 1 part 54.*

Voluntary and negligent wastes are alike punishable. *Dyer 281.* The Lessee or Tenant is bound by Law to keep the houses in as good case and plight as they are when he comes to them; and if he doth not so, but suffer any part of it by his negligence to grow ruinous; this is waste for which the Lessor may sue the Lessee in this Action. *Bro. Waste 130.*

But for the further opening of this point, take these things.

1 To suffer it to decay, is waste; albeit there be no Timber upon the thing to repair it; for the Tenant must procure timber at his own charge.

2 To prostrate, abate or break down any of the houses, either the whole or part (that is) any of the principal walls, or walls of partitions in chambers; or else, whether they be of stone or mud, is waste. *Bro. Waste 26. Kelm 37 10 H 7 2 5 F N B 59.* And yet to throw down the posts or frame of a house remaining of an old building, or set up for a new building, it seemes is no waste. *Bro. Waste 107.*

3 If the house be uncovered by tempest, and the Tenant do not repair it in convenient time, this is waste. *Cook 1 part 53.*

4 To suffer the house to be burnt by negligence or mischance, is waste. *Cook 1 part 53.*

5 If the house be ruinous when the Tenant comes first into it, and hee pull it downe, and do not build it up againe, this is waste. *Cook 1 part 53.*

6 It is waste in the Tenant (as some say) to build up a new house though with timber of his own; yet others doubt of this: And if after it be new builded the Tenant suffer the house to decay, this is another waste. And yet to pull down an old house ready to fall, and to set up another with his own charge of the same length and breadth, is in the Tenant no waste. So neither to set up a house with his own timber that was blown down by wind or tempest, though it be lesser then the former house. *Bro. Waste 39 98 Cook 1 part 53 12 H 4 6 11 Ed 2 Statute.*

7 To take away, pull off, or break downe the Wainscots, Doors, Windowes, Benches, Furnaces, or any other the inseparable incidents of the house, being set up and fastned by the Lessor or Lessee, or whomsoever, is waste. *Cook 4 94 1 part of his Inst 53.*

8 To suffer the houses, covered at the time of the tenants taking to it, to be uncovered so long, as that thereby the principal pieces of timber of the house (viz.) the Beames, Rafteres, Sparres, Planchers, &c. do putrifie and rot, is waste. But the not covering of a new frame of building uncovered when the tenant comes to it, is not waste. And if it be uncovered when the tenant comes to it, though by this means

Tenants in Common. Joyntenants, &c.

Disseisor.

Stranger.

Gardian in Chivalry.

In Socage.

In respect of the thing in which the wrong is pretended to be done.

In Houses.

Self. 5.

meanes the house fall down, it is no waste: and if the uncovering do not produce the effect of marring the timber, this is not a waste. *Cook 1 part 53 Broo Waste 69 455 82. 12 H 44. 10 H 72. F N B 59.*

9. If the house be prostrate by tempests, floods, or burnt by lightning, or be prostrate by enemies, without any default or power to prevent it in the Tenant, or if at his coming into it, it be so ruinous, that it cannot be kept up, and it fall down, and the Tenant build it up again with such materials as remaine, and other timber of his own; or (as some say) the timber upon the ground, and build it no larger then it was, this is no waste. *Cook 1 part 53, 54 Broo Waste 117 82.* Yet I doubt of the last, for he is not in these cases bound to repaire it, nor are these spoiles any such waste, for which the Tenant is at all punishable. *Cook 10 139 11 41 4 64 F N B 59 Broo Waste 19 130 Dyer 36 F N B 60 20 H 7 2.*

In Trees and Woods.

The Tenant is to preserve the Timber Trees on the Land, and if he make spoyle in them, this is waste; for which he in reversion shall have this remedy.

But for the further opening of this point take these things.

1 To cut or break down or root up Trees that are or may be timber; as Oak, Ash, which are timber in all Countries; or other trees in some Countries where Timber is scarce: Elme whether young or old, above or under twenty yeares of age; to sell, build a new house or a new roome, or to any other purpose then towards the necessary repair of the old house or housing, being on the land at the time of the Lease, and in decay by age or tempest, is Waste. *15 H 7 21 Kelw. 95 11 H 4 11 12 H 7 1 Dyer 314 11 H 61 F N B 99 7 H 6 40 Cook 1 part 53.*

2 To cut down timber for reparations at unseasonable times that it dye; or to cut it, and after to sell it, or employ it to any other use, is waste: And though after sale he buy it again, and imploy it to reparations; yet it is said this wil not help the case. *12 Ed 3 Waste 28*

3 Some say, To cut downe timber to build new houses, broken or burnt down by fire, water, enemies, or the like hand of God, is waste; because he is not bound to repaire it; nor is it any waste in the Tenant. *Dyer 36 Perk. 738.* It hath been said, That if a Tenant cut down timber-trees, before there is need of reparations, and keep them till the timber be somewhat seasonable; or to cut down more then enough, so he keep it for that use, and do not mis-employ it, is no waste. *M 37 6 38 Eliz. per curiam.* But it seems the contrary hath been adjudged. *M 39 40 Eliz. Com. B. in Gorges case.* But if an apparant need appear, it may be cut a little before it be used. *Cook 1 139 11 48 6 64 F N B 59.*

4 So it is said, That to cut down timber for necessary reparations, and then to sell it and use his own, or so much thereof for reparations, or repair the houses with the money, is waste. *12 Ed 3 Waste 20.* I doubt this first case. *Cook 1 part 53.*

5 To cut down timber to repaire the houses decayed by the Tenants default, it is waste, and a double waste, *F N B 59. Cook 1 53.* If a house be ruinous at the time of a Lease, and after fall, and the Tenant cut down timber to repaire it; this is no waste *Cook 1 part 54.*

6 To cut young timber trees to repair, when there is enough of fitter timber besides, is waste. *11 H 6 1 13 H 7 21 F N B 60.*

7 To cut down all the under woods in a wood where no high-woods are growing amongst it, is waste. *Broo. chap. 411.* So, to cut down such a wood, and then to suffer Cattel to crop it, being newly felled, and kill it, or to root and stub it up, this is waste, *F N B 59 Cook 1 53.*

8 To cut down timber trees for fire-boot and hedg-boot, when there is enough other hoot, is waste, per two Justices. *P. 7 7 ac. B. R.*

9 To cut down such trees for fire, as are not fit for fire, being timber, and only hollow and dry at the top, is said to be waste: but if they be hollow and dry and dead, that they bear not fruit nor leaves in Summer; if then the Tenant cut down such trees for fire-boot this is not waste. And by this, it seems, otherwise they are not to be cut down for fire-boot, *Dyer 332 Cook 1 part 53.* And yet trees that will never be fit for timber (it seems) may be cut for that use, *11 H 6 1.*

10. If a man lease his land wherein is an open Mine, to another, with all the Mines in it, for years; and the Lessee cut timber trees upon the land, to uphold the earth about the Mines, to keep it from falling; it seems this is no waste, *Pasch 17 Jac Cook B.*

11. To cut down more fire-boot, hay-boot, hedg-boot and house-boot (to keep it as he found it) than is necessary; or to cut down the green wood, when there is sufficient dry and dead wood, is waste, *Broo Waste 130 FNB 59 Cook 1 part 53 88.*

12. It is said, That to cut down Willows, Beech, Birch, Maple, or Aspe that grow in the sight and view of a Manor-House, or are a safeguard to it, is waste, *40 Edw 3 25 Cook 1 part 53.*

13. To cut great Hazles in a Wood and Country, where is no other wood, may be (as some say) waste, *40 Edw 3 25 Broo Waste 21.*

14. To shroud timber trees at seasonable times; to cut down, or fell Willow, or other trees that will not be timber, dead wood, or under wood, for fire, is no waste, *FNB 59 60.*

15. To fell Copices and under-woods, to sell every five, ten, or twenty years, as the course of the Country is, and Tenants have been used to do, is no waste, *10 H 7 2 FNB 59 60 11 H 6 1.*

16. To cut or moote Thorns or Bushes growing in a ground for the bettering of it, is no waste, *Dyer 37 43.* So to cut up black-thorn to burn; though it be in a Champion Country, where fuel is scarce, *M 8 Jac Curia.* And yet it is said, it may be waste, to cut white-thorn in such a country; unless it be for reparations. So to suffer it to be destroyed. So it is said by some, That to cut down, or grub up quick-set hedges in a country where fuel is scarce, may be waste, *Broo Tresp 136 134 411 Cook 1 part, folio 53.* for that may be waste in a field-country, that is not waste in a woodland country. The breaking of a hedge in other cases, is no waste, *Broo Waste, 34 See Brownl 1 part 2 part 46 167.*

To cut down Fruit-trees, Apple-trees, or Pear-trees, or Plum-trees, or the like, growing in an Orchard or Garden; though it be for reparations, is waste. So to take away, cut, or pull up such trees half broken by the wind, or otherwise, while they do yet bear fruit, or the young springs of them that may bear fruit, is waste, *10 H 7 2 48 Edw 3 44 Broo Waste 19.* And yet it is no waste to cut, or destroy such fruit-trees growing in the fields, out of an Orchard or Garden, nor in an Orchard and Garden when they are utterly subverted and fruitless, *Broo Waste 82 39 Cook 1 part 53.*

To dig or eare up the ground, to make gutters or gripes to the hurt of the ground, may be waste. So to eare up ancient deep Meadow, not ploughed in any mans memory; grub up wood and turn it into earable, or turn earable into a Wood, is waste, *Dyer 37 Cook 1 p. 53.* But to dig or gripe a foggie Meadow, for the bettering of it, is no waste: Or to let ones earable, or other ground lye fresh; or let Thorns or Weeds over-grow it; or to plough up ground that hath been ploughed within the memory of man; or that is sometimes earable, and sometimes Meadow; or sometimes Meadow, and sometimes Pasture; this is no waste, *Dyer 361 FNB 59 2 H 6 11 Hill 8 Jac BRTresbams case.* If the Tenant being bound to repair the Banks, for lack hereof suffer the water to overflow, and much to hurt the ground; this may be waste: But if the over-flowing be by some extraordinary flood, *contra, Cook 10 139 1 part 53.*

If the Tenant shall open, or dig new Quarrs for Coal, Stone, Brick, Metal, Gravel, Lime, Clay, or the like; this is waste; unless there be special words in his Lease, to warrant it: But it is no waste for the Tenant to dig forwards, in an old Mine that was open before. And if a Lease be made with the Mines; yet if the Lessee open any other Mines, than what was open before; this is a waste: But if no Mine were opened before; then it is said the Lessee may open the Mines, and not do waste, *Cook 5 12 1 part 53 54.* It is no waste to dig the Land for Gravel, and such like necessities for reparations, *Cook 1 part 53 54.* To sow earable ground to Woad, is said to be waste; because it will bear no corn the next year; *Tresbam's case.* To suffer earable to be

B b b b b b

drowned,

drowned, so that it turn to clay; or to suffer Medows to be drowned, so that it turn to be hereby Rushie, and little worth, may be waste, 20 *Hen 6* 1 *Brownl* 1 part 241.

In Parks or other things.

To suffer the Walls, or Pale of a Park to be so decayed, that it want inclosure, that the Deer are, or may be dispersed, may be a waste, *Broo* 130 *Cook* 1 part 53. So to kill or destroy all the Fish in a Pond, may be waste, 6 *R* 2 *Statham*. So to take so many young out of a Pigeon-house, Warren, Park, Vivarie, Estagnes, or the like, not maintaining that store that was there when the Tenant came first, may be a waste, *Cook* 1 part 53. It is said, That to suffer a mud-wall, thatched, or tyled, to be uncovered, whereby it perish and fall, is a waste. *Bro* Waste 39. But if it be uncovered when the Tenant comes to it, it is said to be no waste; and so though he take it down, *Bro* Waste 94 *Cook* 1 part 53. But none of these things will be waste in a Tenant, where he doth them by the leave or command of the Landlord, *Dyer* 37 *Kelm* 37. 8 *H* 8 5. nor when his Lease is without impeachment of waste.

In respect of the Case. *Sec* 6.

If one demise a Close, *Habendum* the Close with the Trees; and the Lessee cut the Trees, this is a Waste: for the Trees do not pass by the *Habendum*, being not in the premises of the Deed, *Pasch* 7 *Jac* Co B *Sir Francis Leakes case*.

Trespass.

If one make a Lease for years or life, by words of Demise and Grant of a Close with all the Timber-trees except Oaks, and the Lessee cut the trees that are not Oaks, this is waste, *Dyer* 375 314 *Cook* 11 48. If the Lessor make his Lease to the Lessee excepting the Trees, and the Lessee cut the trees; in this case the Lessor must have an Action of Trespass for the Wrong, and not an action of Waste: for the Trees were not let, *Dyer* 19 *Purfrayes case* *M* 9 *Jac* *Goldsb* 1 pl 1. If the Lessor be bound to repair; and the Lessee do it himself; this is not waste, *Cook* 1 part 54. If the Lessee cut down timber, or pull down houses, and the Lessor take it away, yet the action lieth against the Lessee for this, *Cook* 4 64 11 48. So, if a Lessee cut timber for Repair, and sell it, and then buy it again and repair the Houses with it, yet the Action will lie for the cutting of it, *Broo* 112. If the Lessee have covenanted not to do waste, and he do waste; yet the Lessor may have this Action, and remedy upon his Covenant also, *M* 9 *Jac*. *Covenries case*. If the Lessor Covenant with the Lessee that he shall take as much timber as he will, and he cut Timber: it seems either this is no waste, or the Covenant may be pleaded by way of *Rebuttal*, *Purfrayes case*, *M* 9 *Jac*. If the Lessor and Lessee together, do such an act as is waste, no action will lie for this. So if the Lessor himself do the thing, *Dyer* 37 *Kelm* 37 *Perk* 182 203. So, if the Lessee do it by leave or warrant from the Lessor, 18 *H* 8 5. If the Lessee do any thing upon the Land, which is a waste, before the Lease begin, it seems this is not actionable, *Perk* *Sett* 602. If the ruine be caused by the extraordinary hand of God, as by Fire, Wind, or Water; this Action will not lie for this, *Cook* 64 *Broo* Waste 31.

If the Lease be made without impeachment of waste, the Lessee cannot do waste.

Without Impeachment of Waste, How it shall be taken.

Sec 7.

But for the opening of this clause, *Without Impeachment of Waste*, and to shew the Law herein, these things are to be known.

1. An Impeachment of *Waste*, doth signifie a restraint from committing of Waste in Lands or Tenements: And *without Impeachment*, doth signifie a liberty to do waste, and an estate without any such restraint, *Cook* 11 82.

2. These, or the like words inserted into the Deed, are said to be annexed to the Estate, do change the quality of the Estate, and make the Tenant, herein, in the nature of a Tenant in tail; and it addeth a priviledge thereunto, and they give the Lessee a power and interest to make waste, and to dispose the thing to his own use; so that now he hath a general property in that thing wherein before he had only a special property; so that now he may cut down Trees, or pull down Houses, and then, or if they be thrown or cut down by others, he may take the Wood and Timber to himself: And if the Lessor sue this Action for this waste, the Tenant may bar him with this clause, *Cook* 11 81. 2 81 114 *Marlb* chap 23 *Plow* 135 141. *Cook* 6 63.

3. But it must be those very words, or of the like sense: For if the words be without

without Impeachment of waste by any Writ of waste, these words are not so large, they do not give such a power to the Tenant, nor alter the Property, but only discharge the Action; so that the Landlord can bring no Action against the Tenant for the waste done *Dyer* 204 *Cook* 11 82 83.

4. The words must be inserted in the same Deed whereby the Estate is made, or another Deed made at the same time; for if he make his Lease without this Clause, and after willeth that the Lessee shall hold without Impeachment of waste, it is said, these words work nothing to discharge Action or give an Interest, *Cook* 11 82 83 *Plow* 556 557.

5. And yet if *A* make a Lease for years to *B*, and among other Covenants doth insert this. And the said *A* doth for him and his heirs covenant with *B* that he, his executors and assignes, shall at all times during the said term, fell, cut down, all the wood, trees and hedges growing upon the land, and the same carry away and convert to his own use, without any let of the Lessor, his heirs or assignes; it is thought that these words will amount to this clause, and discharge the Lessee; And this was the Opinion of divers Councillors, *M. 10 Car.* If a Lease be made with this clause, *Proviso, quod non prosterneat domum voluntarie*; if in this case the Lessee throw down any of the houses, it will be waste, *Plow.* 153. 9 *Hen.* 6. 35. So if one make a Lease for life, and by Deed grant, that if any waste be done, it shall be redressed by neighbours, and not by Suit or Plea; yet an Action of waste will lye, *Cook* 1 part 53.

6. This priviledge where it is, may be lost; for it is annexed only to privity of Estate. And therefore if one that hath this priviledge annexed to his Estate, agree to change his Estate, the priviledge is gone. And therefore, if he that hath a Lease for years, with this clause in his Deed, accept of a Deed of confirmation of his Estate, without this clause: Or if a Lease be made to a man for another's life, with this clause, the remainder to him for his own life without this clause; the priviledge by the extinguishment of the estate is gone. So if Tenant in tail, after possibility of issue extinct (which holdeth after this manner) granteth away his estate to another; by this the priviledge is gone, *Cook* 11. 83. And yet it is held, if Lessee for years, having this clause in his Lease, do assign over his term, to a stranger, that this priviledge is not gone; but shall go to the Assignee, and the Assignee of the Assignee *in infinitum*; for the Tenant in tail hath only a personal priviledge, or priviledge in Law: but this is an actual priviledge, annexed by the Lessor to the Estate, and shall go with it. And of this opinion were divers Councillors in *Mich. Term 10 Car.*

A man makes a Feoffment to the use of himself and his wife, *et alterius eorum diutius viventis absque impetitione vasti durantibus vitis ipsorum*; in this case if the husband die, the wife shall hold the land without Impeachment of waste, *Goldsb.* 31.

pl. 5.

Some have said, That this Action lyeth not, except the damage come to six-pence; and that the Plaintiff cannot have Judgement where the waste comes but to twelve-pence; others where it comes but to three-pence; for *de minimis non curat Lex*. And yet *Cook* in his 1. part of his *inst. f.* 54. saith, That waste done in trees, to the value of three shillings four-pence, is adjudged waste; and that many little wastes may make up a Value. And it seems, by the common practice, it will lye for any value; only the Plaintiff must be sure to declare for enough; otherwise the Declaration is not good. But if so he declare: then if the Jury find but one peny damage, it is good, *Broo.* Waste 20. 70. 74. *Plow.* 329. 9. *H.* 6. 66. 38. *H.* 8. 7.

If Tenant in tail bring this Action, and hanging the Action, the Estate in tail determine, and the Plaintiff become Tenant in tail after possibility of issue extinct: hereby the action of Waste is gone. So if the Tenant or he in Reversion die, the Action is gone; and if the Suit were begun, it must abate. So, if after the waste is done the Reversion be put out of that estate, wherein it was, as if it be granted away to a stranger; and in this case the taking of it back again will not revive the Action. If he that hath the Reversion grant it to the use of himself, and his wife, and his heirs; the waste in these cases is dis-punishable, *Cook* 1 part 53.

The Pleas to this Action may be either general or special; the general Plea is *Nul Waste fait*. The special Pleas are many, either in a way of Justification, or Excuse, as

B b b b b b a

By what means this Action may be determined, or not. *Sett.* 8.

Pleas: What shall be said a good Plea in this Action, or the

Sect. 9.

the case is. It is a good Plea, if the waste be laid to be in not reparations; that it was repaired before the Action brought: This must be pleaded specially. But to say, it was repaired after the action was brought, is no good Plea, *Cook* 5. 119. 13. *H.* 7. 20. *Cook* 4. 64. 11. 48. So it is a good Plea to any waste, that the Lessor gave authority to do it, *Kelw.* 37. *Broo. Done* 13. It is no good Plea to say, That the Plaintiff did covenant to deliver Timber from off the thing to do it, and refused; for the Defendant in this case, may take it. But if the agreement were, That he should have it from another thing, perhaps the Plea may be good, *Broo. Waste* 36. *Brownl.* 1 part 240. 241.

It is a good Plea to say, The House, or Trees, were burnt or spoyled with fire, with water, or by wind; that the ruine was caused by some extraordinary Act of God, *Broo. waste* 31. *Cook* 4. 64. So it is a good Plea to say, the house fell before the Lease; or that the Lease is surrendered to the Lessor, and he hath accepted it; or that the Plaintiff hath entred upon the land, and before his entrie there was no waste done; or that the Plaintiff himself did the waste; or that the house was so decayed, at the time of the Lease, that it could not be upheld; or that the house fell with tempest, or was burnt; or that the Plaintiff hath granted away his Estate, and before the Grant there was no waste done; or that the Plaintiff hath by good words released it; or that the Lease was made without Impeachment of waste, 12. *H.* 4. 6. 8. *H.* 5. 8. *Broo. waste* 18. 29. 33. 54. *Finches ley* 55. But it is no good Plea for the Defendant to say, He had nothing in the land at the time of the waste done, *Broo. waste* 22.

It is no good Plea in this action, for cutting down timber, or pulling down the house, that the Lessor took away the timber or materials, *Cook* 4. 64. 11. 48. Nor that the Lessor hath a Covenant from the Lessee, not to do waste, *Curia M. 9. jar*, in *Covenories* case.

It is not a good Plea. for the Tenant, in an Action of waste, for cutting Timber, to say, That he cut it, and keeps it till there shall be need. *Adjudg. Gorges vers. Stanfield, M.* 39. 40. *Eliz. Cook B.* Nor to say, He cut for necessary reparations; unless he say withal, That he employed it to that purpose, *Dyer* 332. And yet no doubt, it may be justified to cut it a little before it be used, when an occasion of use is apparently at hand.

Evidence.

It is a good Plea, to say, He cut it to make Posts to part Inclosures; if he can withal prescribe, that there have been alwayes such an Inclosure there, *Dyer* 332. And in all these cases, upon the general issue, the Defendant may give in Evidence, any thing that is no waste, as by Enemies, Tempest, Lightning, or the like. But he cannot give in Evidence, justifiable waste, as to repair the house, or the like; nor that which is in excuse, as, That he repaired it before the Action brought; and so for the like, *Dyer* 276. 212. *Cook* upon *List.* 283. 12. *H.* 8. 1. 29. *Edw.* 3. waste 30. But now by the late Act of 23. *Octob.* 1650. Not guilty, or some such other general issue may be pleaded, and the special matter may be given in Evidence.

Estreupement.
Prohibition.

Estreupement is sometimes taken for the Waste it self, and sometimes for a Writ in the nature of a Prohibition to forbid the making or doing of any Waste, *F. N. B.* 60. 61.

CHAP. CLXVIII.

Of Watch and Ward, Waters, Wax, Wild-Fowle,
Wine, Wuchcraft and Woods:

As to Watch and Ward these things are to be known,

1 It must be made and done by the Inhabitants of the Town only, must be made by men of discretion, of able bodies, and well armed. Watch and Ward.

2 It must be by turn, or by the house, according to the custome and use of the place.

3 The Constable is by his Office, without any other Authority to order it, and he may enlarge it, as there is occasion, but he may not change the course of it, and make some

watch, and excuse others at his pleasure.

4 If any neglect or refuse to do his Duty herein, the Constable may present it to the Assizes or Sessions, or complain to the Justices of Peace out of Sessions.

5 This Watch is to be kept from Ascension to Michaelmas, and must be kept from Sun to Sun, and then the Warding (in reason) must be the rest of the twenty four hours.

6 These Watch and Wardsmen are to pose all men, to stay and secure such as they do suspect till the morning (if it be in the night) and bring them to a Justice to be examined, or if they will they may deliver them over to the Constable, who must take care of them. And if any resist them and fly away, they may send Hue and Cry after them, and upon this any man may arrest them.

7 For neglect of this watch and ward, the Town may be punished. *Stat. Winch.*

1 Ed. 3 4 5 Ed. 3 14

Of Waters and Weirs:

As to Waters and Weirs, see Statutes, 25 Ed. 3 4 45 Ed. 3 2 1 H 4 12 4 H 4 11 1 H 5 2 6 H 6 5 8 H 6 3 12 Ed 7 22 H 8 3 23 Eli. 24 8 Jac 12 *Magna Charta* 23 7 Jac. 19 8 Jac. 12 18 10 1 Jacob. 23 1 Eli. 17 Waters and Weirs.
see *Sewers*.

Piscary signifieth a liberty of Fishing in anothers mans waters.

For passage and arrivage *Stat.* 8 H 6 27 9 H 6 5 19 H 7 18 23 H 8 12 26 H 8 5 2 & 3 *Ph & Mar* 16 1 Jac 16 21 Jac 32. Piscary, what. Passage and Arrivage.

And for fish and fishing. See *Stat.* 13 Ed 1 46 13 R 2 19 17 R 29 2 Ed 6 6 1 Eli 17 5 El 21 22 Ed 4 2 11 H 7 23 13 El 11 5 El 5 21 1 Jacob 25 31 Ed 3 12 39 El 10 43 El 9 3 Jacob 12 1 & 2 *Phil & Mar* 5 53 H 8 33 Fish and Fishing.

1 Jac 23.

For Havens, see *Stat.* 2 H 6 16 4 H 7 16 23 H 8 8 27 H 8 23 18 31 H 8 4 34 H 8 9 27 El 20 21 22 3 Jac 18 4 Jac 12. Havens.

For Wax and Honey. See *Stat.* 23 El 8 11 H 6 12.

Wax and Honey.

of

Of *Wild Fowle*.

Wild Fowle.

HE that takes away or destroyes the eggs of any wild Fowle, forfeits for every egg of a Crane or Bultard 20 d. of a Bitterlyerue or Shovelar 8 d. and of a Mallard, Tele, or other Wild Fowle 1 d. *Stat. 25 H 8 11.*

Of *Wines*.

Wines.

FOR Wines, see the Statutes 27 *Ed 3* 5 6 7 8 31 *Ed 3* 5 38 *Ed 3* 11 45 *Ed 3* 23 6 *H 6* 5 2 *R 2* 1 4 *R 2* 1 6 *R 2* 7 28 *H 8* 14 24 *H 8* 6 4 *Ed 3* 12 37 *H 8* 23 5 & 6 *Ed 6* 18 7 *Ed 6* 5 14 *El 1* 1 *fac 25*.

Who may sell wine, and how, see *Stat. 7 Ed 6* 5.

For the prices of wine, see *Stat 37 H 8* 23 28 *H 8* 14 6 *R 2* *Stat 17 4 Ed 3* 12 27 *Ed 3* *Stat 1 cap 5*.

Of *Witchcraft and Conjurat*ion.

Witchcraft and Conjurat

NOne may use Invocation or Conjurat

ion of Evil Spirits, or take up any dead person, or any part of it to be used in Witchcraft or Inchantment, if any do so, whereby any person is killed or lamed, this is Felony.
None may take upon him by *Witchcraft*, Enchantment, Charm or Socery to discover any thing lost, or any place of hidden Treasure, or to provoke any person to unlawful love, or to destroy or hurt any cattel or goods, or to hurt any person in his body, although it be not effected. He that doth so is for the first fault to be imprisoned a year without Bail, once a Quarter to stand in a Pillory in a Market Town, and confesse his fault, and for the second it is Felony. *Stat. 1 fac. 12.* See for this *Cook 3 part Inst. chap. 6.*

Of *Wood and Trees*.

What wood & trees may be cut, and how. And how they must be disposed.

sec. 1

Standils.

AS to this these things are to be known,
1 He that doth fell or cut any Copice or Underwoods, or wood or trees in waste ground, if it be not above twenty four yeares growth (unlesse it be in some special cases) must leave standing and unfelled in every acre twelve Standils or storers of Oak, if there be so many there, or otherwise so many of Elme, Ash, Asp, or Beech to make them up twelve. And those of such as are like to make timber, and were left the time the wood was cut last before, and if there be not so many of them, then so many others of those that are standing at the time of the fell of the most lively trees, and those standils so left must be preserved and not cut until they be ten inches square within three foot of the ground, under pain of three shillings and four pence for every tree so cut and not left before, or not preserved or cut after; and if the wood be above twenty four yeares growth, then he must leave standing twelve great Oaks, or if these be not so many, other trees, and these must afterwards be preserved and not cut down twenty years after (except it be to repair the Owners house, water-works, garden, Pales of Parks, or the like) under the pain of 6 s 8 d for every tree not so left, and being left, not after preserved. *Stat 13 El 25 35 H 8 17.*

2 He that is Lord or owner of a wood wherein others have common, cannot fell any part of it, (except it be for his own private use, (i.) for reparations of his house, for fire, or the like) until he hath a fourth part divided from the rest, and fenced and inclosed

inclosed by agreement between him and the Commoners and Tenants, or (if they Inclosure.
cannot agree upon the division) by order of two Justices of the Peace, and then he
may sell the fourth part (but he must leave and preserve the Standils as before) and Standals.
after that division and felling, the Commoners are to have Common there, but in all
the other three parts they must take their common as before time, and therein dur-
ing the Inclosure, the Lord is to have no Common. Stat. 13 El 25 35 H Common.
8 17.

3 No person may convert or imploy to Coal, or other fuel for the making of Iron Coal.
or Iron metal, any part of any timber tree or Oak, Beech or Ash, of the breadth
of one foot square at the stub, growing within fourteen miles of the sea, or any part
of any the great Rivers by which carriage is used by boat, nor any other wood or un-
derwoods within twenty two miles of the City of London, and some other places
(for which see the Statute) and Iron mills. Stat. 1 El chap 15 23 El chap 5. Iron-Mills.
And for Iron and Iron-mills, see Stat 27 El 19.

4 No person, nor the Protectors Purveyor himsele (unlesse it be for necessary Bark.
timber for houses, ships and mills) may sell any Oaken trees meet to be barked,
where it is worth two shillings a Cart load, besides the charge of barking and pil-
ling, but between the first day of April and last day of June, under pain of the losse
of the double value thereof; and if the Protectors Purveyor take any such
tree, the Owner may keep back the Bark, Lop and Top thereof. 1 Jacob
chap 22.

5 None may destroy any woods, or convert into Tillage or Pasture any wood
or underwood, that is two acres or more in quantity, and two furlong distant from
the house of the Owner of the wood, or to which the wood doth belong,
under paine of forty shillings for every acre. 35 H 8 chap 17 13 El 25.

6 And whosoever doth cut down any underwoods or Copice of twenty four years Inclosure.
growth or under, not only may, but must inclose it, or preserve it from cattel six
yeers after: And if it be of the growth of fourteen years, and under twenty four
yeers, he must inclose and preserve it eight yeers after: and if it be above the growth
of twenty four yeers, he must enclose it or preserve it nine yeers, under pain of 3 s
4 d for every Rood, not so inclosed or preserved. But if it be in a Park where is
Game, there he must inclose or preserve it four yeers only, and no more under the
like pain. But if any stranger spoile the bounds, he must bear the penalty, nor the Ow-
ner the same. 13 El 25.

7 Any person may sell and inclose all their woods and underwoods in any waste
grounds which have been used to be inclosed and kept for the maintenance of wood
and underwood.

8 For the Assize, (i) the bredth and length of fuel (i.) Tal wood, Billet, Fag- Assize of
got, in and about London and other Townes Corporate and Cities, and who may wood,
buy the same. See Stat. 7 Ed 6 chap 7 23 El chap 14. Fuel.

If a stranger trespasses me in my wood or Trees, I may have an Action of trespass, What remedy a
for which see *Trespass*. If it be my Tenant, there in some cases I may have an Acti- man shall have
on of waste (for which see *Waste*). And if the soyle of the wood be mine in proper for wrong done
there I may have the same remedy against a trespasser, as if it were in any other several in his woods
Close. But if it be in such a wood, wherein other have Common of Pasture, there and Trees.
for any trespass to the woods in cutting them down, or the like, I may have an acti- See 2.
on of Trespass. But if it be in the pasture of a Common wood, I can bring no Acti- Trespass.
on more then another Commoner. Cook 8 138.

If the Lord have the fourth part of a wood by a due inclosure to himself (as above) Commoner.
no Commoner may put in any Cattel there untill five yeers after the time of inclosure,
and then but Calves and yeerling Colts only, untill six yeers, if the wood were under
the age of fourteen yeers, at the last fall, or else untill the age of eight yeers, if the
wood were about twenty four yeers, under pain to forfeit four pence a Beast. But
if the Cattel of the Commoner be put in, the Lord can have no Action of Trespass
against him; for by the Common Law until this Statute, he that had a wood wherein
another had common could not inclose it. and exclude the Commoner. Cook 8 138
Stat 35 H 8 17 13 El 25.

If a man suffer his swine to come into such an inclosed wood during the time of the Inclosure of it as above, unringed or unpegged, he shall forfeit 4 d for every swine 55 H. 8.9.

If a man do purposely burn a heap or pile of wood, or bark any Apple, Pear, or other fruit trees, the owner shall recover trebble damages in an action of Trespasse, and he that doth it, loose 10 l. to the Protector. Stat. 37 H. 6. chap. 6.

If any cut or take away any hedge, pales, railes or fence, cut or spoile any woods or underwoods, or dig or take up any fruit trees, besides that the party grieved may have an Action of Trespasse, he may complain to a Justice of Peace, and he must compel the Offendor to make the party offended an amends, or else the Delinquent must be whipped. Stat. 43 Eliz. chap. 7.

For the Woods and Forrests. See Stat. 1 Ed. 3. 2. 9 H. 3. 9. 12. 13. 22. Ed. 4. 7. Cook 8. 36.

Tree

For Trees these things are to be known,

1 The property of the Trees upon the ground of a Lessee for years or life be partly in him that hath fee, for the body of the timber trees standing and fallen are his, but the boughs and fruit are the Tenants, and the trees, when dead, for fireboot, also so much of the timber as is necessary for house-boot, plow-boot, &c. The bodies of trees not timber, the Lessee may cut down and burn also. See Waste Sect. 5. Tres. passe Sect. 18. Property.

2 If one that is Lessee for years have a Lease without impeachment of Waste, here the trees fallen, and standing are the Tenants or Lessees, and not the Lessors. See Waste. See Estates for years, and House-boot, &c.

See Act 29 Novemb. 1650. Act 2 April 1651.

See the Statutes for wood. 7 Ed. 6. 7. 43 Eliz. 14.

CHAP. CLXIX.

Of Wayes and Bridges, and Women.

Way, what.

The Kinds.



Way is a passage for men to travel in. And there be three kinds of wayes.

1 A foot-way; and this was the first way.

2 A foot and horse way, and this is commonly called a pack and a prime, because it is both a foot way, which is the first and Prime way, and a pack and drift way also, which doth contain the other two. And also 3. A Cart-way; and this is it which in the Law Books is called *Chimin*. And from hence doth come the word *Chiminage*, which doth signify

Chiminage, what.

Pedagium, what.

Sect. 1.

a Toll due by Custome for the having of a way through a Forrest (which is sometimes in ancient Records called *Pedagium*.) And this way also is twofold.

1 Publick, the which is called the Lord Protector's high-way, or the Royal way, which is the way that leadeth from one Village to another, and to Market Townes; this is a way for all men, and wherein every man ought to passe to and fro without let; which is called the Lord Protector's high-way, because the Lord Protector hath at all times passage in it for himself and all his people, and he may punish all the Nunces and abuses done in it.

2. Private, and then it is either *vicinalis*; (i.) That which doth belong to a Village or Town, or that which is in, or leadeth to or from a Village, or doth serve for a Village, to lead to the high-way, Church,

Church, Market, field, or the like. And this way is called, Common. 2 Particular. And this way is where one or more, hath by grant or Prescription, through another mans ground, either from one close to another, or from his house into the field, high-way or the like: And this way is sometimes appendant (that is) adjoining to some other thing, as house or land, and appertaining thereunto; as if a man hire a close or pasture, and hath a Covenant for ingresse and egress to and from the said close, through the ground of some other man, through which otherwise he might not passe: or it may be that which is called Real, which is when a man purchaseth a way through the ground of another man, for such as do, or shall dwell in such a house, or for such as shall be owners of such a Manor for ever; Or it is in grosse (i.) Such a way as a man doth hold principally and solely by it self: As where one doth Covenant for a way through the ground of another man for himself and his heires. So that there are high-ways, common-ways, and private ways. *Terms of the Law. Cook upon Litt 56. Kyth. fol. 137. 35.*

As touching the Lord Protectors High-way, these things are to be knowne,

1 That the Protector hath not, nor claimeth more therein but the free passage of him and his subjects as an easment, the which if any man do deny or interrupt them in, he may be punished for it.

2 The nature of ways, and the interest of the Protector and Subject in the High ways.

2 That the subject hath not, nor claimeth more therein of right, but a liberty and freedom for his travel and passage, the which he may justifie by Prescription, and no man can deny it to him.

3 The subject can make no other use of it but for his travel, and therefore he may not build houses or lay his soyle or blocks upon it, but he will be punishable for it, nor will a Prescription in this case enable him so to do

Prescription.

4 The soil and the freehold of the same and all the profits thereof, as trees, grasse, and the like, do belong to the Lord or Owner of the Soil or Manor, and not to the L. Protector or his Subjects in general, nor to him whose ground is next adjoining: And therefore the Lord or owner of the soyle may lay the Hills there, or do any thing for the bettering of the high-way; or he may take the profits, the Trees, Mines or the like, so as he do not prejudice the way thereby; for this he may not do, albeit he pretend a prescription for it. And the Franchise of the high-way doth belong to the Lord of the soil, and he shall have a Purpresture. And hence it is that by the Common Law the Lord or Owner of the Soil, is bound to cut down the trees and bushes therein that do offend. And hence it was that if one had given a Manor, rendring rent, and within this Manor there had been a great street, that the Donor might have distrained for his rent in this street, for it was reputed within the Fee, until the Statute of *Maribridge* came, which did forbid the taking of a distresse in the high-way; and yet in cases where the high-way doth go through a mans several grounds, the Owner of the ground and not the Lord of the Manor shall have the trees and profits of the high-way. *Inter Cantrel & Church, Hillar. 42. Eliz. Rot. 473. Broo. Nufance 28 H. 7. 5.*

Distress.

Trees.

And any man (as it seemes) by Prescription may have Common of Common. pasture and feeding for his Cattel in the high-way, albeit the soile belong to another.

5 The Lord Protector and subject hath such a right to this easment, that they cannot by any act they can do, suspend or extinguish it.

Extinguishment.

6 As touching the private wayes to common fields and the like, it is held, that the freehold of them, and all the profits thereof do belong to him that hath the ground next adjoining, and therefore that he may cut the trees, and take the profits thereof.

7 As touching the partieuclar way, this with all the profit thereof doth belong to the Owner of the Soile, but he that hath the way hath interest in the same according to his Title by Prescription or grant; but this is such an interest as may by Acts done by him that hath this title, be suspended or extinguished. *Fitz. & Broo. Chimin in toto 13 H. 8. 10. Broo. Leer 3. 8 Ed. 4. 9. 27 H. 6. 9. 2 Ed. 4. 9. Dalt. Just. of P. 60. 32 Ed. 3. Barr. 261. Stattham. Chimin. 2. Fitz. Rescous 14.*

Extinguished.

Cccccc

8. The

Prescription.

3 Where a way may be by prescription: And how, and in what form, and by what person the prescription ought to be made and alleged.

Prescription.

Señ. 2.

Pleading.

4 What shall be said a Disturbance. And the remedy for a wrong or Disturbance in a publick or private way.

Action of the Case.

Tenure.

Action of the Case.

8. The Inhabitants of a Parish by the Common-Law are to Repair all the High-ways of the Parish, unless Prescription do binde any other to it. *March 26.*

Every man by the Common-law may Prescribe to pass and repass in the Lord Protectors High-way; and by prescription men may have a private way: and therefore the Inhabitants of a Village, being but Tenants at will, may prescribe to have a way to Church, or to Market, or into their Fields; and if they say, that the Custom and Usage of the Village of *D*, hath been time out of minde, that the Inhabitants of the same Village have had a way over such a Ground or Close, this is good. Also, one or some few men, may prescribe to have a way to his Field or Close, through another mans Close. And in these cases it is held, men may prescribe to have a way through a Church or Church-yard, and therefore much more through a common house, or through an Orchard or Garden. But in all these cases when a man is to make or set out his title by his prescription, he must take care how he doth prescribe; viz. By what Persons, and in whose Names to make the prescription, and to set forth the particulars, what way he doth claim, and which way it is to go: As if a man claim a way from his house, to such a Close called *B*, he must set forth what way, whether Horse or Foot way he claimeth, and by and through what places his way is to go, or otherwise his pleading will be faulty, *Dyer 71. 18. Edw. 4. 3. Broo. prescript. 76. Cook 6. 60. 18. Edw. 4. 8. Broo. prescript. 91. & 76.*

To erect a House, or Wall upon the High-way, to set up a House of Office, to lay Soyl or Carrion in or upon the high-way, if it be an annoyance to the Traveller; to dig a ditch athwart the way, or any way to straiten and lessen the way, not to scour the ditches, but to suffer them to fill, that the water doth overflow into the way, or otherwise not to repair but to suffer the way to be decayed; all these, and such like things, in case of the Lord Protectors high-way, are disturbances, and wrongs to the Lord Protector and his Subjects. By the Common Law and Custom of *England*, no Carrier or other man ought to draw or carry above 2000 weight, and with a Waggon having but two wheels and but four horses, and he that doth draw more and hurt the wayes, may be fined and imprisoned for it. And now by the new Law, if he draw with more than 5 Horses, or 6 Oxen and a Horse, it is under pain of 20*s.* *Ord. April 12. 1644. March 135. pl. 220.* For the punishment and redress whereof, no one man in particular may have an Action of the Case, for then every man might have an Action. But this is to be punished and redressed most properly at a Leet, or the Upper-Bench, or in the Exchequer at the Sheriffs Turn by Presentment, or at the Sessions by Indictment; in which case any Subject that will, may be a prosecutor in the Lord Protectors Name: Or if the common Nuisance in this case be in erecting, any man may prosecute the thing erected. If the fault be in not repairing, the party that ought to repair, must be punished: as, if it be the Inhabitants of the Parish that should repair, and they do not, they must be punished: and if any man be bound by his Tenure or otherwise to repair, and do not, he is to be punished for it, and yet the Lord of the Soyl may have a private Action against a man that shall dig in the soyle of the Lord Protectors high-way: Also if any man in particular shall meet with any special harm by the publick Nuisance, as if a man lay a tree, or dig a pit in the high-way, and my Horse stumble at it and hurt me, or himself thereby, albeit there be a great deal of room besides in the high-way; in this case he may have a special action of the case, *Agreed in Sir Edward Duncombes case, Trin. 10. B. R.* But if the high-way lead through a Corn-field, or such like place, and a man hath land on both sides, and he inclose on both sides leaving the way broader than it was before, this straiting of the way in this case is not punishable: And yet in this case of a common field, if the high-way lying in it be ill for travelling, the Passengers may go into the land adjoining, and if the next land be deep, into the next to that, and if the land be inclosed, and the way deep, he may break the inclosure, and go on the other side, *Cook 9. 113. 3. 73. 27. H. 8. 27. 13. H. 8. 16. Cook upon Litt. 56. 27. Broo. Action of the Case, 93. 5. Edw. 4. 2. 2 Ed. 4. 9. Kyth. 34. 35. 3. H. 6. 26.*

The same things for the most part that are Disturbances to a man in the Protectors high-way, are Disturbances to men in other wayes, but they are not to have the same Remedy; for if the Inhabitants of a Village have a way to their Church, or otherwise,

therwise, and they are disturbed by any means that they cannot use their way as formerly they have done; in this case every man of them may have an Action of the Case against the disturber; and every Commoner may have against a Stranger, that doth disturb them in their Common: for otherwise they were without Remedy; for they cannot punish this wrong in a Leet: and if any one, or more men have a private way to a Close, &c. and another disturbe him in it, he is to have an Action of the Case, or in some cases an Assise of Nuisance: Or if his way be stopped, he may open it, or go besides it; and therefore in an Action of Trespass for breaking of ones Close, the Defendant pleaded, That time out of mind he hath had a way through it, and that the Plaintiff being owner of the land hath plowed it, and stopped the way with thorn; whereby the Defendant being barred of his ancient way, went besides it upon the land adjoining to his way. And this was adjudged a good Plea in *Horn and Winslades case*, *M. 6. Jac. B. R.* But in these things some take Differences, and say, Where a man hath the Freehold of the thing whereto the way is appendant, or appurtenant, there he must have an Assise, and where not, an Action of the Case: And where the way is wholly stopped, there the party grieved shall have an Assise; but where it is but urained only, there an Action of the Case: and where the stopping is by the Ter-tenant an Assise lyeth, but when it is by a Stranger, an Action of the Case lyeth: and where one doth not repair so that I cannot pass, there I must have an Action of the Case, but where he doth erect or levy any Nuisance in it, I must have an Assise, *F. N. B. 183. 184. Br. Nuisance 13. Dyer 250. Cook 5. 73. 27. H. 8. 27. 14. H. 8. 32.*

Action of the Case.

Trespass.

Amongst Copy-holders, who can have no Assise nor Action of the Case for wrong done in their wayes, it is usual to enquire at their Courts, and to pain the parties that do wrong, and to Assesse the pain; for in this case they may do so; because they have no other remedy, *Kyack 35.*

Sett. 3.

All men that have Ditches adjoining to the high-ways, are bound to cleanse them, though there be no Prescription against them for it. (But for the Ditches that do not adjoin, those they are not bound to cleanse, unless there can be alledged some Prescription against them in it.) And it seems to me by the same Reason; that those that have trees, whose boughs do over-hang and annoy the high-ways, are bound to lop them, yet the Opinion of *Ribbit* is contrary, in *8. Hen. 7. 5.* But now by the Statutes, they are bound to scour their Ditches, and cut their Trees and Bushes, under pain of ten shillings for every default, *8. Hen. 7. 5.*

5. Of Amendment of Wayes and Bridges. And how it shall be. Prescription.

The Constables and Church-wardens of every Parish, with some of the Parishioners must upon *Easter munday* or *wednesday*, yearly appoint and choose Surveyors for that year for amending the high-ways: those Surveyors are to see to the amendment of the wayes, and for that end to require the ayd and help of the neighbourhood, according to the Statutes, which see at large, *2. & 3. Ph. & M. cap. 8. 18. Eliz. chap. 9. 3. Jac. cap. 19.*

Surveyors.

But now by a new Additional Law, made by the Lord Protector and his Council, *31 March 1654.* There is a further Provision for the Repair of the high-ways. The Heads whereof are these:

1. That two, or more of every Parish that have 20*l.* a year, or 100*l.* in Goods, must be chosen yearly in every Parish the first *uesday* after the 25 of *March* for Surveyors.
2. They are to be sworn before a Justice of Peace.
3. They must look so, and amend all the High-ways and Bridges in the Countries, Streets, and Pavements of Towns, and reforme Nuisances therein.
4. They may with consent of one Justice, make and levy any Rate not exceeding twelve pence a pound upon the Inhabitants of the Parish to amend the high-way.
5. With this Money they may hire men and Plowes and amend the High-ways, &c.
6. Take Materials in any mans Entable or Pasture.
7. Force men to frow their Ditches, turn their Waters, &c.

Cccccc 2

8. If

8. If the Parish be Poor and not able to do it, it shall have help from other Parishes.

9. If any thing be given to the Repair of High-ways and mis-employed, the Justices at their Quarter Sessions may order it.

10. These Surveyors may seize and keep every Horse, or Mare, above 5 in a Plow, or Horse, Ox, that is above 6 Oxen and one Mare in a Plow or Cart that passeth through the Town, and keep it 7 dayes till the Owner pay twenty shillings a Horse, Mare, or Ox above the same number, and if the Owner will not pay it, he may sell the same, and pay the twenty shillings, and give the Owner the rest.

By-laws.

11. The Parish may also make By-laws for their High-ways, and being confirmed at the Quarter Sessions must be obeyed.

12. All the Fines and Forfeitures by this Law, and the former Laws, are to go, and be employed by these Officers towards the Repair of the High-ways. But for all these things, see them at large in my Justice of Peace Office, the Third Edition.

By the Ancient Common-Laws, Villages are bound to Repair their High-ways, and may be punished for their Decay, and if any do break down, straiten, corrupt, or mar the High-ways, he is punishable in the Kings Bench, or before Justices of the Peace, Oyer and Terminer, Lect, or the like, 27. Aff. 65. *Crompt. jur.* 76.

So all Purprestures or Nuisances made upon the Protector's high-way by Land or Water, to the damage of the Protector and his people, is unpunishable there. *idem* And he that hath land adjoyning to any high-way, by the common-law (before any statutes) was and is chargeable of common-right to cleanse and scour the ditches adjoyning to the high-way. *H. 8. 7. Brio. Nuisance* 28. If a man inclose the high-way and put it within his own ground, the parish is not to repair it, but he must repair it himself, *Trin.* 10. *Car. B. R. per curiam* in *Sir Edw. Duntombes case*. By an ancient Statute the high-ways from one Market town to another ought to be enlarged, and all the Bushes and small Woods neere it to be cut down, that there be no lurking places for Thieves within two hundred foot of either side; and if by default of the same any Robbery were done, the Lord of the place ought to answer it, and if any Murder, the Lord shall be fined. And for the ways within the Kings Forreills and demean lands ought to be enlarged, and by the statute it is provided, That if a Park be taken from the high-way, the Lord shall set his Wall or Pale two hundred foot from the high-way, or that he may make such a Wall, Dike, or Hedge, that Offenders may not pass to and fro to do evil, *Stat. of Wincestr.* 13. *Edw.* 1. 5. and 1. 1. *idem*

Bridges.

Pontibus reparandis, what

Pontage, what.

If Bridges be decayed, and any one or more is bound by Prescription to repair them, he or they shall be compelled to it. And for this purpose it seems is the ancient Writ in the Register called *Pontibus Reparandis*, which is a Writ directed to the Sheriff, to will him to command one or more to repair a Bridge to whom it belongeth. And for this was the *Pontage*, which doth signifie either a Contribution towards the maintenance or re-edifying of Bridges, or a Toll taken for this purpose of all those that pass over Bridges, *West.* 2 chap. 2. 39, *Eliz.* 24. *Crompt. jur.* p. 199. *Regist. Orig.* fol. 153. Four Justices, whereof one of the *Quorum*, may take order for amendment of Bridges in the high-ways, and compel them to it that ought to mend them; and if it be uncertain who ought to do it, they may set a Rate upon the Neighbor-hood, and make them do it, and appoint Surveyors to see it done: But no man unless it be in this course shall be distrained to make any Bridges, but such as have been used to do it, *St.* 21 *H. 8.* 5. *H. 3.* cap. 15. See For Bridges *Cork* 2. par. just. 697. the Exposition of these Statutes.

See who shall maintain Eden and Prestback Bridges, *Stat.* 43 *Eliz.* 2 chap. 16. Newport and Carlin Bridges, *Stat.* 39 *Eliz.* chap. 23. Wilton Bridge, 39 *Eliz.* chap. 24. Rochester Bridge in Kent, *Stat.* 9 *H. 5.* chap. 12. 18. *Eliz.* 16. 27. *Eliz.* 25. Stamford and Culhamford in Oxfordshire, *Stat.* 8 *H. 6.* 28. Chepstow Bridge in the Counties of Gloucester and Monmouth, *Stat.* 18 *Eliz.* 17. 2. fac. 231. Cardiff Bridge in the County of Glamorgan, *Stat.* 23 *Eliz.* 11. Upen Bridge upon Severn 3. fac. 24. Stanes Bridge in the County of Middlesex, *Stat.* 1 *H. 8.* cap. 9. The Bridges over the River of Lee, *Stat.* 13 *Eliz.* cap. The old Statutes for High-ways, See 2 & 3 Ph. & M. 8. 5. *Eliz.* 13. 18. *Eliz.* 10. 39. *Eliz.* 19.

Of

Of Women, Maids, and Widows.

AS to Women, Maids, and Widows, these things are to be known: (1) If any abuse a young Maid under 10 years of age, and have the Carnal knowledge of her, though with her consent, it is Felony. *See for this, Crown.* (2) If any one by force or fraud, steal, or cause to be stollen away a Maid under 21 years old with intent to Marry her, he forfeits all his Estate, and shall be put in Bridwel in Prison during life; and the Aiders and Abettors be imprisoned in Bridwel 7 years. (3) The Guardian or Overseer of such Child that shall betray her in a Marriage, shall forfeit the double of the Marriage-portion of such Child, the one half to it, the other to the Common-wealth by the new Law, 24. *Aug. 1653.* (4) If any take a Woman by force or by subtilty get her into their custody, and then procure her to enter into Obligations or Statutes, such woman may be relieved by the Lord Chancellor, and the Bonds will be made void, *Stat. 37. H. 6. 9.* (5) To take away unlawfully any Maid, Widow, or Wife, that hath any Lands or Goods, or is an Heir to her Ancestor, against her will, is Felony, and the Felon shall lose the benefit of his Clergy, *Stat. 3. Hen. 7. 2. 39. E. 1. 9. See Cook 3. part. 1. 148. 149. 12.* (6) No person must by flattery, fraud, or force, help to convey away any Maid under the age of 16 years, out of the custody, and against the will of her Parents, or such as have the lawful custody of her, under pain of Imprisonment two years without Bayl. But Guardians, Masters, and Mistresses may take the bodies of their Wards and servants notwithstanding, *Stat. 4. & 5. Phil. & M. chap. 8. Crompr. Jur. fol. 30.* (7) In case where any shall be seized on by force, and carried away here or beyond Sea against her will, or shall have words wrested from her whereupon a marriage is pretended; the Lords Commissioners of the Great Seal may send a Commission to whom they think fit to hear and end, and as they judge it, so it shall be a marriage or no marriage, *14. 10 January 1650.* And if any person shall deflowre such a Maiden, or contract marriage with her without the Agreement of her Parents or Governors, he shall be imprisoned 5 years without Bayl. And if any such Maiden after 12 years of age before 16 shall consent to any such contract against her Parents or Tutors agreement or liking, the next of Kin shall have her Land during her life, *Stat. 4. & 5. Phil. & M. chap. 8.* (8) The Widow is to have her Dower *Paraphernalia Quarrentine, &c.* after her Husbands death freely without Money, *See for this Dower Mag. Charta 7.* (9) The Kings Tenants wife could not have married nor took her Dower, but by the Kings leave in the Court of Wards; but this is altered now, and she is in the case of another Tenants wife, *Prerog. Regis 4.* (10) If she have any estate in tale, or for life made to her Husband, or any of his Ancestors, of his or their land, she must not alien it, to bar the Heir; and if she do, she shall forfeit her estate, and he may enter presently upon her, and put her out, (*see more in Discontinuance.*) but she may dispose it for her own life. (11) The wife of a Copyholder, that holdeth by Widows Estate, must do suit of Court, be subject to forfeitures, is to be admitted Tenant, and appear and be ordered at the Court as other Copyholders, *20 Jac. curia.* (12) If her Husband die Intestate, or the Executors, named by his Will, do refuse the Administration of his Goods, it doth most properly belong to her, and the Ordinary ought to grant it to her, or the next of his Kin, or both, at his discretion, *See Stat. 2. Hen. 8. chap. 5.* (13) She may by Will devise the Crop of Corn growing upon the Ground she holdeth in Dower, *Stat. 20. H. 3. chap. 2.*

CHAP. CLXX.

Of Words.

Abisberfing
Misberfing.
Acquis.

Abisberfing or **Misberfing** is to be quit of Amercements before whomsoever of Trespasse proved. *Terms of the Law.*

Agiftment
and *Agift.*

To acquit is nothing else but to discharge or keep in quiet from trouble. *Cook upon Litt. 100.*

Advent.

This word **Agiftment** and **Pawnage**, it seemes, doth signifie the same thing, and it was used for that taking in and feeding of the Cattel of strangers in the Forrest; and the gathering of the money due for the same. See in my Book of the second part of the *Marrion of the Law*, page 53.

Alnetum

Advent is a time which containeth about a Month next before the Feast of the Nativity of our Saviour Christ. *Westm. 1 Chap. 48.*

Allodarii

Alnetum is a word of Elders, *Ubi Alibi Arbures crescent*, and by the grant of twenty Acres **Alnet**, the wood and soil will passe: And fullings are taken for Elders. *Stat. 18 Ed. 4.*

Angel

Allodarii, signifieth free-holders, or such as have Fee simple of Lands. *Cook upon Litt. 100.*

Allocations
Array

Angel is the name of a piece of Gold used among us, in value 11 s which hath the form of an Angel pictured upon it.

Allocations are allowances made upon an account.

Array is the raising or ordering of a Jury or Inquest of men, that are impannelled upon any Cause; and hence cometh to array a pannel (that is,) to let forth one by another the men that are impannelled. *Stat. 18 H. 6. chap. 14. Old N. B. fol. 157.*

Arraign

Arraign is to put a thing in order, or in his place; also a prisoner is said to be arraigned when he is indicted and put to his tryal. *New Terms of Law.*

Arrested

Arrested is he that is convicted before any Judge, and charged with any Crime. *Terms of the Law.*

Affize

The **Affize** of Bread and Beer, is the setting down of the prizes and quantity of bread and Beer; and hence it is that to affize or to tax, is to set down rates upon men for payment of duties to the King or otherwise; and such as so do are called Assessors: And these are in many Cases; (amongst others) such Officers as divide and ascertaine the Contribution Rates in parishes, are called Assessors.

Averpeny

It is to be quit of divers summes of money for the Kings Carriages or Carts. *Terms of the Law.*

Averia

This word it seems is specially applyed to tame Beasts, as Oxen, Kine, sheep and such like, and to no other thing. See 18 Ed. 4. 14.

Aumone

The tithing by Divine Service was anciently called by this name. *Cook upon Litt. 97. a 9*

Average

It seems to be a service one doth owe to his Lord, to be done by horse and Cart for carriage. See *Averpeny*.

Avoir de pais

It signifieth two things. 1. A kind of weight diverse from the Troy weight, which doth contain but twelve ounces to the pound, which is sixteen ounces. 2. Such Merchandizes as are bought by this weight and not by the other. *Stat. of York 9 Ed. 4.*

SECT. I

Bailiff errant.

Bailiff-errant or **Itinerants**, be such as go hither and thither about the County to serve

- Writs, and summon the County to Sessions or Assises, &c. and these are made by the Sheriff, *Cook super Litt* 126.
- Berewica, or Berewit.** It signifieth a Town.
- Berneth** Berneth, it signifieth the service of a Plow and Cart.
- Benevolence** Benevolence was a charge or payment exacted by the Prince of the people of this Nation in the time of R 3 *stat Chap* 2.
- Berquarium, or Bercaria** It signifieth a tan-house, or a heath-house, where barks or rinds of trees are laid to tan withal. It signifieth also a sheep-coat, *Cook super Litt* 36 a.
- Black book** It is a Book lying in the Exchequer, *see stat Annals* f 154 191.
- Bordanis vel Bordanni** They are cottages, or husband-men that have a cottage, and a little land of husbandry belongs to it, *Cook super Litt* 5 b.
- Blodewit** Bloodwit, to be quit of Ameacements for blood-shedding, *Terms of the Law*.
- Bord-lands** It doth signifie the Demeasnes that Lords of Manors kept in their hands for the maintenance of their Bord or Table, *Braet lib* 4.
- Borrowhead** It signifieth he that is the chief of the Frankpledges, and him that had the principal Government of them within his own pledge: And he had divers other names, according to the diversity of the country, as Burshoulder, Third-borrow, Third-borrow,
- Burrow, or Chief Pledge** Tythingman, Chief Pledge, Borrow-elder. It doth signifie now a Constable or Tythingman, *stat* 20 H 6 *chap* 8 *Cook* 6 77 78.
- Boote** Boote signifieth help, ayd, or advantage, and is usually joyned with another word, as Fire-boot, &c.
- Borrowholders** And Borrowholders or Borsholders they are the elder or ancientest Pledges for or Borsholders Borrowes.
- Boscus** By this word Boscus is understood not only the trees growing on the ground, but the ground it self whereon they grow, *Cook* 4 6.
- Bosens** It signifieth sometimes an ameacement or compensation, and sometimes a freedom from the same, *Cook super Litt* 127 a.
- Bovata terre** Una Bovata terre is an Oxgauge, or as much as an Ox can til, *Crompt jur* 220 *Cook super Litt* 5 a.
- Briga** Briga, it signifieth wrangle, contention, or intracacy, *idem* 3 b.
- Bragboote** Bragboote is to be quit of giving aid to the repair of bridges, *Terms of the Law*.
- Brnera** By this is understood the soyl where Heath doth grow: And this will pass, or may by Writ be demanded by this name, *Cook super Litt* 4 b.
- Burgboote** It is the exemption and freedom by ancient Charter from contribution towards the building and repairing of Castles or borrow Towns, *Terms of the Law*.
- Bullion** Bullion-money is taken for silver or Gold in the marks or billot, and sometimes for the place where such silver or Gold in the marks is brought to be tryed or exchanged for the King, 9 Edw 3 *stat* 2 *chap* 2 27 Edw 3 *stat* 2 *chap* 14 4 Hen 4 *chap* 10.
- Balkens** Of Balk, because they stand higher as it were on a balk or ridge of land to give notice of something to others, *see Conders*.
- Barkarie** A house where they put bark of trees, or a heath-house, that which we sometimes call a tan-house.
- Bouge of Court** Bouge of Court was closet-diet for him and his Officers in the Kings Court.
- Burrow elder,** These words do either of them signifie the Constable or Tythingman of a place in some Counties, in some places he is called a Chief Pledge, in some places a third borrow, or Borsholder, row, or Third borrow.
- Third Borrow.**

SECT. 2.

- Cantred** Cantred is as much in Wales as a hundred in England, *stat* 28 H 8 *cap* 3.
- Canon, or Canonship** Canon doth sometimes signifie a peece of Ordnance, sometimes a spiritual person resident in, and depending upon a Cathedral Church; sometime an Ordinance made by the clergy in the convocation-house, or in a lawful council, *see Clergy*.
- Cark** Cark is a quantity of Wall whereof thirty make a Surpler, 27 H 6 *cap* 7.
- Carvage.** Carvage is to be quit, if the King should tax all his land by Carves of land (i.) by the plow-land, *Terms Ley*.

A Carve

- Carve of Land** A carve of Land or plow-land; is (it seems) as much land as may be plowed in one year and a day with one plow, which is also called a Hide of land, or Hild of land: and by this quantity of land the subjects have been heretofore taxed, whereupon the tribute so levyed is called Carvage; *Termes Ley, Stowes Annals page 271*
- Carno** It was a kind of Immunity from a payment, *Crompt. jur. fol. 291. Termes Ley.*
- Cell** Cell was a private place where Hermites did live and repose themselves.
- Chamber de Kins** They were Irish beggers which by the Statute of *Hen 5 cap 8* were by a certain time therein limited, appointed to avoid this land.
- Chevage** Chevage or Chivage is sometimes taken for a sum of Money paid by Villains to their Lords, in signe and acknowledgement of their subjection: And sometimes it signifieth a sum of Money or other Gifts yearly in the name of Chivage given by one man to another of power and might for his avowment, maintenance and protection, as to their head or leader, *Cook super Litt fol 140 a.*
- Chevisance** This word is used for bargaining, *37 Hen 8 9 13 Eliz 5.*
- Childwit** Childwit is that you may take a fine of your bond-woman defiled and begotten with child without your license.
- Choral** Choral; it seemeth to be those that by vertue of any of the Orders of the clergy, were in ancient time admitted to serve God in the Quier.
- Churchesse, or Chirchsed.** It signifieth a certain measure of wheat-corn which in times past every man on *Martins* day gave to the holy Church, *Termes Ley.*
- Clack force or bard** To clack wooll, is to cut off the mark of the sheep which makes it weigh less, and so to pay the less custom to the Lord Protector. To Force wooll is to clip the upper and most hairy part of it. To bard or beard wooll, is to cut the head and neck from the other part of the Fleece, *8 Hen 6 22 Termes Ley.*
- Cocket** A Cocket is used for a Seal belonging to the custom-house, *Regist 192.* Also for a Scrowl of parchment delivered there to Merchants to shew that their wares are customed, *11 Hen 6 chap 16.* Also for a kind of Bread.
- Cognizans, or Conusans** This word doth signifie sometimes the acknowledgement of a Fine, or other act, and sometimes a priviledge that a Town hath, as Conusans of Pleas is a priviledge to hold Pleas, *Manwood Forrest Lawes.*
- Colbertis** It signifieth such tenants as hold in free Soccage by a free rent.
- Conders** Conders are such as stand on the Sea-coast at Herring fishing time to shew the fishers which way the shoales of Herrings pass, sometimes called Huers and Bakers, *1 Jac 23 Cook super Litt 86 a 5.*
- Collateral** Collateral is that which cometh in, or adhereth to the side of any thing, as collateral Assurances is said to be that which is made besides the Deed it self. For Example, If a man covenant with another and enters into Bond for the performance of his covenant, the Bond is said to be collateral Assurance, because it is external, and that which is without the nature and essence of the covenant. And *Crompt. 185* saith, That to be subject to the feeding of the Kings Deer is collateral to the Soyl within the Forrest. So the liberty to pitch shades or standings for a Fair in the Soyl of another man, is collateral to the land. The private woods of a common person cannot be cut down without the Lord Protectors license, for it is a prerogative collateral to the soyl. The Ancestor or heir that is on the one side, that is Uncle or Nephew, &c. is said to be collateral and opposed to him that is lineal, as father or son, &c. See *collateral Warranty, Termes Ley.*
- Commandry** Commandry was the name of a Manor or chief Mesuage with which lands or Tenements were occupied, belonging to the late priory of *St. Johns of Jerusalem in England*, until they were given to *Hen. 8. Termes Ley.*
- Committee** Committee is he to whom the consideration and ordering of a thing is referred either by some court, or consent; as in Parliament a Bill being read is either consented unto and passed, or denied, or referred to the consideration of some certain men appointed by the House who were called Committees. And sometimes it is used to set forth him that hath the Grant of the Wardship of the Kings Tenant from the King: But in *Kirch 160.* the Widow of the Kings Tenant, is called the Committee of the King, because by Law she was committed to the Kings Protection. *Termes Ley.*

- Commotes, or Commoythes.** Commotes signifieth in *Wales*, part of a County or Hundred: And in 4 *H* 7 17 it is used for a gathering made upon the people of this or that Hundred, by Welsh Minstrels. *Termes ley.*
- Conge de Eslier.** Conge de Eslier, was the Kings permission to a Dean and Chapter, to choose a Bishop in the time of vacancy. *FN B 169 Termes Leg.*
- Contentement.** Contentement is a mans countenance, which he hath together with and by reason of his Free-hold; as the Armor of a Soldier, the Books of a Scholar is his countenance, and the like; *Cock 2 part of Inst 28.*
- Cornage.** Cornage, It was an extraordinary payment of corn imposed upon the Subject by the King, upon some special occasion. *Bract lib 2 ch 16.*
- Coram non Judice.** Is a term to expresse a thing done without Authority, and subject to question, where a man taketh upon him to have Authority as a Judge, *Cock 8 Cafe of the Marshalsey.*
- Cordiner.** It signifieth nothing but a Shoo-maker, 3 *H* 8 10 5 *H* 77.
- Cote, Sheep-cote.** This word signifieth sometimes a kinde of refuse Wool clung together, that it cannot be pulled assunder, 13 *R* 2 19. Sometimes it is taken for a little poor Cottage, or slight built house, sometimes for a little place where they fold sheep, called a Sheep-cote.
- A Costerel or Costle.** These words in old English, it seems, did signifie a little house or cottage.
- Covenable or Convenable.** Covenable or Convenable, doth signifie fit, convenient, and suitable, 4 *H* 8 12. It is sometimes written Convenable, 27 *Ed* 3 2 17 *Termes Leg.*
- Couthentlaugh.** Couthentlaugh was one that did receive; cherish and hide an Outlawed person, which was to have been punished with the same punishment; but it is not so now.
- Countenance.** Countenance is used sometimes for credit or estimation, old *N B* 111 1 *Ed* 3 *St* 2 ch 4.
- Coucher.** Coucher seems to signifie a lying down, or setting in a place of couch, a little bed; or a Factor lying in a place for Traffique, 37 *Ed* ch 16. or for the Register book of the Corporation.
- Cranage.** Cranage is the liberty to use a crane for the drawing up of Wares from the Vessel at any Creek of the Sea, or Wharf; unto the Land, and to make profit of it: It signifieth also the money paid and taken for the same: *New Book of Entries, fol 3.*
- Creanson.** Creanson signifieth a creditor, or one that trusteth another with any debt, be it for Money or Wares. *Old N B* 67.
- Creast tile.** Creast tile, or Roof tile, is that tile which is made to lie on the Ridge of the house 17 *Ed* 4 4.
- Creek del Sea.** Creek of the Sea in our Law, it seems, doth intend a part of a Haven, where any thing is landed or disburdened from the Sea: So that so many landing places you have in a Haven, so many Creeks may be said to belong to that Haven, *Cromptur* 110. 5 *Eliz* 5.
- Crofs.** It is a little Close or plot of ground lying and belonging to a house; sometimes used to Corn, and sometimes to hemp, &c. as the owner pleaseth
- Croises.** Croises sometimes did intend such Pilgrims as were signed with the sign of the Crofs; sometimes Knights of the Order of St. John in *Jerusalem*, created for the defence of Pilgrims, *Bracton, Britton.*
- Cuinage.** Cuinage, it is a word used for the making up of Tin into such fashion as it is commonly framed into, for the earriage thereof into other places, 11 *H* 7 4.
- Cunty.** Cunty was a kinde of a tryal, *Bract* l 4. and is conceived to intend nothing but tryal by the Country or a Jury: *Termes of the Law.*
- Curate.** Curate, this word is sometimes taken largely for any one that hath *curam animarum*: But it seems to be usually taken for such a one as is hired to serve a cure, for and under another, Statute of non-Residence.
- Curtein.** Curtein is a sword of that name that was used to be carryed before the King.
- Curtilage or Courtilage.** Curtilage is a Garden or piece of void ground, lying near and belonging to a Messuage or House. 39 *Eliz* 2 35 *H* 8 4 *Cow* 6 64.

SECT 3.

Damage cleer. Damage cleer was a kinde of payment unto Kings, now taken away. *Ord.* 17 *Jan.* 1650. *March fol.* 76 *pl.* 116.

D d d d d d

Dan

- Dane geld,** or **Dane guilt.** Dane guilt: This is to be quit of a certain custom which the *Danes* did leave in *England. Terms of the Law.*
- Deciners or Dozinors.** Deciners *alias* Dociners, or Dozinors, were such as had the oversight and Check of 10 Friburies, for the maintenance of the Kings peace. *Fleta, Bracton.*
- Defender of the Faith.** Defender of the Faith was a peculiar Title given by the Pope to the Kings of *England. Stows Annals. 863.*
- Derein.** Derein in our Law sometimes signifieth to prove, as to derein the warranty, 30 *H. 8. 1. Plow. 7. 6.* Sometimes for a Religious mans forsaking of his Orders and Profession. *Kitch 152.*
- Devoire, Devoires of Calais.** Devoire is nothing but a mans duty or endeavor, and that which by the rule of Law and Reason a man is bound to do, and is applied to Merchants of *Calais*, who were wont to pay a duty or custom due to the King, when the King of *England* had it. 2 *R 2. Stat 1 ch 3.*
- Dieta Rationabilis.** Dieta rationabilis is sometimes used for a days Journey. *Brac. 3.*
- Diocifs.** Diocifs was the Circuit of the Jurisdiction of every Bishop: For this Realm hath two kinds of Divisions; the one in Shires or Counties, in respect of the Temporal Policy; the other into Diocesses, in respect of the Ecclesiastical Jurisdiction.
- Districus or Distric.** Districus is used for a Circuit or place, wherein a Lord hath some Jurisdiction above others. *Britton ch. 20.*
- Dividents.** Devident was a word used in the Statute of *Rutland, Anno. 10. Ed. 1.* where it is provided that the Chamberlains of the Exchequer shall not make to the Sheriffs or any of their Bayliffs, Dividents, unless they first receive of them particulars; in which particulars, he would have such Dividents parted, &c. See *Anno 28. ejusdem. Stat 3 ch 2.*
- Docket.** Docket is a little piece of Paper or Parchment written, which containeth in it the effect of a greater writing. *Stat 2 & 3 Phil & Mary, ch 6.*
- Dogger, Dogger fish, Dogger men.** Dogger is a kinde of Ship, and Dogger men such as went in those Ships: Dogger fish, the fish carried in those ships. 31 *Ed 3 St 3 ch 1.*
- Dole fish.** Dole fish seem to be the fish which the Fishermen yearly employed in the North Seas; do of custom receive for their allowance. 35 *H 8 ch 7.*
- Dorture.** Dorture was a common Room, place or Chamber, where all the Fryars of one Covent slept and lay all night. *Anno 25 H 8 ch 11.*
- Dotkins.** Dotkins was a kinde of coyn now out of use. *Stamf. pl. Cor. f. 37.*
- Doubles.** Doubles did signifie Letters Patents. 14 *H 6 ch 6.*
- Double quarrel.** Double quarrel was a complaint made by a Clerk or some other, to the Archbishop against an inferior Ordinary: Now gone and out of use. *Terms of the Law.*
- Drawlatchet.** Drawlatchet, It was taken for a certain kinde of an eminent Thief in the days of old. 5 *Ed 3 ch 14 7 R 2 ch 5.*

SECT. 4.

- Easement.** Easment is a Service that one Neighbor hath of another by Charter or Prescription, without profit: As a way through his ground, a sink, or such like. *Kitch. fol. 105.*
- Empannel.** Empannel, It signifieth the writing or entring the names of a Jury into a Parchment, Schedule, or Roll, or Paper, by the Sheriff, which he hath summoned to appear for the performance of such publique Service as Juries are employed in. *Terms of the Law.*
- Englshire.** Englshire is an old word, signifieth nothing but to be an Englishman. *Terms of the Law.*
- Entendment.** Entendment, It signifieth the true meaning or signification of a Sentence or word. *Kitch. 124.*
- Entire Tenacy.** Entire tenancy is contrary to several Tenancy, which signifieth a sole possession in *enternes several* one man; whereas the other doth signifie a joynt or common possession with one or more. *Broo. several Tenancy.*
- Equivalent.** Equivalent is of equal power and virtue with another.
- Enure.** Enure signifieth to take place or effect to available: Example, A Release shall enure by way of Extinguishment. *Li. cap. Release.* And a release made to a Tenant for term of life, shall enure to him in the Reversion.

- Errant, or Itinerant.* This word is sometimes used to Justices going in their Circuit, sometimes to Bayliffs at large.
- Escambio.* Escambio is a License granted to one for the making over a Bill of Exchange to a man over the Sea. Regist. Original, fol. 199.
- Establishment de Dower.* Establishment de Dower seemeth to be the assurance of Dower made to the wife by the husband, or his friends, before or at Marriage.
- Ex Mero Motu.* These words, Ex Mero Motu, are formal words used in Letters Patents *Kitch. 252.*
- Ex Assensu partium.* Ex Assensu partium, is a form of Entry, of a day given by consent of Parties in an Action. For which see Action.
- Expeditate.* To Expeditate Dogs, is to pare their feet that they cannot go abroad.
- Expectant.* Expectant is used in the common Law with this word (Fee) and thus used it is opposite to Fee-simple. For example, Lands are given to a man and his wife in Frank-Marriage, To have and to hold to them and their heirs. In this case they have a Fee-simple: But if it be given unto them and the heirs of their Bodies, &c. they have Tail and Fee-expectant. *Kitch fol 153.*
- Ex post facto.* Ex post facto signifieth nothing but a thing that is done after another thing.

S E C T. 5.

- Falkland.* This word Falklord or Falkland, heretofore did signifie Copyhold Land.
- Faint Action or Pleading.* Faint Action, as *Lit. fol. 154.* saith, is as much as to say in English, A faint Action; that although the words of the writ be true, yet for certain Causes he hath not cause nor title by the Law to recover by the same Action: And a false Action is, where the words of the VVrit are false: So faint-pleading is a covenous and colusory manner of pleading to the deceit of a third party.
- Faitor.* Faitor doth signifie a bad doer, or idle liver. *7 R 2 ch 5 34. & 35 H 8. ch 24.*
- Farding.* A Farding of Gold was a coyn used in ancient time, and now out of use. *9 H 3 2 Stat 2 ch 3.*
- Fat.* Fat is a great wooden Vessel used among Brewers in London. *Stat 1 Hen 5 chap 10.*
- Ferdwit.* Ferdwit, It is to be acquit of Murther in an Army. *Fleta.*
- Fordfare.* Fordfare is an acquitment of a man to go into the wars.
- Fewd or Fee.* Fewd or Fee signifieth a deadly hatred and enmity, or an open profession of it.
- Fendum.* Fendum is a kinde of Fealty that one oweth to another.
- Fine force.* This word Fine force seemeth to intend an unavoidable necessity. *old N. B. 78.*
- Form.* Form is an order or decorum to be used in VVrits and Pleadings, which in some cases is regarded, and in some cases not. *Bro. 442.*
- Fledwit.* Fledwit is to be quit for Amearcements, when an Out-lawed Fugitive came to the Kings Peace of his own will, or by License. *Terms leg.*
- Fletwit.* Fletwit is to be quit from contention and convicts, and to have the Plea thereof in your Court. Terms of the Law.
- Flemiswite.* Flemiswite is a liberty or Charter, whereby to challenge the Cattle, or Amearcements of a Fugitive. *Raſſ. exp. of words.*
- Florences.* Florences was a kinde of cloth. *Stat 1 R 3 ch 8.*
- Fodder.* Fodder was a Prerogative that the Prince had, to be provided for meat for his horses in the wars, now out of use.
- Folgers.* Folgers or Folgheres, doth signifie followers.
- Folkmoor.* Folkmoor is a Court in London. Mamood.
- Forbar.* Forbar is for ever to deprive. *Stat 9 R 2 chap 2.*
- Foregoers.* Foregoers did signifie Furveyors for the King, that went before him to provide for him.
- Forejudget.* Forejudget signifieth a Judgement, whereby he is deprived of the thing in question, *Bracton. lib. 4.*

Formapanperis. *Formapanperis* doth signifie, the admission of a poor man to follow his Suit in Law without paying any Fees in any Court.

Fourcher. Fourcher doth signifie the delay and putting off an Action. *West 1 ch 24.*

Frankbank. Frankbank was used for Lands the wife had in Dower, which in some places is more, in some places less. *Terms of the Law.*

Frank Fee. Frank Fee, To hold Lands in Frank Fee, is to hold them in Fee simple pleadable at the Common Law, and not in ancient demelm, *Terms of the Law.*

Frank Ferm. Frankferm is said to be Land wherein the nature of Fee is charged by Feoffment, out of Knights Service for certain yearly Services, and where neither Homage, VVardship, Marriage, nor relief, nor any other Service but what is contained in the Feoffment is to be demanded. *Britton.*

Fresh Fint. Fresh fine is that Fine which was levied within a year past. *West. 2. ch. 45.*

Freeborgh. Freeborgh is a Frankpledge. See *Frankpledge.*

Fresh force. Freshforce is a force done within 40 days. *F. N. B. 731.*

Friperer, or A Friperer is one that buyeth old Apparel to sell again; or a kinde of Broker in Pawntaker. and about London. *St. 1 Jac. ch. 21.*

Fuer. Fuer is flight, which is either in Deed, or in Law, when being called in the County, he appeareth not, but is out-lawed, *Stamf. pl. Cur. lib. 3. ch. 22.*

S E C T. I G.

Gable. Gable was taken for a kinde of Toll paid for Goods moveable, that are carried from one place to another. *Britton.*

Gainage. Gainage it signifieth the Land that is held by some Villains or Soakmen. *Bracton.*

Galedge or Gallocks. Galedge or Gallocks, were a certain kind of shoes worn by the Gauls, in old time in foul weather. *Stat 4. Ed 4. ch. 7.*

Garble. To Garble any thing, is to cull the good from the bad of the thing.

Garb. Garb is a bundle or sheaf of corn: And a Garb of Arrows, a sheaf of Arrows. *Stat 1. R 2 121.*

Gare. Gare is course wool full of staring hairs, that groweth about the pesh or shanks of Sheep. *Stat 3. Ed 3. ch 8.*

Gig-Mills. Gig-Mills were for the Fulling of wollen-cloth. *Stat 5. Ed 6 ch 22.*

Gild or Gold. Geld doth signifie money, or tribute.

Graffer. Graffer signifieth a Scrivener or Notary. *Stat 5 H 8 ch 1.*

Grange. Grange is a House or Building, where not onely corn is laid up, and Barns be, but also where be Stables for Horses, Stalls for Oxen and other cattle, Sties for Hogs, and other necessaries for Husbandry: Sometimes it signifieth a whole Farm of Land. *Linwood.*

Gree. Gree signifieth contentment, good liking; as to make gree, is to satisfie for an offence done. *Stat 1 R 2 ch 15.*

Green Wax. Green wax is used for Estreats delivered to Sheriffs out of the Exchequer, under the Seal of that Court to be levied in the Country. *Stat 42 Ed 3 ch 9.*

Greve. Greeve doth signifie as much as *Dominus*, or *Presellus*, and seems to have been all one with *Reeve*.

Grith-breach. Grith-breach is a breach of the Peace.

Groom. It seems is an Engine to stretch cloth. *Stat 43 Ed 3 ch 10.*

Guardian. Guardian is but a custody.

Guidage. Guidage is a thing given for a safe conduct through a strange Countrey.

Guild. Guild is a Brotherhood, or Company of Men Incorporate into one combination, supporting their common charge by mutual composition.

Gula Augusti. Gula Augusti is the first of August, or Lammas day. *F. N. B. 62.*

Gultwit. Gultwit signifieth an amends for a wrong.

Guest. Guest is a stranger that lodgeth the second night.

S E C T. 7.

- Haberjets** Haber jets, Pawnes. *Mag.Ch.ch.25.*
- Hables** This word Hables is used for a Port or Haven. *St.27 H.6.ch.3.*
- Haga** Haga was a Latine word used for a house.
- Half Seal** Half seal was a word used in Chancery for the sealing of Commissions to Delegates in Causes Ecclesiastical. *8 El.5.*
- Half Mark** The half Mark is 6 s. 8 d. *F.N.B.5.*
- Hallage.** Hallage is a Fee due for Cloathes brought to be sold in Blackwel Hall in London.
- Hallymote.** Hallymote (as some say) did signifie in some places a Court Baron in some places, the spiritual or holy Courts. *Munwood. Cook 4 part Inst.ch.74.*
- Hamlet.** Hamlet is an old house or cottage decayed; a place where a house was.
- Hamble** To Hamble dogs is to pare their feet that they may not go about.
- Haukwit.** Haukwit is a liberty granted to a man, whereby he is quit of punishment for a Felon hanged without judgment, or escaped out of custody. *Raff.*
- Haque or de-mi-haque** Haque or Demi-haque, is a hand-gun about three quarters of a yard long. *St.2 & 3 Ed.6.chap.14.*
- Hawkers** Hawkars are cheating fellowes, that goes about buying and selling pewter and other Merchandizes. *25.H.8.ch.6.*
- Hemfare** Hemfare did signifie the departure of a servant from his Master. *Stat.3 Edw.4. chap.5.*
- Hentzman** is used for a Footman that attends a great man.
- Herbage** Herbage doth commonly signifie a mans liberty to feed his Cattel in anothers ground. *Crompt Jur.197.*
- Heck** Heck is an Engine to take fish. *23 H.8.chap.18.*
- Head-Borrow** Head-Borrow or Borrow head, is an Officer like to the Constable or Tithing-man.
- Hereditament.** Hereditament doth signifie all that a man hath by way of Inheritance, and will descend to his heires if he bequeath not; And that which is not Goods and Chattels will go to an executor after his death.
- Hide de terre.** A Hide of Land or Plow-land is a certain quantity of Land in some Countries more, and in some lesse: In some Countries an hundred Acres, and in some countries as much as a Plow can plow in a year; in some places it doth signifie a house and wood, Meadow and Pasture thereunto belonging. *Plow.168. Cook 1 part Inst.56.*
- Hidage** Hidage was an extraordinary Tax to be paid for every Hide of Land, or sometimes the word did intend to be quit of this payment. *Bract.Term ley.*
- Hidel** Hidel seems to signifie a place of protection, *1 H.7. chap.6.* or Sanctuary.
- Hine** Hine was used for a servant. *St.12. R.2.chap.4.*
- Hithe** Hithe is a little Haven to land wares in out of a Vessel or Boat. *New Book of Entries.*
- Hogbixhian** Hogbixhian was he that did come Guestwise and lye the third night, then he was reckoned one of the family, for whom the Master must have answered. *Bracton.*
- Hoblers.** Hoblers were such as by the tenure were to keep a horse to ride to discover enemies. *18 Ed.3. St.2.ch.7.*
- Homofoken** Homofoken did signifie a liberty to invade a house. *Raff.*
- Horn gelt** Horn gelt is a Tax within the Forrest to be paid for horned beasts. *Crompt. Jur.*
- Hors de son fee** Hors de son fee, is without his fee.
- Hospisallers** Hospisallers were certain Knights of holy Order. *St.13 Ed.ch.33.*
- Hofsters** Hofsters signifieth with us him that is an Inn-Keeper. *9 Ed.3.St.2.ch.12.*
- Houfage** Houfage is a kind of fee paid for housing of stuff in a place of safety by a Carryer, or at a Wharf, or the like.
- Houfe** An house can intend nothing but building.
- Hudegeld** Hudegeld doth signifie a discharge from a Trespass. *Fleta.*
- Hufeans** Hufeans did signifie a boot. *St.4 H.4. ch.7.*
- Husfastene** Husfastene was he that did hold house and land. *Bracton.*

S E C T. 8.

- Jarrook* Jarrook was a kind of Cork. *St. 1 R. 3 ch. 8.*
Implead To implead is to sue,
Infangthiefe Infangthief is taken for a Franchise that thieves, taken in your Demefn or Fee, convicted of thefts, shall be judged in your Court.
Indorsement Indorsement doth signifie something written on the back side of an Obligation or other Conveyance. *West Symb. 2 part.*
Intakers Intakers are a kind of thieves. *St. H. 5. chap. 8.*
Invest To invest doth signifie to give possession.
Journ-choppers Journ-choppers were Regrators of yarn. *St. 8 H. 6 ch. 5.*
Jour
Ipsa facto Ipsa facto signifieth nothing but in very deed.
Jure Corone These words Jure Corone did signifie nothing but the Kings being seised of any thing as King in right of his Crown, or in his politick capacity, to distinguish from the things he had in his natural capacity as another man.

S E C T. 9.

- Laghtite* Laghtite doth signifie a kind of mulct or fine.
Land Land doth include earable, Meadow, pasture, woods, meers, marishes, furzes, heaths, houses, &c. *Cook 1 part Inst. 4.*
Lastage. or Lastage is to be quit of certain customes exacted in Faires and Markets, for carrying a
Lestage mans goods whither he will. Or the custome it self.
Letters de Exchange. Letters of Exchange. *Regist. Orig. 294.*
Levant et couchant Levant and Couchant is where the Cattel of another man that is a stranger, are come into another mans ground, and there have remained a good time.
Levy To levy is to set up, to levy a mill, or to cast up, to levy a ditch, or to gather and exact, as to levy money.
Lobbe Lobbe a kind of sea fish, *32 Ed. 2 St. 3.*
Local Local is as much as tyed to a place certain, and it is used in opposition to transitory, as Trespasse for battery is transitory, and the place of the battery need not be set downe in the declaration, nor can the other say it was not done in that place. *Kytch 180.*
Locus partitus Locus partitus is a division between two Townes or Countries, to try in whether the land or place in question lyeth. *Fleta.*
Lollards Lollards were such as in account and reputation were Hereticks, *2 H. 5 ch. 7*
Lode manage Lode manage is the hire of a Pilot for conducting of a Ship from one place to another.
Loriners Loriners is one of the Companies in London that make bits for horses bridles. *St. 1 R. 3 12*
Lodeworks Lodeworks are works belonging to the stanneries in Cornwall.
Lotherwit Lotherwit is that you may take amends of him that doth defile your Bondwoman. *Termes of the Law.*
Lushborrow Lushborrow was a kind of base Coyn heretofore used. *25 Ed. 3 Stat. 4 chap. 2.*

S E C T. 10.

- Mace griefs* Mace griefs were such as did buy and sell stolen fleish. *Crompt. Just P 193.*
Manbote Manbote is a recompence for killing a man.
Male tenant Male tenant is a Toll for wooll. *29 Ed. 1 chap. 7.*
Mandatum Mandatum signifieth a Commandment of the King or his Justices, to have something done for the dispatch of Justice.

<i>Manuel</i>	Manuel signifieth that whereof present profit may be made, and a thing not Manuel is that whereof no present profit is to be made, but somewhat hereafter when it falleth. <i>Stamf' Peer</i> 54.
<i>Marches</i>	Marches do signifie bounds or limits, as between us and <i>Wales</i> , or betweene us and <i>Scotland</i> : somtimes it doth signifie all that was the Kings dominions.
<i>Matter in Deed</i>	Matter in Deed is nothing but a truth to be proved though not by a Record. And matter of Record is that which may be proved by some Record.
<i>Mark</i>	Mark did signifie a piece of money, thirty silver pence; now it signifies thirteen shillings and four pence.
<i>Medelese</i>	Medelese seemes to be a quarrel. <i>Crompt Jur</i> 293.
<i>Messuage</i>	Messuage signifieth no more properly then a dwelling house. But in this word is comprehended sometimes, and may passe a Courtlage, which is a yard or piece of void ground, garden, orchard and out-houses, as a Dove-house, shop, mill, barn or the like. <i>Trin</i> 22 <i>Jac B R Plow</i> 199 170 171.
<i>Mineral</i>	Mineral is any thing that growes in Mines, and contains metals.
<i>Mise</i>	Mise hath had many significations, but properly now it means nothing but the point whereon the parties do proceed to tryal.
<i>Mortling</i>	Mortling or Mortling is the wooll taken from dead sheep. <i>Stat</i> 27 <i>H 6 ch</i> 2.
<i>Moyety</i>	Moyety is nothing but the one half of a thing.
<i>Multure</i>	Multure doth signifie the Toll that the Millard taketh for grinding corn.
<i>Murage</i>	Murage doth sometimes mean a Toll or Tribute to be levied for building a wall, and sometimes a liberty granted to a Town by the King for the gathering of money towards the walling of it. <i>F N B</i> 227 <i>St</i> 3 <i>Ed</i> 1 <i>chap</i> 30.
<i>Naam</i>	Naam did signifie the taking of another mans goods.

S E C T. 10.

<i>Oblations</i>	Oblations were taken for such things as were given to God and his Church by Christians.
<i>Obventions</i>	Obventions did signifie the same thing. <i>Stat</i> 30 <i>Ed</i> 3 1.
<i>Orgeis</i>	Orgeis is a kind of fish. 31 <i>Ed</i> 3 <i>St</i> 3 <i>ch</i> 2.
<i>Ordel</i>	Ordel was used in old time for a kind of Legal Purgation. <i>Lamb</i> in his Exposition of words.
<i>Ordelf</i>	Ordelf, it is where one doth claime to have the Oar that is found in his own soile or ground. <i>Terms Law</i> .
<i>Outfangthief</i>	Outfangthief was a kind of priviledg that some had, that certaine felons should be brought to their Court to be judged. <i>Termes Law</i> .
<i>Out-riders</i>	Out-riders were a kind of Bailiffs-errants that the Sheriffs did formerly use. <i>St</i> 14 <i>Ed</i> 3 1 <i>ch</i> 9.
<i>Owelty des services</i>	Owelty des services, those words signifie an equality, when the tenant paravayl oweth as much to the mesme, as the mesm doth to the Lord Paramount. <i>F N B</i> 136
<i>Out-parters</i>	Out-parters were a kind of thieves. <i>Stat</i> 9 <i>H 5 chap</i> 8.
<i>Oyer and Terminer</i>	Oyer and Terminer is a Commission granted to one or more to heare and determine causes. They were granted formerly upon sudden risings: <i>Crompt Jur</i> 231
<i>Oyer de Record</i>	Oyer de Record was a desire to the Judges that they would look on a Record.

S E C T. 11.

<i>Pardoners</i>	Pardoners were such as carryed about the Popes pardons: 22 <i>H 8 ch</i> 12
<i>Paramount</i>	Paramount doth signifie the highest Lord of the fee: For there may be a tenant to a Lord, who holdeth over of another Lord. <i>Kysch</i> 209
<i>Paravil</i>	And Paravail signifieth the lowest Tenant, or him that is tenant to one who holdeth his fee under another. <i>F N B</i> 135.

- Pares or Peers** Pares or Peers signifie those that are sworn in an Enquest. *Kitch* 78. It hath another signification for Noble men.
- Passage** Passage doth signifie the money one payes for being transported over sea. *4 Ed. 3 chap. 7.*
- Pelt-wool** Pelt-wool is the wool taken off a dead sheep. *St. 8 H 6 ch. 22.*
- Pedage** Pedage did signifie money given for passing through a Countrey on horse back, or on foot.
- Pernor of Profits.** Pernor of profits, or Tenant, i. he that taketh the profits. *St. 1 H 7 ch. 1.*
- Perquisites.** Perquisites signifie profits; as the perquisites of Courts, the profits that grow to the Lord by vertue of his Court, over and above the certain and yeerly profits of his land, as Escheats, Marriages, Fines for Copyholds, and the like. *New Terms of Law.*
- Personal and Personality.** Personal being joyned to things, goods or chattels, doth signifie any corporeal or moveable thing belonging to any man, be it quick or dead. *Kitch* 119 *West. Symb.* Personality is an abstract of personal. *Old N B 92.*
- Pipe** Pipe is a Roll in the Exchequer called a great Roll. *St. 37 Ed. 3 ch. 34.* It signifieth a measure also.
- Pikel or Pistle.** Pikel did signifie a little Close or Inclosure.
- Plite** Plite of Lawne was a quantity of bane. *St. 3. Ed. 4 ch. 5.*
- Placats** Placats seem to signifie an Instrument of the Prince for License giving, or some other purpose. *St. 2 & 3. P & M ch. 7.*
- Plonkets** Plonkets is a kind of woollen cloth. *St. 1 R 3 ch. 8.*
- Plow land** Plow land in some Countries doth signifie as much as a plow can dresse, in some Countries more, in some lesse.
- Polein** Polein was a kind of shoe that was worne. *4 Ed 4 ch 7.*
- Portsale** Portsale is a present sale of fish in the haven. *St 35 H 8 ch 7*
- Portgreve** Portgreve doth signifie a chief Magistrate in some Towns.
- Portmote** Portmote is a Court kept in some Haven Townes. *St 43 Eliz ch 15*
- Posse Comitatus** Posse Comitatus is the Aid and attendance of all Knights, Gentlemen, Yeomen, Labourers, and others of men kind and Lay, who are bound, being lawfully required by them that have power, to assist them in keeping the peace, and doing of Justice. *St 2 H 5 ch 8.*
- Post diem** Post diem is the return of the Writ after the day.
- Posteriority and priority.** Posteriority and priority are words of comparison and correlatives, relating to tenure for a man holding Lands or tenements of two Lords, holdeth of his ancient Lord by priority, and of his latter Lord by posteriority.
- Post term** Post term is the return of a Writ, not only after the day assigned for the return thereof, but after the term also, which is not to be received by the Officer without the consent of the Judges.
- Postea** Postea is a word used for a matter tryed by *Nisi prius*, and returned into the Court for Judgment, and there afterwards recorded. *Plow* 210
- Pour party** Pour party is opposed to *pro indiviso*, for to make pour party, is to divide and sever the lands that fall to partners, which before partition they held joyntly and *pro indiviso*. *Old N B 11.*
- Powndage** Powndage it seemes is a sum of money to be paid for the impounding of cattle: But properly it is taken for a kind of subsidy. *St 12 Ed 6 ch 13.*
- Preceptories** Preceptories were a kind of Benefices held by the Templers.
- Prepositus villa** Prepositus villæ hath been taken for the Constable. Also for an Officer in the Forest. *Crompton* 205.
- Prest money** Prest money is taken for a kind of earnest money to bind a man to a thing to be done. Also taken for some money the Sheriff was to pay upon his account. *St 2 & 3 Ed 6 ch. 4.*
- Prisage** Prisage doth signifie the custome that belonged to the King out of Merchandizes taken at sea by way of lawful prize. *St 31 Eliz. ch 5*
- Procurator** Procurator was taken for him that did gather the fruits of a Benefice for another man. *St 3 R 2 ch. 1.*
- Profer** Profer is the time appointed for the Account of Officers in the Exchequer.

- Provisor** Provisor was one that did sue to the Court of *Rome* for provision. *Old N B 193.*
Province Province was taken for the circuit of an Arch-Bishops Jurisdiction.
Provincial Provincial for a Governour of an Order of Fryars. *St. 4 H 4 ch. 17.*
Provision Provision was taken for the Popes providing of a man for an Ecclesiastical Living before it falls. *St. 3 H 5 ch. 4.*

S E C T. 12.

- Quadragesima.** Quadragesima is the first Sunday in Lent; the Sunday before that is Quinquagesima, and so backward the second Sexagesima, the third Septuagesima.
Qualified Qualified did signifie a man enabled to hold two Benefices.
Querens non invenit plegium. Querens non invenit Plegium is the Return of a Sheriff on a Writ that runs thus, *Si venit plegium. A fecerit de securum, &c.*
Quarrels Quarrels doth comprehend not only Actions real and personal, but causes of Actions also; so that by a Release of Quarrels both are released. *Terms ley.*
Quorum Quorum is a word of distinction used in Commissions to Justices of the Peace and other Officers, whereby direction is given that some businesse of importance shall not be done, but before them, or one of them; and it is given by this word, *Quorum vos A B convenisse volumus.*
Rack Vintage Rack vintage did signifie the second Vintage, or Voyage for Wines into *France* for Rackt Wines, that is, Wines cleansed and purged that it may be drawn from the Lees. *St. 32 H 8 ch. 14.*
Ran Ran did signifie such an open felony that could not be denied.
Ransom Ransome is a sum paid for the redeeming of a Captive, or for the pardoning of some great Crime.
Ratification Ratification was the confirmation of a Clark in a Prebends place, given by a Bishop where the right of Patronage was doubted to be in the King.
Ray Ray did signifie cloath never coloured or dyed. *St. 11 H 4 ch. 6.*
Recluse Recluse was where a man was shut up in his cloyster by his Order of Religion. *Lit. 92.*
Recogintors Recogintors was a word used for a Jury impannelled upon an Assize.
Rectus in curia. Rectus in Curia is one that doth stand at a Bar of Justice, and no man hath any thing to object against him. *6 R 2 St. 1 ch. 12.*
Redubbers Redubbers are they that buy cloth which they know to be stolne, and turn it to some other form or fashion. *Crompton 193.*
Render & Prender There are certain things that lye in Render in a Manor, that it must be delivered by the Tenant, and the Lord cannot take it without his delivery, as Rents, Releases and Heriot services: But others that ly in Prender, and the Lord may take without delivery, as Wards and Heriot customes, which he may seize and take.
Repeal Repeal is nothing but a Revocation; as to repeal a Statute is to revoke it.
Reprieve To Reprieve is to take back a prisoner for that time from the Execution and proceeding of Law.
Reprises Reprises are deductions that go yearly, and are paid out of a Manor or Land; as rents out of the Manor, Fees of Stewards, Bailiffs &c. *Terms of the Law.*
Repugnancy Repugnancy is a contradiction of sayings or doings. *Plow 153.*
Resciance, and Resciant Resciance signifieth a mans continuance or abode in a place. *Old N B 85.* And hence comes Resciant, which signifies continual abiding in a place. It is all one with Residence, but that this is applied to Ecclesiastical persons only. *Kyich 33.*

S E C T. 13.

- Sac** Sac is a Royalty or priviledg touching plea and correction of Trespases of men within a Manor. *Rastal.*
Sake Sake is a plea and correction of Trespasse of men in a Court. *Terms ley.*

E e e e e e

Scavage

- Scavage or Scavage.** Scavage was a kinde of custom exacted in some Cities, now taken away. *Stat 19 H 7 ch 8.*
- Schedule.** Schedule is a little Roll, or long piece of Paper or Parchment.
- Scot & lot.** Scot and lot seemeth to signifie a Customary contribution laid upon all subjects after their ability, *St 33 H 8 ch 19.*
- Selioterre.** Selio terre, or a ridge of Land, is taken for an incertain quantity of Land; sometimes more, and sometimes less, *West. Symb.*
- Shewing.** Shewing, is to be quit of Attachment in any Court, and before whomsoever, in Plaints shewed and not avowed.
- Soke.** Soke is a kinde of Suit of men in a Court or Precinct, to which divers Manors come to do Suit: *Terms of the Law, Gouldf. 105.*
- Stanneries, or Stenneries.** The Stanneries are certain Mines in *Cornwal*, *Plow 327 Stat 4 H 8 chap. 8.*
- Surfise.** Surfise is a penalty or Forfeiture.
- Sterling.** Sterling is currant Money in this Realm.
- Sumage.** Sumage was a toll for carryage on Horse-back, *Crompt. Jur. 191.*

S E C T. 14.

- Taylage.** Taylage was a kinde of Tribute.
- Tail or Tally.** Tally, it seems, is a score used in the Exchequer about Accounts.
- Tant amount on aquivalent.** Tant amount ou equivalent, is where one thing doth amount to another, and then it is all one as if it were the same: As a Lease and Release amounteth to a Feoffment, So *14 H 8 13 5 H 7.* A License to occupy Land for years, is a Lease for years: So a Lease for 1000 days, is a Lease for years.
- Team.** Team was a kinde of Royalty granted by the Kings Charter, *4 Ed 4.*
- Templers.** Templers were an Order of Knights sometimes in *England.*
- Tassels.** Tassels was an Instrument used by Cloathiers in making cloth.
- Tend.** To tend is to endeavor to offer or shew forth.
- Talwood.** Talwood a kinde of fish, *Stat 35 H 8 ch 3.*
- Tenement.** A Tenement doth signifie any thing that may be held, and is much of the signification and extent of Hereditament, but most properly it signifieth a House or Home-stall.
- Terre Tenant.** Terre Tenant, is he that hath the actual Possession and Occupation of Land. He is,
- Termor.** Termor is one that boldeth Lands for a Term of years.
- Teste.** Teste is a word used for the last part of every Writ, as *Teste me ipse*, for the King, or *Teste Edwardo Cook*, or *Francisco Hobharts*, according to the Court whence it comes.
- Thanus.** Thanus had divers significations; it did signifie sometimes a Noble man, sometimes a Free Man, sometimes a Magistrate, &c.
- Theft boor.** Theft boor doth signifie the receiving of Goods from a Thief, to the end to favor and maintain him.
- Thirdborrow.** Thirdborrow is a Constable in some Countries, *Stat 28 H 8 ch 10.*
- Thme.** Team or Team, did signifie a Royalty granted by the Kings Charter.
- Tholl.** Tholl was a liberty to buy and sell in a mans own Land.
- Thrave de corn.** A Thrave of corn was two shocks, of six Sheaves apiece, *Stat 2 H 6 ch 2.*
- Title in Law.** Title in Law, is where a lawful cause is come upon a man to have a thing which another hath, and he hath not Action to recover it, as Title in Mortmain; or to enter for breach of condition. *Terms of Law.*
- Toft.** Toft is a piece of Ground, wherein a house now decayed and gone, did stand. *Plow. 17C.*
- Totted.** Totted is a word used in the Exchequer, of a debt, which the Foreign opposer, or other Officer there, noteth for a good debt to the King, by writing this word (*Tot*) unto it. *Stat 42 Ed 3 9.*
- Tronage.** Tronage was a kinde of Toll.

Turney or Turnament Turney is a Marshall exercife of Knights or souldiers, fighting one with another for sport.

Turbary Turbary is an interest to dig turves in a Common. *Kitch 94*

S E C T. 15.

Vestura terre The vesture or herbage of land seems to intend nothing but the profits & possession of it
Very Lord and very Tenant Very Lord and very Tenant, are they that be immediate Lord and Tenant one to very Tenant another.

Vaccaria Vaccaria sometimes signifieth a house to keep Cowes, sometimes a piece of ground in the Forrest.

Villain Judgment Villain judgment is such a judgment as casteth shame on a man, as for Conspiracy, Perjury, when it is that their lands and goods be seised to the Kings use, trees rooted, &c.

Vicountiel Vicountiel Writs are such as belong to the Sheriff, and are tryable in his Court. *Old N B 109.*

Villain-fleeces Villain fleeces were the fleeces of wool taken off shabbed sheep. *St 31 Ed 3 ch 8.*

Vierge Vierge signifieth the compasse about the Kings Court that bounded the Jurisdiction of the Lord Steward, and Coroner of the Kings household, which was twelve miles. *13 R 2 stat 1 ch 3.*

Virgata terre Virgata terre signifieth a yard land.

Utas Utas is the eighth day following any Term or Feast.

Waive Waive, a woman outlawed is said to be waived.

Wage To wage, is but to do or performe something; to wage Law, is to do his Law.

Wapentake Wapentake is all one with that we call an hundred.

Ward penny Ward-penny was money given towards Watch.

Warscote Warscote was a payment towards the Wars.

Warwit or Wardwit. Warwit is to be quit of giving money for keeping Watches. *Termes of the Law.*

Wild of Kent The VVild of Kent is the woody part of the Country.

Were or Werre This word Were did signifie once as much as the price of Redemption of him that had killed a man.

Wharf & Wharfage Wharf is a broad place neer the water; to put goods on that are brought to or from the water to be transported into other places. And Wharfage is a fee due for any thing that is there laid down. And Wharfager is the Keeper of it. *N. Book of Entries.*

Wool-winders VVool-winders are such as make up fleeces of wool. *ft 8 H 6 ch 22.*

FINIS.
